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MESSAGE FROM THE CO-CHAIRS

Dear Interest Group Members:

We are delighted to enclose the annual newsletter of the ASIL International Organizations Interest Group. This newsletter contains articles written by our interest group members about international organizations. It also contains announcements relating to our upcoming activities and an overview of our main accomplishments of the past year.

Let us begin by drawing your attention to our first works-in-progress workshop on international organizations, which will take place on October 29, 2010, at the OAS Headquarters in Washington, DC. The formal call for papers is reproduced on page 6; we encourage everyone working on academic articles relating to international organizations to submit a proposal. Presentation of a paper is certainly not a prerequisite for attendance; commentators and participants will be a key component of the discussion. So mark your calendars!

For those following the academic literature on IOs, we would also like to draw your attention to a new journal – the *Journal of International Organizations Studies*. The mission of the journal “is to support innovative approaches to the study of international organizations.” The journal welcomes papers that are theoretical, empirical, or more practitioner-centered and particularly seeks “papers that explore new grounds and transcend the traditional perspective of international organizations as merely the sum of its members and their policies.” The journal is interested not only in submissions, but also book reviews, as well as expressions of interest to serve as potential reviewers. The deadline for papers to be included in the next issue (which will be published in Spring 2011) is November 2010. Further information for potential submissions is on the website at <http://www.journal-iostudies.org> and on page 58 below. You can also contact Martin S. Edwards, a member of the editorial board, at Martin.Edwards@shu.edu, if you have any questions concerning the journal.

Our interest group was involved in several very successful activities last year. First, in October 2009, we co-sponsored (with Seton Hall Law School, the Center on International Cooperation at NYU, and ASIL) an “experts workshop” on the Responsibility of International Organizations. The workshop coincided with the publication of the International Law Commission’s draft articles and commentary on the Responsibility of International Organizations. The workshop was a great success, and we were honored to welcome Giorgio Gaja, the ILC’s Special Rapporteur, Professors Jan Klabbers and Erika de Wet, and representatives of the IMF, World Bank, International Labor Organization, and International Seabed Authority, among other diplomats and lawyers. The focused conversation on attribution of acts to IOs (Article 5 of the Draft Articles) and the review of Security Council resolutions by regional and international courts led to a lively debate.

Our second substantive conversation took place during the 2010 annual meeting. We sponsored a panel on Cuba and its re-entry into the Inter-American System during our business meeting. The panel was well attended, and the very positively received. Interest groups are eligible to hold substantive panels every three years, and so we hope to continue the tradition in 2013.

In March, the Interest Group – through the leadership of Richard Burchill – also published another round of *Reports on International Organizations*. In this iteration, *RIO* highlighted legal developments in the African Union (AU); Council of Europe (CoE); the International Maritime Organization (IMO); the Organization for Economic Cooperation and Development (OECD); the Pacific Islands Forum (PIF); the Secretariat of the Stockholm Convention; the United Nations Framework Convention on Climate Change (UNFCCC); and the World Intellectual Property Organization (WIPO). More information on the RIO project is provided on page 7 of this newsletter, including an invitation for new reporters.

Let us conclude by welcoming Lorena Perez, a lawyer for the OAS Secretariat in Washington, as the new vice-chair of our Interest Group. Lorena was elected at the 2010 annual meeting for a three-year term, the final two years of which she will serve as co-chair.

If you have any suggestions for our Interest Group, including activities, issues or reports you would like to propose or participate in, please do not hesitate to contact us.

Kristen Boon
Associate Professor of Law
Seton Hall Law School

Jacob Katz Cogan
Associate Professor of Law
University of Cincinnati College of Law

CALL FOR PAPERS: ASIL IO INTEREST GROUP WORKS-IN-PROGRESS WORKSHOP

The International Organizations Interest Group of the American Society of International Law will hold a works-in-progress workshop on October 29, 2010, at the headquarters of the Organization of American States, Washington, DC.

If you are interested in presenting a paper at the workshop, please submit an abstract to Kristen Boon (Kristen.Boon[at]shu.edu), Jacob Cogan (jacob.cogan[at]uc.edu), and Lorena Perez (LPerez[at]oas.org) by the end of the day on August 27. Abstracts should be a couple of paragraphs long, but no more than one page. Papers should relate to the subject “international organizations.”

Papers selected for presentation are due no later than October 18. Papers should not yet be in print; ideally, authors will have time to make revisions based on the comments from the workshop.

The workshop’s format will be as follows. Each paper will be introduced by a commentator for about ten minutes. The author will have the opportunity to respond, if he or she wishes to do so. The floor will then be opened up for a little more than an hour of comments, reactions, and discussion from the group as a whole. The workshop is conducted on the assumption that everyone has read all of the papers in advance. After we have selected papers, we will ask for volunteers to serve as commentators. One need not present a paper or comment on a paper to participate.

Please do not hesitate to contact us should you have any questions at all about the workshop or paper submissions.

Kristen Boon, Jacob Katz Cogan
Interest Group Co-Chairs

Lorena Perez
Interest Group Vice-Chair

ASIL REPORTS ON INTERNATIONAL ORGANIZATIONS (ASIL RIO)

Most interest group members will be aware of the online resource ASIL RIO (www.asil.org/rio). The purpose of this project is to provide accessible information about international organisations that are not regularly discussed either in academic work, or more generally. The RIO project is going into its third year with ever increasing popularity. To date reports have been provided on twenty seven different international organizations. The project is continually seeking to expand and any individuals interested in becoming reporters as invited to contact the co-ordinator, Richard Burchill (r.m.burchill@hull.ac.uk).

**“ASSESSING THE EUROPEAN UNION’S POSITION ON HUMAN RIGHTS: IS IT A DESIRABLE ONE?” IN
THE EU AS A GLOBAL PLAYER IN THE FIELD OF HUMAN RIGHTS, EDITED BY J. WETZEL
(ROUTLEDGE, FORTHCOMING 2011)**

Richard Burchill

Dr. Richard Burchill is Director of the McCoubrey Centre for International Law at the University of Hull and a visiting professor at the George C. Marshall European Centre for Security Studies. He can be reached at r.m.burchill@hull.ac.uk. SSRN: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1198413

This paper poses the question as to whether or not the EU’s model for the promotion and protection of human rights is a desirable one. Over the course of the EU’s development it has become clear that the economic integration project has taken priority over other values. This has impacted the EU’s position on governance as conceptions and practices of democracy and human rights are influenced and fashioned in a manner that serves the principles of the economic integration project with its basis in free market principles. In examining the EU as a global player in the field of human rights three areas are addressed: the EU’s approach to governance based on the primacy of the economic integration project and how this limits the effective realisation of human rights; assessments of claims regarding the exceptional nature of the EU’s approach to human rights and governance; of the size and reach of the EU as an international organisation and how its model for human rights impacts upon the international system. Clearly the EU is a global player and its position on human rights will be influential, primarily among the member states but also globally. If the EU is going to claim to have an exceptional model, it has to be a model that can undergo sustained scrutiny instead of an unquestioning acceptance that its model is exceptional.

**“REGIONAL ARRANGEMENTS AND THE UN LEGAL ORDER” IN INTERNATIONAL ORGANISATIONS
AND THE IDEA OF AUTONOMY EDITED BY N. WHITE AND R. COLLINS
(ROUTLEDGE, FORTHCOMING 2010)**

Richard Burchill

Dr. Richard Burchill is Director of the McCoubrey Centre for International Law at the University of Hull and a visiting professor at the George C. Marshall European Centre for Security Studies. He can be reached at r.m.burchill@hull.ac.uk. SSRN: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1198413

This paper looks at the position of regional international organisations in the UN legal order with a view to demonstrating how regional arrangements serve a useful function in the pursuit of the purposes and principles of the UN and for the ongoing development of general international law. Regional arrangements have proven to be distinct and important elements in the international system due to the fact that they occupy a unique space between the particular nature of individual states and the seemingly undifferentiated international system. Attention to this unique space is vital in today's world as we are experiencing seemingly competing processes of globalization which is seen as moving the world towards a more homogenous existence, and localization which includes localised responses exerting particular identities. International law, understood as a universal project, struggles to adequately accommodate regional arrangements as these appear to undermine the coherence of the system. This paper examines how the process of international organisation from the creation of the UN until today has never adequately addressed the tensions regional arrangements give rise to. It is argued that international law needs to engage more actively with regional arrangements as a major facet of the international system that contributes to the ongoing effectiveness of international law.

**“COOPERATION AND CONFLICT IN THE PROMOTION AND PROTECTION OF DEMOCRACY BY
EUROPEAN REGIONAL ORGANISATIONS” IN COOPERATION OR CONFLICT? PROBLEMATIZING
ORGANIZATION OVERLAP IN EUROPE, EDITED BY D. GALBREATH AND C. GEBHARD
(ASHGATE, FORTHCOMING 2010).**

Richard Burchill

Dr. Richard Burchill is Director of the McCoubrey Centre for International Law at the University of Hull and a visiting professor at the George C. Marshall European Centre for Security Studies. He can be reached at r.m.burchill@hull.ac.uk. SSRN: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1198413

Regional organisation in Europe is highly developed as evidenced by the existence of multiple regional arrangements involved in a wide spectrum of activities. The proliferation of regional organisation demonstrates the region's belief in pursuing multilateral cooperation to achieve common goals through the creation of international institutions based on international legal obligations. This paper examines the activities of the CoE, EU and OSCE in the promotion and protection of democracy, and the extent to which there is cooperation or conflict in these areas. The regional organisations of Europe have developed significant levels of obligation regarding democracy that places the region at the forefront of international legal developments in this area. While it is difficult to establish any clear conclusions on the institutional interaction of international organisations, it is possible to identify particular trends among the regional arrangements of Europe whereby the EU's conception of democracy is coming to dominate the activities of the others in this regard. Outwardly each organisation maintains its claim to autonomy and unique contribution to regional affairs. This paper argues that this outward appearance of cooperation is really about two of the regional organisations (the CoE and OSCE) modifying their own principles and objectives to meet the demands of the dominant partner (the EU).

**RETOOLING LAW ENFORCEMENT TO INVESTIGATE AND PROSECUTE ENTRENCHED CORRUPTION:
KEY CRIMINAL PROCEDURE REFORMS FOR INDONESIA AND OTHER NATIONS**

30 UNIV. PENN. J. INT'L L. 183 (2008)

Leslie Gielow Jacobs and Benjamin B. Wagner

Professor Jacobs is a Professor of Law at the University of the Pacific, McGeorge School of Law and Director of the Capital Center for Government Law & Policy. She has authored a substantial body of scholarship on constitutional doctrine, governance, bioterrorism and national security. Professor Jacobs' articles have appeared in law journals at Yale, Michigan, Illinois, Ohio State, UC Davis, Rutgers, Tulane, Florida and Indiana. In the past, Professor Jacobs served as Director of Pacific McGeorge's Institute for Development of Legal Infrastructure and led the Pacific McGeorge Bioterrorism and Public Health Initiative. Professor Jacobs received her B.A. from Wesleyan University, graduated magna cum laude from the University of Michigan Law School, and served as a law clerk to United States Supreme Court Justice Lewis F. Powell, Jr.

Benjamin B. Wagner was appointed by President Obama in November 2009 to be the United States Attorney for the Eastern District of California. Between 1992 and 2009 he was an Assistant U.S. Attorney in that office, handling federal prosecutions of public corruption, fraud and terrorism crimes. He served as the U.S. Department of Justice's Resident Legal Advisor in Indonesia from 2005 to 2006, where he worked with Indonesian law enforcement authorities on strengthening enforcement of terrorism, corruption and money laundering laws. Prior to joining the U.S. Department of Justice he was an associate at a New York City law firm for five years. He is a graduate of Dartmouth College and New York University School of Law.

Public corruption is *the* development issue of the twenty-first century. Players in the global campaign agree that criminal law enforcement is an essential cornerstone in a comprehensive strategy to fight the entrenched public corruption that plagues so many developing countries. But while much progress has been made in amending national laws to define the necessary corruption crimes, very little legislative attention has been paid to updating the procedural tools that police and prosecutors need to succeed. In this Article, we address this critical deficiency. Using insights gained from inside the United States Department of Justice and the Attorney General's Office of Indonesia, this Article argues that developing countries need to transform their legislative arsenals to equip law enforcement to engage in the proactive investigatory strategies that are required to attack the collusive, secret crime of public corruption. We identify key evidence-gathering tools that are lacking in the criminal procedure code of Indonesia and many developing countries. These include laws that provide whistleblower protections, authorize undercover operations, authorize access to financial documents, establish mechanisms for offering witnesses immunity or sentencing leniency, and that target related conduct, such as intimidating witnesses and money laundering. We explain how, in

other countries such as the U.S., the procedures interact to enable law enforcement to effectively detect and prosecute corruption crimes, and assess the need for each of these reforms in Indonesia, as well as the progress made. This Article concludes with a short legislative agenda, which provides a model for law enforcement-enabling reforms in developing countries.

LIMITS TO THE INDEPENDENT ANTI-CORRUPTION COMMISSION

MODEL OF CORRUPTION REFORM: LESSONS FROM INDONESIA

20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 327 (2007)

Leslie Gielow Jacobs and Benjamin B. Wagner

Professor Jacobs is a Professor of Law at the University of the Pacific, McGeorge School of Law and Director of the Capital Center for Government Law & Policy. She has authored a substantial body of scholarship on constitutional doctrine, governance, bioterrorism and national security. Professor Jacobs' articles have appeared in law journals at Yale, Michigan, Illinois, Ohio State, UC Davis, Rutgers, Tulane, Florida and Indiana. In the past, Professor Jacobs served as Director of Pacific McGeorge's Institute for Development of Legal Infrastructure and led the Pacific McGeorge Bioterrorism and Public Health Initiative. Professor Jacobs received her B.A. from Wesleyan University, graduated magna cum laude from the University of Michigan Law School, and served as a law clerk to United States Supreme Court Justice Lewis F. Powell, Jr.

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Strategies have proliferated to combat the plague of public corruption in developing countries. To centralize and invigorate criminal enforcement, creating an independent anti-corruption agency has been a popular strategy. But the anti-corruption agency mechanism that works in the small, relatively homogenous city-states of Hong Kong and Singapore should be transported with great care into nations where the law enforcement challenges are broader and more diverse, both geographically and numerically, such as Indonesia. The creation of, and support for, anti-corruption agencies in developing countries that present the same types of geographical and institutional challenges as Indonesia should not come at the expense of reform of the core police and prosecution services. These institutions, unlike anti-corruption

agencies with limited mandates, are structured to address the wide range of law enforcement efforts that good governance requires. In developing countries like Indonesia, the formation of anti-corruption agencies should not be viewed as the long-term solution. The traditional police and prosecution service should be equipped with appropriate powers to investigate and prosecute public corruption offenses. In addition, a reform of the prosecution service itself that would aim at making it more professional, productive, transparent, and effective, is a necessary ingredient of sustainable corruption reform.

EFFECTIVE LAW-MAKING IN TIMES OF GLOBAL CRISIS –

A ROLE FOR INTERNATIONAL ORGANIZATIONS

STEFAN KIRCHNER

Stefan Kirchner is Attorney-at-law (Rechtsanwalt) and holds a MJJ degree from Justus-Liebig-University, Giessen, Germany. He is a Research Fellow at the Institute of Public Law of the University of Göttingen and works on issues concerning Public International Law and Human Rights.

Public International Law is often slow to react to changes and challenges. Due to the need for consensus among the subjects to which rules are meant to apply, the creation of new rules often requires more time than is available in times of crisis. At the same time, Public International Law is highly flexible and might provide alternative means for the effective and fast creation of new rules. In this article we will examine several alternatives to traditional treaty-based law-making with regard to their effective creation and operation. Alternatives could include soft law which, although relatively fast to create, is non-binding, which raises doubts as to its effectiveness for regulation in times of crisis. In the last years network approaches to law-making have been discussed, most recently with regard to the G20. But while this approach might look modern, it raises serious questions as to the legitimacy of rules created thereunder. A more legitimate form of law-making could be through international organizations. This leaves two options: the mere drafting of rules by international organizations and actual legislation by them. It is the latter option which appears to be most efficient. In this text the work of several international organizations is investigated more closely, ranging from the loose Group of 20 (G20) to international organizations which rely on non-binding

recommendations to international organizations which have an actual law-making capacity. At the center of the investigation is the question of how existing international organizations can effectively create new rules which enable states parties to react swiftly, while at the same time taking into account the technical expertise required to formulate an effective response to a global crisis. In this context, the experience of the International Civil Aviation Organization (ICAO) can serve as a model for other international organizations. The ICAO's reaction to the threat of terrorism provides an interesting example for effective law-making in times of crisis. After a short introduction to the law-making capabilities of the ICAO, we will examine how effective it really is and whether the ICAO can serve as a model for future reactions to crises by rapidly providing new rules for a large number of member states in a field which can be technically complicated - characteristics which apply to the global financial crisis as well as global epidemics, climate change and similar issues.

**DISPUTE SETTLEMENT IN THE LAW OF THE SEA, THE BAY OF BENGAL,
THE CLCS AND THE CASE BANGLADESH/MYANMAR BEFORE
THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

2 AEGEAN REVIEW OF THE LAW OF THE SEA AND MARITIME LAW (FORTHCOMING) (2010)

Ioannis Konstantinidis

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On the basis of the maritime boundary dispute between Bangladesh and Myanmar in the Bay of Bengal, the scope of this article is to briefly describe the relative procedures provided by UNCLOS Part XV and to analyse an important part of this dispute concerning the delimitation of the outer continental shelf. Following this reasoning, a special reference is made to the Commission on the limits of the continental shelf, to which Myanmar submitted all information and data for its continental shelf beyond 200 nautical miles in the Bay of Bengal.

THE UNITED NATIONS ACTION AGAINST PIRACY ORIGINATING FROM SOMALIA

Mateus Kowalski and Miguel de Serpa Soares

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Miguel de Serpa Soares is currently Director of the Department of Legal Affairs of the Portuguese Ministry of Foreign Affairs. He studied Law in the University of Lisbon, and European and International Law in the College of Europe, Bruges, Belgium and the University of Urbino, Italy. He is a Member of the Lisbon Bar, and was Assistant-Lecturer of Criminal Procedural Law and International Economics Law at the University of Lisbon. He has been Chef-de-Cabinet of the Vice-Minister for Infrastructure, Planning and Territorial Administration (in charge of Maritime Affairs) and Legal Counsellor to the Portuguese Permanent Representation to the European Union in Brussels.

In 2008, the rise of maritime piracy originating from Somalia set off a robust military response by the international community following Security Council resolutions on the subject. Somali piracy has thus been removed from what would be its normal policy agenda. The rise of maritime piracy was not initially accompanied by a discourse of the need to solve the structural problems of Somalia. In order to cope with the phenomenon of organized crime it is fundamental to enable capacity building in Somalia at local and regional levels and the creation of socio-economic conditions for the survival of populations now engaged in piracy due to the lack of alternative licit economic activities.

The initial reaction against piracy configures a successful ‘securitization process’ as defined by the ‘Copenhagen School’ insofar as a securitization discourse was constructed and linked to a strategy of containment which had its focus essentially on military action. However, the complexity of factors being at the root of piracy originating from Somalia point to the need for a comprehensive response to the problem, in which the security element is relevant, though not dominant. Therefore, the article argues that the desecuritization of piracy in Somalia is a major step to open the agenda on piracy to other dimensions beyond the securitarian one.

The article advocates that the action against piracy by certain United Nations organs and specialized agencies seems to follow a non securitized strategy. However, the desecuritization movement also depends on its acceptance by a relevant audience in order to be successful.

Therefore, any act of speech of the United Nations on piracy pointing to comprehensive and democratic solutions committed with the structural roots of the problem can only be considered as a desecuritized discourse if constructed outside a simple containment strategy. The tendency of the discourse of the United Nations - and its acceptance by the relevant actors - seems to go in this direction, with practical implications in terms of action against piracy originating from Somalia.

THE UNITED NATIONS CHARTER AS THE 'CONSTITUTION' OF THE INTERNATIONAL COMMUNITY

Mateus Kowalski

Mateus Kowalski is a PhD Candidate in International Politics and Conflict Resolution at the University of Coimbra, Portugal. He holds a degree in Law and a Master degree in International Law. He is author of articles on theory of International Law, human rights, the UN system and security issues. Mateus Kowalski is currently Legal Counsellor at the Ministry of Foreign Affairs of Portugal. He can be reached at mateuskowalski@ces.uc.pt.

The Charter of the United Nations is frequently referred to as the “constitution of the international community”. In fact, more than just being a constitutive treaty of an international organization, it functions as an instrument that reinforces normative values of the international community.

The term ‘constitution’ as used by many authors may be somewhat controversial since it seems to point to a similarity between the international community and a State and between the United Nations and a State Government. Those differences and the relevance of the State in current international relations are unquestionable. The term ‘constitution’ may be misleading in this sense. However, as this article tries to demonstrate, the Charter has many characteristics common to a State constitution, such as: it has a nucleus of peremptory norms; it establishes an international normative hierarchy; it shapes a base for the protection and promotion of human fundamental rights; it has a modification procedure that does not require unanimity; and it has a reasonably developed institutional structure that has the competence to deal with any subject of relevance to the international community.

This article argues that the Charter creates a foundational legal structure of the international community. As such, it may also play an important role in establishing world governance based on the United Nations.

**THE TRANSFORMATION OF THE INSTITUTIONAL STRUCTURE OF INTERNATIONAL ORGANIZATIONS:
FROM "SOFT" TO "HARD" MULTILATERAL INSTITUTIONS**

Magliveras Konstantinos

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Paper presented to the Annual Conference of the Greek Society of International Law and International Relations, Athens, 3-5 December 2010

Based on the observation that during the last 15 years there is a tendency for "soft" international organizations (IO) to attempt to be transformed to "hard" or "harder" than before institutions. This paper investigates the reasons behind this trend. It demonstrates this trend on the basis of a number of examples of IOs that have different structures and are at different stages of evolution, including the Organization for Security and Cooperation in Europe, the Association of Southeast Asian Nations, the GATT/WTO, the Collective Security Treaty Organization, the African Union, the Organisation of Economic Cooperation and Development, the European Union, the Regional Cooperation Council.

After examining and grouping together the changes brought about in these IOs, the paper concludes that there are four reasons for this trend. First, there is a need for a "soft" IO to acquire a "harder" institutional dimension, which will allow it to resolve problems that have appeared in its operation and to perform its activities in a more efficient manner (e.g. OSCE). Second, the existing "soft" non-binding structure cannot address the challenges posed to the IO and it becomes obvious that Member States must devolve more powers to the IO, including the power to tackle breaches of the constitutive instruments by Member States through the

imposition of sanctions, the latter being a prime characteristic of a "hard" IO (e.g. the African Union). Third, a "soft" IO can no longer cope with developments and its transformation to a "hard" IO with the parallel adoption of a legally binding charter is necessary in order to continue its operations (e.g. ASEAN and GATT/WTO). Fourth, a "soft" IO wishes to upgrade its role and importance in the global community and believes that the way to do it is by becoming a much "harder" IO. The majority of IOs examined in the paper fall into this category.

**INTERNATIONAL TRADE AND INVESTMENT LAW:
MULTILATERAL, REGIONAL AND BILATERAL GOVERNANCE
(EDWARD ELGAR, 2010)
Dr Rafael Leal-Arcas**

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This timely book examines international trade and investment law at various levels of governance, including unilateral, bilateral, regional, and multilateral arrangements.

Rafael Leal-Arcas demonstrates that the nature of international trade law is fragmented and cyclical. Whilst not always straightforward, the process of making international trade law more multilateral, beginning with the General Agreement on Tariffs and Trade in 1947, has been largely successful. The author shows how this success could be emulated for international investment law, as well as providing a careful analysis of the choice of jurisdiction – regional versus global – for the settlement of disputes.

This insightful book will be an invaluable resource for research institutions, legal practitioners, judges, trade and investment policy-makers, officials at international organizations and national civil servants. Advanced students of international economic law, international investment law, external relations law of the EU, international trade law and WTO law will also find this book important.

Contents:

1. Introduction: International Law is Fragmented and Cyclical; **Part I:** International Trade Law and Policy; **2.** Unilateralism; **3.** The Rise and Fall of Multilateralism; **4.** The Rise of Bilateralism/Regionalism; **5.** The EU's Relationship with Brazil and India; **6.** The EU's Relationship with China; **7.** The EU's Relationship with Russia; **Part II:** International Investment Law and Policy; **8.** Preliminary Remarks on Foreign Direct Investment; **9.** History of Foreign Direct Investment Regulation; **10.** Current Regulatory Regimes; **11.** Why is there a Need for a Multilateral Investment Treaty?; **12.** How to Design a Multilateral Framework for Investment; **Part III:** Choice of Jurisdiction for the Settlement of Trade Disputes; **13.** An Overview of the WTO and the NAFTA; **14.** Comparison between the WTO and NAFTA; Epilogue and Recommendations to Part 3; Bibliography; Index.

For more information see http://www.e-elgar.co.uk/Bookentry_Main.lasso?id=14067

THE ROLE OF DISPUTE SYSTEMS IN MANAGING ORGANIZATIONAL CONFLICT
AN EXPLORATION ON THE ROLE AND EFFECTS OF INTEGRATING DISPUTES SYSTEMS INTO THE
ORGANIZATIONAL STRUCTURE: IDENTIFYING CURRENT PRACTICES OF DISPUTE SYSTEMS DESIGN

Ernest E. Pegram

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Since the 1990s, a new concept has emerged in the literature on conflict management: dispute systems. Although much academic discussion on dispute systems and their application for conflict management has transpired, dispute systems have yet to be understood thoroughly. This paper is shaped by research that seeks to understand what organizations do to manage conflict. The purpose of this research is to explore the consequences of integrating dispute systems into the organizational structure. Smith and Martinez (2009) observe that “dispute systems encompasses one or more internal processes that have been adopted to prevent, manage or resolve a stream of disputes connected to an organization or institution” (p. 126). The United States Postal Service’s REDRESS program is one such dispute system. Research has shown that “parties who have participated in REDRESS mediations—both managers and employees—are highly satisfied with the program and believe it offers a constructive approach to addressing employment disputes in the workplace” (Antes, Folger, & Della Noce, 2001, p. 429). Dispute systems integration has three relational effects on conflict management: efficiency effects, effectiveness effects, and satisfaction effects (Bordone, 2008). This paper explores the efficiency effects of integrating dispute systems into the organizational structure; in addition, it identifies current practices of dispute systems design. This paper reviews the literature on conflict management, conflict management systems, and dispute systems design. The future direction of this research, which is rooted in dispute systems design modeling, falls into the category of applied organizational change. The research becomes part of the scholarly

discussion on organizations' "movement toward a systematic approach for organizational conflict management rather than ad hoc dispute resolution methods" (Constantino & Merchant, 1996, p. xv), and defines changing the "structure of an organization, not in terms of changing people, but changing the framework" (Turner & Weed, 1993, p. 122). Systemic approaches to conflict management are broadly defined as alternative methods of resolving disputes other than the use of trials or organizational authority.

BEYOND THE COURT OF PUBLIC OPINION:

MILITARY COMMISSIONS AND THE REPUTATIONAL PULL OF COMPLIANCE THEORY

(FORTHCOMING GEORGETOWN JOURNAL OF INTERNATIONAL LAW)

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The decision to prosecute the suspected co-conspirators of the 9/11 terrorist attacks in either a federal courtroom or by military tribunal has reached a critical juncture. Central to this debate is whether the military commissions are consistent with domestic and international standards of justice. Utilizing the analytical framework of compliance theory, which seeks to answer why States comply with the rule of law, this article discusses the U.S. reputation for compliance in the context of the revised military commissions.

A common element to several competing theories in the compliance debate is reputation. States are pulled toward compliance with accepted legal standards in part out of concern for reputation among transnational actors. These include governments, multi-national institutions, non-governmental organizations, and legal commentators. I argue that a decidedly negative reputation of the military commissions contributed to recent policies to amend the tribunal process, culminating in the Military Commissions Act of 2009.

A critical analysis of the substantive and procedural aspects of the military commissions reveals that, in spite of a reputation for non-compliance, the process is consistent with applicable legal standards. Nonetheless, as witnessed in this debate, opting out of the transnational and domestic discourse results in diminished interpretive influence when future efforts are made to shape a reputation for compliance.

**FROM ANNEX I (AIXG) TO CLIMATE CHANGE EXPERT GROUP (CCXG):
OECD/IEA'S MOVE TOWARD INCLUSIVENESS BUILDS ON THE SUCCESS OF ITS ROLE IN
EMISSIONS TRADING IN THE COP NEGOTIATIONS**

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One of the lessons from Copenhagen is that a meaningful global climate agreement requires greater compromise between developed and developing countries. The recent transformation of the Annex I Expert Group (AIXG) into the Climate Change Expert Group (CCXG) may help achieve compromise and consensus. This change represents a move toward inclusiveness that strives to maintain the expert group's relevancy and builds on the successful role the group played in developing emissions trading.

The *ad hoc* Annex I Expert Group (AIXG) on the UNFCCC was established in 1994 by the Organisation for Economic Cooperation and Development and the International Energy Agency to support countries in addressing analytical and technical issues on climate change policy. The AIXG has provided guidance on various issues ranging from standardized reporting of national emissions inventories to laying the groundwork for emissions trading and other market mechanisms under the Kyoto Protocol.

In analyzing the AIXG and its shift to CCXG, this paper offers an example of a way in which technical expert groups can promote consensus in international negotiations and influence substantive outcomes. An examination of why international negotiations break down, how other international agreements have been negotiated and how expert groups are classified provides valuable insight into the current climate talks. Regarding institutional structure, technical expert groups can exist outside the legal instrument or within a Convention itself, which distinguishes informal from formal mechanisms. Regarding their function, expert groups can be involved in assessment or actively involved in analysis through member engagement, as in the case of the CCXG.

In order to demonstrate CCXG's utility, this paper outlines the history of the expert group, discusses its success in implementing emissions trading and identifies CCXG's need to remain relevant in the future. Part I provides an overview and history of the original AIXG, including its membership, institutional structure, functions, and obstacles. Part II details the success of the expert group's function through a case study of how it brought emissions trading from a theoretical concept to a functioning application to achieve reductions through its technical support to Annex I Parties. Part III argues that AIXG made a positive choice by jettisoning the exclusive identification with Annex I parties and renaming itself the Climate Change Expert Group, thereby signaling its shift toward greater inclusiveness. The group's previous name – Annex I Expert Group – appeared to limit engagement and represented a fallacy since it had repeatedly involved several developing countries and emerging economies through its analytical capacity. The newly named CCXG continues its role in promoting a solid economic footing both for members' domestic climate policies and within an international climate framework. Undeniably, challenges in overcoming cultural and political obstacles remain. However, by taking on a broader discourse and reaching out to developing countries under the auspices of the CCXG, the expert group provides a renewed possibility for progress in identifying decisive common ground.

**UN CONSTITUTIONAL ASSISTANCE [UNCA]: A MECHANISM FOR IMPLEMENTING
INTERNATIONAL LAW AND PUBLIC POLICY OR A TOOL OF IMPERIALISM?**

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This essay is drawn from my doctoral dissertation on the evolution of the UN Constitutional Assistance [CA] analyzed from a “Third World Approaches to International Law” (TWAIL) perspective. This essay’s chief purpose is to understand how the UN justifies its intrusive CA by situating it within the broader international law and public policy framework. Although the UN has generally associated its CA with broader policy goals that all tap into the Millennium Development Goals, it specifically justified CA programmes as a means of implementing (1) the Rule of Law; and promoting (2) conflict prevention and (3) women empowerment. This essay argues that, from a broader perspective, the UN’s perspective on the significance of a (*good*) constitution is the starting-point to understanding its purposes for offering CA. Indeed, the emergence of criteria [a few are highlighted in this abstract] which a *good* constitution should fulfill and the foundational role played by these criteria in promoting democracy-human rights-peace-security-and-development [DHRPSD] in Least Developed Countries [LDCs] is a salient but much ignored feature of the peace-building-development assistance phenomenon. In short, this essay argues that today the consolidated UN DHRPSD system has a constitutional dimension whose deeper implications for the future of global constitutionalism must be critically examined.

Until 1989-91, both scholars and states agreed that “international law does not generally address domestic constitutional issues, such as how a national government is formed” (Fox, G.) But the emergent UNCA ‘policy institution’ (established practice) is a telling indicator of how far international law has swung from the 1987 position and a sign of what is to come. Indeed,

constitutional issues such as the unconstitutional overthrow of a government (as a threat to world peace), the ways in which a constitution is forged and the content of a constitution have now become proper subject matters of international law. These issues are extensively internationalized in the post-conflict and developmental assistance contexts. And indeed, the adoption by Bhutan (the picturesque, mountainous, Buddhist country which is widely perceived as backward and isolated) of its first written constitution in 2008 - under the United Nations Development Programme's tutelage - attests to the heightened importance of a (written) constitution as a symbol of political modernity and a prerequisite for democracy.

The UN's conception of a good (written) constitution's DHRPSD-strengthening potential is linked to the UN's prescriptions for *making* a good constitution and what it should broadly *contain*. According to the UN, because a (good) constitution is forged through a "transparent, inclusive and participatory" process, it promotes democracy by providing its makers (i.e., LDCs) an opportunity to employ democratic principles and practices. A *good* constitution also strengthens democracy by entrenching an international human rights-protecting framework, in general, and gender equality, in particular.

In the post 9/11 era, the idea that a *good* constitution has a potential to battle terrorism through the constitutionalization of anti-terrorism provisions, especially in the states that are perceived to have a history of terror and violence, such as Afghanistan and Iraq, has become integral to the UN discourse. And, indeed, the dots between the UN's counter-terrorism strategy of deterring states from sponsoring terrorism and the use of constitutional measures (in Afghanistan, Iraq, & Bhutan) as the means of establishing their behavioral norms are easily connectable.

The UN's implicit premise is that a *good* constitution also addresses "human security," broadly understood as "freedom from fear" in its political avatar. If by limiting political power and enshrining court-policed human rights, a good constitution is deemed to tamp down political

insecurities, such as military dictatorships, then building state capacity to free political life from violence by creating other representative institutions represents its second benefit.

Integral to the human security theme and casting an additional *protective* hue over a *good* constitution is the “Responsibility to Protect” [R2P] doctrine. Although *protection* in R2P is confined to: Genocide, war crimes, ethnic cleansing and crimes against humanity, the implicit understanding is that a good constitution will both curb the propensity of states to tread the forbidden path of committing the atrocities listed above and build their *capacities* to resist committing such atrocities.

Finally, and more significantly, the UN’s notion of a *good* constitution also has an implicit economic dimension - rooted in the Washington consensus - that in fact, shapes its political features. To ostensibly promote good economic governance, a good constitution must endorse the market economy, property rights, and allied neo-liberal prescriptions and entrench relevant institutions such as anti-corruption commissions. All in all, according to the UN “good internal governance” has come to stand for a polity governed by and according to a *good* constitution as defined above.

This essay concludes by drawing upon links made between the development of modern constitutional democracy and imperialism (Tully, James). Thus, by examining its operation, this essay hopes to identify the colonial continuities in the UNCA enterprise.

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**James Tully, *Modern Constitutional Democracy and Imperialism* 46 Osgoode H. L. J. 461(2008).

**INTERNATIONAL RELIGIOUS FREEDOM ADVOCACY –
A GUIDE TO ORGANIZATIONS, LAW, AND NGOS
BY H. KNOX THAMES, CHRIS SEIPLE & AMY ROWE**

Book Review by James D. Standish

James D. Standish earned his JD, cum laude, from Georgetown University, his MBA from the University of Virginia and his bachelor's degree from Newbold College, England. Mr. Standish represents the world headquarters of the Seventh-day Adventist Church to the United Nations, serves as Secretary of the United Nations NGO Committee on Freedom of Religion or Belief, and was a member of President Obama's Task Force on Interfaith Dialogue & Cooperation. Mr. Standish formally served as executive director of the U.S. Commission on International Religious Freedom and is a regular contributor to the Washington Post's "On Faith" blog.

I began working in the field of international religious freedom advocacy almost a decade ago. Despite living overseas much of my life, taking a range of human rights and international law classes at Georgetown and the University of Sydney, and working for an organization with a rich heritage in the field, it was a very steep learning curve. Maybe the hardest element to wrap my arms around was how to effectively engage the principal actors with the power to change conditions on the ground. Who are the actors? How can they be engaged? What are the national and international mechanisms open to NGO engagement? What tools make for effective advocacy, and what are the traps that should be avoided?

A decade of hard knocks, and I have the answers to most of these questions. Thames, Seiple and Rowe prove in their book, however, that there is a much more efficient way to become an effective religious freedom advocate. *International Religious Freedom Advocacy* provides an excellent overview of the most significant multi-lateral bodies with human rights mandates that include religious freedom. More specifically, they describe which organs of the bodies have oversight of religious freedom norms, and the precise means available to those organs to influence religious freedom conditions, highlight a violations or enforce a standard.

The book begins with an examination of the United Nations and moves to more focused regional bodies including the Organization for American States and the African Union. The section on the United Nations takes the extremely large, diffuse and complex organization and

breaks it down to the points of interaction for the NGO community, while making sense of the UN's interlocking entities. For example, the authors concisely explain not only the difference between the UN Human Rights Committee, the UN Human Rights Council and the UN Human Rights Commission, but how to interact effectively with the former two (the latter is defunct as of 2006).

The section on the United States also proves helpful in understanding the role different entities in the US Government play in advancing America's foreign policy objective of promoting religious freedom. With US Congressional commissions, an independent governmental commission and an office in the State Department, along with entities ranging from the National Security Council through to Congressional committees, sorting out who to turn to and when can be challenging for religious freedom advocates. In a very concise chapter, the authors provide the lay of the land along with a very useful perspective on the utility each entity provides.

The case studies on effective religious freedom advocacy that can be found in the latter half of the book are particularly effective illustrations of how the tools, techniques and entities described in the book can be woven together to change conditions in nations. Indeed, if the book has a weakness, it is that it tackles what is by its nature a fascinating field in such a clinical fashion that it makes for dry reading. By weaving more case studies into the text, the authors could have brought needed texture, context and humanity to the subject.

What the book lacks in emotion, it gains in efficiency. It is a relatively quick read, and any advocate in the field will find it an invaluable resource. It also serves as an ideal text for college classes on human right advocacy. As my own education illustrates, it can be a long road from legal theory to effective advocacy. *International Religious Freedom Advocacy* provides the best road map available for making that journey in an efficient and effective manner.

**PROTECTION OF JOURNALISTS IN SITUATIONS OF ARMED CONFLICT ENHANCING LEGAL
PROTECTION UNDER INTERNATIONAL LAW**

Hong Tang

Dr. Hong Tang is a practicing lawyer focusing on international law and policy. Dr. Tang received an S.J.D. from the Golden Gate University School of Law, and an LL.M. from the University of the Pacific, McGeorge School of Law. Dr. Tang was admitted to the Bars of the State of New York and various Federal Courts. Dr. Hong Tang is currently the Chair of the Subcommittee on Climate Change under the United Nations Committee at the New York City Bar, and the official representative of the New York City Bar to the United Nations. Dr. Tang is the Vice-Chair (2010-2011) to the U.N. & International Institutions Coordinating Committee and the International Environmental Law Committee of the American Bar Association (ABA International), and a Steering Group member (2010-2011) to the International Energy & Natural Resources Committee of ABA International. Dr. Tang is also an Executive Committee member of the Young Lawyers Section at the New York State Bar Association. Dr. Tang's research, practice and interests cover almost every area of international law and policy.

Although the doctrine of “limited war”¹ has been recognized by the international community and nowadays become the view of the majority, the practice in real life, as is often the case in human affairs, is sometimes different from the theory,.

The recent U.S.A.-initiated wars are a perfect illustration of the growing risks faced by journalists performing their duties in situations of armed conflict. It is necessary and important to call for renewed interest and attention to this issue in order to increase protection of this special professional group.

Contemporary armed conflicts involve not only state actors but also non-state armed groups² and include international as well as internal conflicts. This raises a new issue, such that every individual state and the whole international community, and, in particular, international inter-governmental organizations, shall bear the burden and responsibility to prevent harm to civilians and journalists caused by non-state armed groups in the respective territories of individual states (responsibility to protect and collective action).

¹ GEOFFREY BEST, HUMANITY IN WARFARE (Weidenfeld and Nicolson, 1980); GEOFFREY BEST, WAR AND LAWS SINCE 1945 (Oxford University Press, 1994)

² Such as the “Janjaweed” (“devil on horseback”, or “a man with a gun on a horse”) in the Darfur region of Sudan.

Under current international law, attacks against journalists and their equipment are illegal and may be subject to charges of war crimes and crimes against humanity.³ Journalists cannot be a legitimate target of attacks unless they are being exploited to instigate grave breaches of international humanitarian law.⁴

Chapter I of this article generally reviews the different statuses of journalists under the current international legal regime. It discusses the importance and special characteristics of journalists performing their duties in areas of armed conflicts, which reflects the need for additional international humanitarian conventions or other appropriate legal instruments to promote better protection of journalists.

Chapters II, III, and IV in detail review the current international laws that grant legal protection to journalists in situations of armed conflict. These international legal instruments include but are not limited to international conventions, international charters, customary international law, and the U.N. laws. These chapters are intended to give readers a much more informed survey and description of current international rules on this particular issue.

Based on the review of current needs and legal protections of journalists in situations of armed conflict, this article makes a recommendation for a future special international convention (governing and imposing responsibility on sovereign states⁵). It focuses particularly on the issue of the protection of journalists in situations of armed conflict and discusses the basic provisions that should be included in such an *ad-hoc* convention (“second-level” legislation in international law).

³ David Scheffer et al. *The End of Exceptionalism in War Crimes: The International Criminal Court and America's Credibility in the World*, Harv. Int'l Rev. (2007), <http://hir.harvard.edu/index.php?page=article&id=1647>

⁴ For example, if journalists act as spies, they may become legitimate targets of attacks.

⁵ Compared to “international inter-governmental organizations”

Traditionally, only states can be subject to international law. States negotiate international treaties by a long process. States sign and then ratify international treaties and are thereafter bound by them.

In 1945, the Charter of the United Nations (U.N.) was signed in San Francisco, California. The U.N. is an international inter-governmental organization whose stated aims are to facilitate cooperation in international law, international security, economic development, social progress, and human rights issues.⁶ It is a creation of international law, more specifically, an international treaty—the Charter of the United Nations. Similarly to states, the U.N. serves a multitude of roles and legal functions on an international level. It has developed far beyond a multilateral political forum and has an independent legal personality under international law.⁷ The United Nations is also a creator, regulator, and actor of international law, along with its role of being a subject of international law. Under contemporary international law, the United Nations and its organs are creating international rules, in addition to their original role of being an international multilateral political forum.

Under the doctrine of international rule of law (a rule-based international system; the reflection and promotion of the rule of law on both international and national levels), contemporary international law serves some special and unique functions, more than those of national law. The most important function of contemporary international law is to promote and strengthen the rule of law on both national and international levels. The negotiation process of international conventions itself serves this function. They also provide modern international technical assistance from the international community to failing or failed states through international forums and mechanisms. Meanwhile, as “soft law,” international conventions also

⁶ Charter of the United Nations, Article 1

⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11): in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

grants individuals a power of right, since a demand for rights engenders a completely different type of response than a request for help.

In the context of the contemporary international legal regime and rule of law, there are two different types of international rules regulating the protection of journalists in situations of armed conflict

Chapter II and Chapter III cover the first type. The first type includes laws governing and imposing burdens and responsibilities on states. These include: (1) *general* international conventions on the law of war (such as the Geneva Conventions of 1949 and their Additional Protocols of 1977); (2) *ad-hoc* international conventions on a particular group involved in war (for example, the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict); (3) the laws of the United Nations (the U.N. laws, such as the “legislative” Resolutions of the U.N. General Assembly and the Security Council); and (4) the precedents (case law) of international judicial tribunals (such as the judgments of the International Court of Justice and the International Tribunal for the former Yugoslavia).

After surveying and reviewing the existing international rules on the issue of the protection of journalists during armed conflicts, I found that there is a clear gap in the current international legal regime — there is no *ad-hoc* international convention specifically addressing this professional group. The article proposes a future *ad-hoc* international convention regarding this issue.⁸ The article also discusses the effects and impacts of such an *ad-hoc* international convention.

⁸ Only states are parties to a convention. States negotiate conventions. States sign and ratify conventions and thereafter are bound by those conventions. Although international inter-governmental organizations have a state-like independent legal personality under international law, they are only the forum for facility of the negotiation process of a convention, rather than a party to a convention. This is also why the author of this article purposes a future *ad-hoc* convention (governing individual states) before discussing the rules governing international inter-governmental organizations.

Chapter IV covers the second type. The second type includes those laws governing and imposing burdens and responsibilities on international inter-governmental organizations, namely the United Nations, including its organs and peacekeeping missions (which are working on the ground during crises, protecting civilians and journalists). These include international conventions that created organizations (such as the Charter of the United Nations), those constitutional mandates of the organization and peacekeeping missions, and also the international laws created by the organization itself (such as those “generally applicable” “legislative-character” Resolutions of the Security Council and the General Assembly). Under the doctrine of international rule of law, the United Nations shall also be subject to and respect the rules created by itself, as both creator and actor and also subject of international law.

Chapter V discusses the comparative philosophy and cultures (both Eastern and Western values) relative to the issue of the protection of civilians/journalists in armed conflicts, which support contemporary international laws on the issue.

The purpose of this article is to highlight the specific conditions created by armed conflicts (international and internal armed conflicts), and to survey and discuss the international laws (governing both sovereign states and international inter-governmental organizations, or governing either sovereign states or international inter-governmental organizations) that can promote better protection for journalists in the circumstances of armed conflict.

This article also serves to reaffirm those elements of international humanitarian law that apply to the protection of civilians and journalists in situations of armed conflict; to re-establish and promote the authority of those basic rules on both international and national levels; to improve and even develop current international law on this issue for adaptation to contemporary requirements; and to clearly define and strengthen the legal “power of rights” of those journalists who perform their profession in situations of armed conflict for the public interest of the whole international community.

With the proliferation of armed conflict around the world, journalists working in war zones have suffered hardship and even paid the ultimate price with their lives. Journalists, who are bringing information to the whole international community for the public interest, are entitled to and desire better legal protection under international law.

**THE SPECIAL MEASURES MANDATE OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION:
LESSONS FROM THE UNITED STATES AND SOUTH AFRICA**

Connie de la Vega

Professor de la Vega is an Academic Director of International Programs at the University of San Francisco School of Law. She writes extensively on international human rights law and participates in United Nations human rights meetings. She has submitted amicus briefs detailing international law standards to U.S. courts for juvenile death penalty and affirmative action cases and has filed petitions before the Inter-American Commission on Human Rights. Professor De la Vega co-authored "Human Rights Law: An Introduction" (University of Pennsylvania Press, 2007), and serves on the advisory group for the Human Rights Institute at Columbia University. She established the Frank C. Newman International Human Rights Law Clinic at USF and is a founding member of Human Rights Advocates.

The International Convention on the Elimination of all Forms of Racial Discrimination is the United Nations main treaty elaborating on Article 1 of the Charter of the United Nations which emphasizes the importance of the prohibition of racial discrimination. CERD has been ratified by 173 countries, which is evidence of its importance in the protection of human rights.

CERD went beyond the non-discrimination language of the Charter, however, in two very important ways: 1) it established a requirement for special measures aimed at ensuring the development and protection of certain racial groups or individuals belonging to them to guarantee them the full and equal enjoyment of human rights as well as prohibiting and preventing racial discrimination; and 2) it established equality as a goal alongside the prohibition of racial discrimination. With respect to the prohibition and prevention of racial discrimination, article 2 sets forth a series of affirmative steps that States Parties must take

towards its elimination. It specifically requires that special measures must be adopted for ensuring equality, not only of individuals but also of groups.

The guarantee of equality in human rights is mentioned in article 2(2) and is further elaborated on in article 5, which provides among other things that State Parties undertake to guarantee equality before the law and in the enjoyment of a list of rights. The latter include political, civil, and economic social and cultural rights. Governments are required to use special measures not only to prevent racial discrimination, but to achieve equality in the enjoyment of these rights.

Despite the clear language of these mandates, special measures have been controversial in many countries, though such manifestations have been varied. For example, in the United States, a number of states have prohibited the use of race in making decisions about admissions to universities and the courts have restricted use of race in both employment and education cases unless to remedy intentional discrimination. In South Africa, questions have been raised regarding the effectiveness of some affirmative action programs and concerns have been raised that it does not benefit those who are most disadvantaged from injustice. In Brazil, conflicts arise from the fact that a large percentage of the population is of mixed race with the result that the use of quotas is highly controversial.

The controversies that surround the issue may benefit from the elaboration of the obligations by the Committee on the Elimination of Racial Discrimination (“Committee”). Clarification of the requirements may aid governments as they develop and implement programs that are more focused on the goals set forth in the treaty. Further, *de facto* discrimination along with the continued existence of bias are reasons for continuing to use race-based affirmative action programs, even while the focus on disadvantage and social class may also serve similar purposes for attaining equality.

The article gives an overview of the major issues related to the CERD mandate on special measures and then reviews the experience of affirmative action in the United States and South

Africa – both its practice and judicial decisions. These two countries are chosen because of their history of *de jure* discrimination and their very different approaches to affirmative action. The author suggests, however, that despite those differences lessons can be gleaned from those approaches that provide guidance to the CERD Committee as it develops more concrete standards for the special measures mandate of CERD.

In addition to identifying standards that the CERD Committee has enunciated in its review of States Parties reports, the article reviews elements addressed by other U.N. bodies. The article concludes with suggestions for other areas that require further elaboration based on the experiences in the United States and South Africa. These include: 1) the need for affirmative action as long as racial disparities exist in education and employment; 2) the need to address bias through the special measures requirement; 3) the concept of diversity as a helpful means for achieving equality, though it should not replace race based measures for achieving that goal; 4) the need to carefully tailor the measures to the specific goals being sought; and 5) that special measures are only one means for addressing the effects of discrimination and inequality.

In August 2009, the CERD Committee adopted General Recommendation 32 which provides its views on the special measures mandates requirements under the treaty. The article includes a short summary of the relevant provisions.

The article will be published in English and in Spanish in the Summer 2010 issue of the ILSA Journal of International and Comparative Law and is meanwhile available at <http://ssrn.com/abstract=1317934>.

SOME THOUGHTS ON THE STEP BEFORE
SPEECH DELIVERED ON FEB 22, 2010 AT THE
CELEBRATION OF THE 30TH ANNIVERSARY WORLD BANK ADMINISTRATIVE TRIBUNAL

Arnold M. Zack

Arnold M. Zack is President of the Asian Development Bank Administrative Tribunal and is an Arbitrator and Mediator of over 5,000 Labor Management Disputes since 1957, designer of employment dispute resolution systems; member of the Steering Committee for the Permanent Court of Arbitration in the Hague; occasional consultant for the governments of the United States (Department of State, Peace Corps, Department of Labor, Department of Commerce), Australia, Cambodia, Greece, Israel, Italy, Philippines, and South Africa, as well as the International Labor Organization, International Monetary Fund, Inter-American Development Bank, and UN Development Program. He has also been a Member of Four Presidential Emergency Boards (chair of two).

We are all partners in seeking to provide fairness in the unique universe of dispute resolution within international organizations. We all tend to look at the institution of the Administrative Tribunal, as would the proverbial blind mouse seeking to describe the elephant under its feet. Since the establishment of the League of Nations Administrative Tribunal the goal of its progeny has been to provide a dispute resolution system with, I suggest, the following objectives:

1. Proclaim to the public and international community the commitment of the organization to provide workplace standards and rules which are reasonable and equitable and fairly implemented.
2. Assure its staff members that it is so committed to the implementation of those standards and rules that it is receptive to challenges as to claimed violations thereof.
3. Assure its treaty signatory nations that it will provide and implement a set of workplace conditions that are reasonable and equitable for its international staff who have surrendered their right to invoke their homeland employment laws.
4. Establish a dispute resolution system that will provide a fair and equitable procedure through which staff members may voice their complaints, with initial steps for negotiated resolution while, if that approach fails, providing appeal to a neutral Administrative Tribunal which will have final authority as to whether or not the organization's action was taken within its managerial authority.

Judging from the frequency with which organizations continue to review and reform their internal appeal procedures, it is clear that the happy blend of speedy and equitable informal complaint resolution by the parties themselves with final authority being retained by Tribunals for remaining unresolved disputes has not yet been achieved.

What then are we seeking? I suggest it is an in house procedure where the staff and management are best able to negotiate a resolution of the dispute between them. That ideally is how all such disputes should be resolved. In normal courts of law direct negotiation, mediation, neutral case assessment and even settlement on court house steps have been all effective in resolving the great majority of pending law suits leaving a small percentage of cases actually going to trial. In US and Canadian collective bargaining arbitration with which I am most familiar, the parties negotiated grievance procedures with several internal steps involving ever higher authorities on the union and management side routinely dispose of the great majority of cases with only a few escaping mutual settlement and being appealed to arbitration.

Make no mistake, we all agree that voluntary resolution of dispute though direct negotiation (perhaps with the help of a mediator) is preferable to some outsider deciding what is best for the parties. There is no question that the parties should be encouraged to resolve disputes on their own before resort to their Tribunal. Utilization of administrative review followed by discussions between the staff member and management either directly or through a peer review or conciliation process offer the best hope for resolving such disputes in house, for assuring that settlements are totally acceptable to both, and for avoiding the risk, always present, that the Tribunal may make an unacceptable decision with potentially adverse impact on the disputants as well as the image and authority of the organization.

As I look at the recent efforts to craft the perfect balance, that best hope offered by seeking early and mutually acceptable resolution through in house procedures of peer review and conciliation is too often divorced from recognition that unresolved disputes are to be appealed to the Tribunal. Thus when the lower step fails to achieve resolution, unresolved disputes may

be appealed to the Tribunal. Recognizing the need to protect the confidentiality of the preceding step, the Tribunal must start from scratch. Although the Tribunal's right to institute de novo proceedings needs to be recognized, to require hearings on every case is costly, inefficient and time consuming. To require the Tribunal to hear a case as though nothing had been attempted to narrow the issues or resolve the dispute at the lower steps likewise ignores reality. Tribunals, composed of experts in the relevant areas, can never gain full understanding of the dynamics of the parties' professional or personal relationships, or indeed of the circumstances that led to the Application. As a consequence, a Tribunal decision that is deprived of insights as to what occurred below may not effectively end the dispute or may end it in a way that may be totally acceptable to one or both of the disputants. Or it may end it by a decision that does not overcome the problems that gave rise to the application risking the credibility of the Tribunal procedure. Nonetheless, when the parties have surrendered their control over outcome by appeal to the Tribunal, it must respond.

Thus we are faced with two unpleasant prospects: a delegalized in-house peer review or conciliation step which, if unsuccessful forces a new consideration of the conflict before judges who proceed from scratch, and who may despite sincere, honest and knowledgeable interpretations of law and rule, hand down unacceptable judgments, or we are faced with Tribunals holding de novo hearings to resolve questions of fact and law, but without any appeal, thus raising the question of whether there should be a single forum or a fully judicialized appellate process.

Is there a middle ground in which the procedure below can encourage resolution while providing the Tribunal with information and guidance to limit the likelihood of Tribunals making "bad law"? Is there a procedure, which can provide finality on issues of fact, while at the same time providing the disputants an objective assessment of the legality of their positions? Is it possible to create a forum where the disputants may be provided an adversarial opportunity to simply explain their position while providing the legal safe guard of confronting their accusers?

Is it feasible to utilize such a forum to relieve the Administrative Tribunal of the costly and time consuming burden of hearings in all appeals, resolving questions of fact while permitting the Tribunal to focus on issues of law and thus protecting its finality and independence?

With the ever rising threat of state based challenges to the independence of organization created, funded and appointed Administrative Tribunals, there seems to be increased sensitivity to the need to develop a rational decision making process and structure that is viewed as a reasonable and acceptable alternative to national law to protect the rights of staff members. The study commissions and diverse recommendations for change that seem to proliferate suggest that now is a good time for suggesting a structure and that I believe will satisfy those desires.

I think it is feasible to refashion the current post Administrative Review format to make the step below the Tribunal both a fact finding and legal opinion rendering facility, blending in the Tribunal as a form of appellate body retaining its final decision making role. The IMF currently provides an “arbitration” step, which is closest to what I propose, so I could readily use that term to describe my proposed fact-finding with recommendations.

How it would operate

As I envision it, the organization would, with the cooperation of the staff association create a panel of ad hoc, neutral, outsiders, experienced in dispute resolution, retired judges or attorneys competent in official languages, offering the disputants their mutual choice of arbitrator for their pending case, who on an agreed upon schedule at an agreed upon location, would facilitate discussions between the disputants, and hear evidence and argument on the issues between them. If unsuccessful in bringing them together, following the hearing the arbitrator would issue a written statement including findings of fact and reasoned recommendations for resolution of the dispute consistent with the organization’s governing laws. The arbitrator would be bound by a code of professional responsibility and precluded from subsequent employment by either disputant.

The opinion and recommendations would then be provided to the head of the organization and if accepted by both parties would end the dispute on the recommended terms. If the response of the organization is unacceptable to the applicant appeal to the Tribunal could proceed with the Tribunal retaining the right to create a de novo proceeding to rehear the facts, or if accepting the proffered facts, determine whether it accepts the legal reasoning recommended by the arbitrator. Arbitrators' decisions could be considered as precedential or not, depending on the way the organization structured the process. The Tribunal would be the final decision maker on facts as well as reasoning. Assuming this quasi-appellate role, the Tribunal's decision would hopefully obviate the need for any further appellate proceedings or structure. To the extent that organizations utilize the Tribunal facilities of another organization such as the UNAT or the ILOAT, changes in the step preceding appeal to those Tribunals need not interfere with their current structure while providing them the option of de novo or appellate consideration of the matters appealed to them.

The revised procedures should be viewed as the appellate route for unresolved disputes. The importance of direct negotiation, and mediation should not be overlooked. If the matter involves personal relations that ought not distract the resolution of disputes over facts or law, the arbitrator should be able to recommend the disputants a formal mediation.

Benefits

Among the benefits of such change might be the following:

1. The roster of arbitrators would be tailored to the size and geographic jurisdiction of the organization, with neutrals from different regions who would conduct their sessions locally bringing the system closer to the locus of the staff.
2. Such local hearings would be cheaper and faster without the time delay of waiting for the full Tribunal to convene and the expense of convening numerous witnesses at the organization's headquarters.

3. The Tribunal Executive Secretary could maintain a roster of arbitrators undertaking inquiry and resolution of issues.
4. The Tribunal Executive Secretary could provide a roster of arbitrators for the disputants to alternately strike names until they select their preferred arbitrator and, absent agreement, have the authority to appoint an arbitrator from the roster.
5. Having a stake in the procedure for determining the arbitrator would provide a new level of staff member involvement in the dispute resolution process, enhancing transparency and the buy-in benefits of process participation.
6. The arbitrator would have the opportunity to try to mediate a resolution of the dispute before donning the arbitrator hat.
7. Provision of arbitration as and where appropriate would be cheaper, faster and provide staff a greater sense of access and participation.
8. Much more rapid neutral evaluation through arbitration will satisfy the needs of many applicants, and thus reduce the staff uncertainty and tension that is likely to persist throughout the current delayed process of appeal to Tribunal's finality.
9. Early findings of fact will tend to reduce the areas of conflict and may deter appeals to the Tribunals.
10. Reducing the requirement of Tribunals conducting adversarial hearings to a de novo option will cut the cost and duration of sessions, and perhaps the need for large Tribunals while relieving the Tribunal of the burden of fact finding.
11. The arbitration decisions, by resolving disputes of fact and by proposing reasoned legal rationales which may well satisfy the applicants, will reduce the work and time pressures on Tribunals permitting the judges more time for consideration of unresolved or disputed legal issues from below.
12. An arbitration decision with recommended legal reasoning and proposed resolution may thwart the concern over finality of Tribunal decisions, making the Tribunal, in essence, an appellate forum reviewing, accepting or rejecting the reasoning of the arbitrator, thus folding in the need for any appeal within the organization itself.

Conclusion

In our new world of the internet, and ever more rapid communication, and ever greater expression of individual legal rights and protest against the status quo, it would be refreshing to bring expedition and cost savings to the dispute resolution procedures of international organizations. The foregoing proposal would not guarantee the independence of Administrative Tribunals from national or individual challenges, but it would demonstrate an effort to make the procedures more user-friendly while enhancing the probity of Tribunals' decisions. It would create a form of 'stalking horse' where the disputes are resolved below, before being appealed to the Tribunal, thus strengthening the Tribunal's finality and credibility. In the developing world, where judicial machinery is all too often suspect and subject to challenge, it will provide greater-experience with the concept of arbitration as a private alternative to resolve a whole range of local and regional disputes. Most importantly it will enhance the sense of staff participation while providing more rapid and much less expensive disposition of workplace disputes.

DEVELOPING STANDARDS OF WORKPLACE JUSTICE WITHIN INTERNATIONAL ORGANIZATIONS

Arnold M. Zack

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We are all familiar with the utilization of Federal and State Courts to apply and enforce the statutes which govern and protect workers under Federal and State Law, but we pay little heed to the statutory rights of those working for international agencies or institutions established by treaties.

A little explored aspect of our growing global interdependence has been the proliferation of international organizations employing hundreds of thousands of employees who labor without access to the workplace protections provided by the national laws of their home and host countries. The expansion of such international organizations from the fledgling focus of the League of Nations on inter-government regulation of health, post, telegraph, labor standards and the like to the broader role of the United Nations, and the more recent extension into economic development and criminal prosecutions has occurred in the context of negotiated privileges and immunities treaties with member states. There are now more than 100 such independent international, multistate organizations. Their independence from national constraints places their employees beyond the protection of national legislation and judicial enforcement. It also raises questions of the adequacy of workplace standards and fairness within such organizations, and the effectiveness of the machinery created by the employer to supplant access to national law. As these organizations grow and multiply, the problems of structure and administration continue in the context of seeking to recognize a universal standard of fairness in a world where national laws and enforcement are so variable and uncertain.

Development of Administrative Tribunals

In the era after World War I, the few international organizations had small staffs and in many cases, as with the Universal Postal Union, had their administration handled by their host country, Switzerland. In 1927, the League of Nations, having a more diverse operation, established its own internal Tribunal to which employees, dissatisfied with the determinations of the executive head of the League, could appeal. The internal appellate body reviewed the legality of the League's actions in light of the laws of the League⁹. This standard of review was affirmed by the International Court of Justice, which in 1954 held that the United Nations, successor to the League of Nations, had the right to establish a Tribunal to resolve "inevitable...disputes between the Organization and staff members as to their rights and duties."¹⁰

When one appreciates the diversity of national law, and the varying and perhaps contradictory outcomes that could result from application of national law to individual staff members it is easy to see the need for a single set of rules to be applied with consistency to all staff members. At the same time it is essential to signal member states that their representatives working in such organizations are afforded workplace protections consistent with what they would receive at home. Thus the many international organizations established since the Second World War have created Administrative Tribunals, not as equal branches of government, but as courts of limited jurisdiction within the organization to provide assurance to staff and member states that they function in compliance with a set of reasonable statutes, rules and regulations.¹¹

⁹ Di Palma Castiglioni, LNT No. 1

¹⁰ Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 57 (July 13) "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter (of the UN) to promise freedom and justice for individuals and with the constant preoccupation of the UNO to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which might arise between it and them"

¹¹ The number of such international organizations is difficult to assess. The Yearbook of International Organizations 2002/2003 (2002. Vol. 5 p.3) records 55282 "international organizations" But of that number, 232 are considered as "conventional intergovernmental organizations" (C. F. AMERASINGHE, PRINCIPLES OF THE INTERNATIONAL LAW OF INTERNATIONAL ORGANIZATIONS (Cambridge University Press, 2nd ed. 2005), p. 6.

These international organizations, of course, cannot provide a match for the laws under which their employees might have had protection in their home countries. But they have independently sought to fashion a set of internal laws and regulations by which they have agreed to adhere to the terms of the “contracts of employment” and “terms of employment” under which their staff members are hired. Adherence to the terms of those contracts is not merely acknowledgment of the organization’s commitment to the law of contracts. Tribunals thus require adherence to the organization’s internal policy statements and statutes as part of the staff member’s contract of employment. Robert Gorman, former President of the Administrative Tribunals of the Asian Development Bank and the World Bank, wrote in referring to the World Bank’s management, that obligation to adhere to internal rules and regulations also extends to “ all persons and bodies making decisions on behalf of the employer as being restrained by legal principles going beyond the self proclaimed rules and regulations of the Bank”.¹² Offering of employment under the organization’s structure also assumes a commitment to fairness and due process in handling staff disputes over substantive rights . But in addition to requiring the organization to adhere to its written commitments, Tribunals also invoke general principles of law in their effort to ensure that the management of the organization acts fairly in handling the broader scope of workplace rights of its employees. As the WBAT held in its landmark first decision de Merode:¹³

“The contract may be the sine qua non of the relationships, but it remains no more than one of a number of elements which collectively establish the ensemble of considerations of employment operative between the Bank and its staff members” .

Tribunals look not only at the specific language of the contract of employment, but at the rules and regulations adopted by the organization as providing the context in which such documents are to be interpreted and applied. In addition, the Judges look at the organization’s written documents and unwritten practices to assess the reasonable expectations of employees. Judges of Tribunals also bring into consideration their own experiences influenced by their own national legal backgrounds. Added to this mix is also the experience of other Administrative

¹² Robert Gorman, *Development of International Employment Law*, 2004 Comp. Lab. L. & Pol’y J. 427, 429

¹³ De Merode Case, WBAT Decision No 1 [1981], para. 18

Tribunals in handling similar cases in other international organizations, which have developed their own set of laws.

Some twenty international organizations maintain their own Administrative Tribunals, including the United Nations, World Bank, Inter-American Development Bank, Asian Development Bank, African Development Bank, International Labor Organization, International Monetary Fund, Pan-American Union. Dozens of others use the Tribunals of either the United Nations or the International Labor Organization.

Appeal Procedures

Administrative Tribunals are created to resolve disputes arising from employment between staff members and the organization. Such claims must be in response to an action of the organization, and usually do not encompass personal disputes between or among employees and/or managerial personnel. Only full time regular staff members may usually file claims, with contract employees often being excluded from access to the machinery. Since the claim is a response to an action taken by the employing organization, it requires the organization to make its final position known before any claim may be made. Accordingly any initial claim by a staff member that an immediate supervisor violated the organization's regulations has no standing as a charge against the organization until the employee has processed that claim through the prescribed administrative review. Once the organization has given its final position, an employee may take a first step of appealing to the organization's Appeal Committee, usually a peer review committee composed of individuals appointed by the organization's head and the organization's Staff Association. That body has different names in different organizations and indeed, somewhat different functions. In the Inter-American Development Bank the body is called the Conciliation Committee, and seeks a mediated resolution of the dispute, without factual findings or rulings as to whether organization laws have been violated. At the International Monetary Fund, its Grievance Committee conducts hearings before a professional arbitrator, also appointed by the head of the organization, who issues a determination as to

whether or not there has been a violation. Most such appeals committees, including the Grievance Committee of the IMF, are viewed as dispassionate bodies established by the organization to make recommendations to the organization's head for resolving the dispute. If that recommendation to the organization head is declined, that decision constitutes the prerequisite for filing a formal appeal to the Administrative Tribunal.

Structure of Administrative Tribunals

Unlike the judiciaries of member states, Administrative Tribunals do not exist as an equal branch of government, yet the credibility of the organizations that create them requires a structure that assures the Tribunal's independence. Each Tribunal functions with administrative support of a Registrar or Executive Secretary, appointed by the organization but whose prime loyalty is to the Tribunal. The Registrar or Secretary handles the processing and scheduling of the cases, and administers the work of the Tribunal between its periodic sittings. The individual or designee may be called upon to research the documentation and citations relied on in the parties' briefs, and to draft a summary of the parties positions, the facts and relevant issues, with reference to the case law on the matters in question as garnered from the prior decisions of that and other Tribunals.

The standard for selecting judges to the Tribunals is set forth in the organizations' governing statutes. They come from various member states, with no two from the same state, and serve for fixed terms of 3 to 6 years, usually with a possibility of renewal. They cannot be employed by the organization for several years before or after serving as judges of the Tribunal. They are usually required to be persons of "high moral character¹⁴", or of "proven impartiality¹⁵" and are often lawyers who possess the qualifications for appointment to the highest judicial office or be jurisconsults of recognized competence¹⁶". Many have served as judges of their nations' highest courts, and several also serve as judges on more than one Administrative Tribunal. In most

¹⁴ WBAT Statute, Art IV(1)

¹⁵ OECDAT, Staff Regulations 22(d)

¹⁶ ADBAT Statute Art IV(1), AfDBAT Statute, Art IV (1), IMFAT Statute Art VII (1)(c)

cases, although appointed by the organization, their selection is made with the consultation, and usually approval of the organization's Staff Association¹⁷. English is the primary language of most Tribunals, but some also require fluency in Spanish (Inter-American Development Bank) or French (African Development Bank and Europe based organizations). The membership of the court usually consists of 5 to 7 judges who sit in staggered terms either in panels of three or en banc at their option. The judges opt for en banc sittings when they deem a pending case to be of significant importance.

Case Presentations

Some organizations such as the African Development Bank Administrative Tribunal, the Inter-American Development Bank Administrative Tribunal, The Council of Europe Administrative Tribunal, the NATO Administrative Tribunal and the OAS Administrative Tribunal also provide for oral hearings.¹⁸ They adhere to the process of adversarial hearings with the right of representation in all cases even though there may be consensus on the facts of the Applicant's case. In the case of the AfDBAT, oral hearings are viewed as being consistent with its African tradition roots. In the case of the IDBAT, the prior step of conciliation makes an oral hearing by the Tribunal essential to establishing the facts of the case. Although provision for oral Tribunal hearings may be considered as routine in many organizations, the reality is that most disputes do not focus on factual differences but rather on disputes over the interpretation or application of the law with both parties accepting a set of facts as undisputed. As noted above, in the case of the International Monetary Fund, the fact-finding function is performed at the step below, under the guidance of a professional American arbitrator who may be more experienced than staff members in ascertaining the facts of a case. Comparable arbitration has recently been introduced at the Tribunal of the European Bank for Reconstruction. But factual conflicts are inevitable and their solution may be a prerequisite to the Tribunal's disposition of a claim. Therefore even in organizations without routine adversarial hearings, the Tribunal may call for

¹⁷ In the case of the IDBAT the Board of Executive Directors appoints three judges from a list provided by the Staff Association and four judges from a list drawn up by the President of the Bank. (IDBAT Statute Article III 92)

¹⁸ PROBLEMS OF INTERNATIONAL ADMINISTRATIVE LAW (Nassib G. Ziade, ed., Martin Nijhoff Publisher, 2008), at xvi

such a hearing rather than rely merely on the written submissions of the parties. However, as a matter of practice, most Tribunals decide cases on the basis of written submissions only, consisting of an initial formal Application from the staff member, followed by an Answer from the Organization, a Reply by the Applicant and a Rejoinder by the Organization, all on a fixed statutory schedule.

Once the case is submitted, the usual practice is for a confidential employee of the Tribunal's Secretariat or Registry to research the issues and the law. Usually, the research is presented to a Rapporteur designated by the President of the Tribunal, who writes a draft opinion for discussion among the judges usually by email prior to the regularly scheduled hearing where the final judgment is hammered out. In other cases an expository draft is prepared for the Tribunal as a whole, which resolves and writes its determination on the issues of law during its meetings.

As argued by C. F. Amerasinghe in his *Principles of the Institutional Law of International Organizations*, these tribunals meet all the requirements of "real" courts: their judges are independent, impartial, competent, free of conflicts of interest and possess the requisite integrity.¹⁹

Standards of Decision Making

The controlling standard for judgments rendered by Administrative Tribunals is that management is obligated to exercise its legitimate authority and that its discretion will control unless there is proof of abuse of discretion, improper motive or arbitrary or capricious exercise of its authority. When challenged by a staff member, that exercise of discretion is subject to

¹⁹ *Ibid.*

review by the Tribunal, not for its wisdom, or soundness or unsoundness but for its legality under the statute, laws, rules and regulations of that Organization²⁰.

Although all Tribunals function independently, the evidence shows that they do appear to comply with standards similar to those exercised, not by national or member state courts, but by other Administrative Tribunals, in their rendering of judgments. This is achieved by a practice of referring and adhering to the precepts already announced, published and made available by other Tribunals. Despite the absence of any structure for routine or periodic meetings among judges from various Tribunals for common study or exchange of views on prevailing issues, the access to precedents has helped to formulate a relatively cohesive body of the law of international Tribunals.²¹ All the Tribunals adhere to similar tenets on their review responsibility. Michel Gentot, President of the ILO Administrative Tribunal reflected this in asserting the obligation of judges to censure decisions of their organizations, which were

1. Issued by an authority not competent to act in the situation,
2. Taken in violation of procedural rules,
3. Based on errors of fact or law, or
4. Which constituted an abuse of power or misuse of authority.²²

Nicolas Valticos, Former President of the Administrative Tribunal of the Council of Europe, offered the following principles governing the exercise of discretionary power by the Secretary General of the Council of Europe's Administration: it must always be exercised within the bounds of the law, with respect for due process and for procedures set forth in the organization's rules, and without any abuse of power undertaken to the detriment of the staff

²⁰ ROBERT A. GORMAN, *The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank* in PROBLEMS OF INTERNATIONAL ADMINISTRATIVE LAW (Nassib G. Ziade, ed., Martin Nijhoff Publisher, 2008), at 218

²¹ Ziade, at 235. The topic of managerial discretion in International Tribunals was the subject a meeting convened to celebrate the 20th Anniversary of the World Bank Administrative Tribunal held in Paris in 2000. The volume reports the complete presentations of the participants. The volume edited by Nassib G Ziade who was then the Executive Secretary of the WBAT. It is essential reading for those interested in the decision making process of Tribunals.

²² Ziade, at 24

member. In disputes arising from personnel management, he asserted, the Tribunal was obligated to ascertain not only whether the contested decision emanated from a competent body, and was taken in a competent manner but whether the procedures were properly followed, whether the administrative authority took all relevant factors into account, whether erroneous conclusions were drawn from the file, or, finally, whether there had been an abuse of power.²³

Tribunals take a somewhat stricter review of the exercise of managerial discretion in cases involving discipline, although falling short of Tribunal substituting its own judgment for that of the management. This tighter scrutiny is justified in reviewing disciplinary actions, according to Amersinghe, because in imposing discipline management is exercising a quasi judicial power to impose sanctions and its decisions are thus of greater import than the usual exercise of managerial discretion.²⁴ Judge Gorman, noted that the Tribunals have gone beyond determining whether the management has complied with its staff rules and requirements for investigation prior to imposing discipline to assure compliance with various due process requirements and have stressed the importance of proportionality in the imposition of discipline – a reasonable fit between the wrongdoing and the severity of the punishment.²⁵

Judgments are based primarily on the written statutes of the Organizations, although general principles of law of a fundamental nature, protection of due process, assurance of equality of treatment, protection against discrimination and a staff member's right to be heard may modify or even trump the written statute²⁶. In rendering their written and reasoned awards the judges have the opportunity and responsibility to assert their independence of the organization and thus uphold the goal of an independent judiciary so essential to the credibility of organization for which they are the final arbiter.

²³ Ziade, at 29-30

²⁴ Ziade, at 38-39

²⁵ Ziade, at 221

²⁶ C.F. AMERASINGHE, THE LAW OF THE INTERNATIONAL CIVIL SERVICE, Vol. 1 (Oxford University Press, 1988), at 156

Remedies, if ordered, may call for specific performance, correction of procedural faults, reinstatement or may require payment of compensation, attorney's fees, etc. as "back pay" and/or "front pay" damages. Inasmuch as the organization establishes the Tribunal, and prescribes its jurisdiction, it may also undertake to impose limits on the authority of the Tribunal to impose penalties. In the case of the Asian Development Bank, if the Administrative Tribunal orders specific performance it is required to provide for an alternative compensatory remedy in the event that the Bank opts not to implement the specific performance²⁷.

Finality of Judgments

The reasoned judgments rendered by Administrative Tribunals are considered to be final and binding. Although dissents are on occasion filed, an effort is made by judges to craft unanimous decisions to provide clear guidance to the organization as to its future conduct and to forestall dissents being exploited to stimulate further litigation. As Judge Gorman reasoned: "...all of us have given great weight to the belief that our judgments have greater force and clarity and that the Tribunal will have greater credibility, if we speak with one voice rather than several"²⁸.

The absence of any appellate body for review of Tribunal decisions places the burden on the organization to enforce the award. Compliance is the prevailing ethos, given the fact that failure to adhere to a Tribunal decision would be considered as demoralizing to staff morale and would embolden those who challenge the independence of tribunals and the concept of privilege and immunity so essential to the survival of the system. There is always an opportunity for rehearing, or indeed revision of a judgment, but it would be before the same body.

²⁷ ADBAT Statute Art X(1) "...At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the President of the Bank, within thirty days of the notification of the judgment, decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case..." If the Tribunal in such cases, intends payment of more than three years basic salary it must give reasons for such award.

²⁸ Ziade, at 224

In a related matter there has been concern about excessive filing of claims by staff members both because of the time consumed and cost of processing they impose on the organization's legal offices. A number of organizations have introduced into the statutes governing the Tribunal jurisdiction language to deter vexatious or frivolous claims. Such language does not preclude such proceedings, but usually imposes costs on the applicant if the claim is found to be meritless and frivolous. Although those terms are within the jurisdiction of the Tribunal to define and apply, and although there is little evidence of costs ever being imposed on applicants, the presence of such language in the Tribunal statutes is generally considered to be a sufficient deterrent to the filing of such groundless claims. On the other hand, the mere presence of such threatening language may squelch legitimate claims of wrongdoing and thus may be a deterrent to the more fearful staff members who might well suppress a legitimate claim, out of fear, rather than exercise the rights that are the proclaimed goal of the procedure. The cost of such alleged frivolous claims, may well be the price the organization should shoulder to better protect its integrity, and Tribunals can disallow filing of a claim if they perceive the Application to be frivolous.

The Tribunal's structure has provided a viable and credible process for protecting staff members from suffering abuse or deprivation of proclaimed employment rights at the hands of the organization or its leadership. That in turn has assured staff of protection against arbitrary action as the staff implements the responsibilities of the organization. This relatively young system of international justice has for the most part garnered the respect of national courts, which are properly concerned about the welfare, and treatment of their citizens.

There has been to date relatively little challenge to the independence of the Tribunals and the host organizations are sensitive to the need to remain at arms length in dealing with them.

There have been some cases where national courts have rejected the determination of Tribunals as undeserving of their respect and which have permitted their citizens to invoke national law despite the privilege and immunity clauses through which national governments

have ceded protection of their citizens to the international bodies. The greatest threat to the independent operation of Administrative Tribunals is the potential challenge that they are not indeed “independent” of control by the organizations as the organizations loudly proclaim. Article 6 of the European Convention on Human Rights, which provides that “everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal established by law”, has been used as a benchmark by which to gauge whether Administrative Tribunals do in fact provide a reasonable alternative to protections afforded citizens by their national courts. In 2005, the Labor Court of Brussels set forth the following criteria for evaluating immunity for an organization’s internal dispute resolution procedures “1. The impartiality and independence of the decision-making body, 2. The adversarial nature of the judicial proceedings, 3. The authority of the body to issue a final and binding decision, 4. The right of the parties to partake in the procedures, 5. The assurance of public hearings and published awards.”²⁹ In that case the Labor Court challenged the independence of the NATO Appeals Board on the grounds that its judges were appointed for a two year term and were thus susceptible to the organization’s influence. As noted by then Executive Secretary Ziade at the 25th Anniversary of the WBAT:

... the question of the independence of international administrative tribunals is no longer a purely academic one, or one occasionally raised by tribunal judges and registrars seeking to avoid micromanagement of their procedures by their organizations. The involvement of national courts is now a real and even more pressing challenge to the immunity of organizations and underscores the risks that those organizations take if they neglect the independence of their tribunals³⁰

Hopefully, international organizations that are sensitive to these potential threats to the independence of Administrative Tribunals will consider such adjustments as necessary to keep national courts mounting effective challenges to their very existence. Consideration of staff

²⁹ Crown Council v. Chapman, NATO et al., Labor Court of Brussels, Judgement of 1 February 2005

³⁰ Nassib Ziade, The Independence of International Administrative Tribunals (2005) (paper delivered at the 25th anniversary celebration of the WBAT).

participation in the process of selection of judges, introduction of fixed non renewable terms of 5 to 7 years without prospects of future organization employment, assurance of access to some form of adversarial proceeding through hearings at the Tribunal level or perhaps through arbitration at the step before the Tribunal might help to thwart these challenges. But the challenges are real.

Conclusion

Being beyond the reach of national law enforcement procedures and institutions it could be reasoned that international organizations need not concern themselves with employees' objections to their actions. But recognition of the need for a system that offers opportunity to challenge rules and actions of managers and perhaps even the reasonableness of the rules themselves has led to the establishment of internal dispute resolution systems and internal judicial system to resolve disputes over the employers adherence to its own laws and rules. The appeal of unresolved disputes to the organization's Administrative Tribunal, a true judicial body, brings final and binding resolution of the dispute.

Despite the proliferation of international organizations and the existence of more than two dozen independent Administrative Tribunals, the part time role of their judges and the dearth of process for organizational coordination, they have to date been able to provide an increasingly coherent body of international jurisprudence.

As long as the status quo continues, their effectiveness is pretty secure. However a future in which there is increased scrutiny of the decisions by member states challenging the independence of Tribunals, or greater militancy by unionization of staff, or the creation of more international organizations dealing with new problems of security or criminal prosecution will certainly test the effectiveness and the credibility of an institution that is currently of minimum profile. In that light it might be appropriate to look to procedures for enhanced cooperation and coordination, and perhaps consolidation to most effectively assure that international

organizations meet their proclaimed goals of providing reasonable working conditions under the rule of law.

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Journal of International Organizations Studies



JIOS NEWSLETTER

INSIGHT INTO THE FIRST ISSUE

Dear members of the Editorial Board and JIOS Reviewers,

We have come a long way since we first discussed setting up a new journal at the ACUNS meeting in Bonn 2008. Thank you all very much for your hard work in peer-reviewing papers, suggesting papers and new avenues of advertising.

Each time we advertised or reached out to researchers whose work we liked, we received a good numbers of enquiries about how to submit to JIOS or how to become member of the Editorial Board. The Editorial Board has now grown to a size appropriate to its workload and we will soon have our first complete (virtual) Board meeting (tba).

Today we proudly present the first issue of the Journal of International Organizations Studies, which will be officially published in September 2010. Here is a sneak preview of the first issue - see the Table of Contents on the left.

The Editors

Kirsten Haack, John Mathiason
Nicola Contessi, Manuela Scheuermann

FUTURE ISSUES: IDEAS & SUGGESTIONS

To develop JIOS further into a long-term success and publication of choice we need your help to "spread the word" and contribute to JIOS' development. Please consider the following:

Advertising: We currently advertise on a number of websites or through mailing lists, including ISA, BISA, PSA, ECPR, EGOS and h-net. We have also addressed individual researchers and organizers of workshops and conferences. Please tell us about any other avenues of advertising you know of.

Research papers: We have attracted some theoretical work and are in discussion with the organisers of an interesting (theoretically oriented) workshop to publish their proceedings.

We also continue to attract a lot of UN and UN related research, however, as yet we receive little research on regional organizations. Please let us know if you have any ideas about how to reach out to researchers of regional IOs (conferences, associations etc.), or if you are interested in writing a review on IO research in a specific region. We had some interest from our reviewers on addressing IOs in Asia and Issue 2 will feature a review on UN Studies and EU Studies.

Insider's View: Please encourage friends & acquaintances who work in IOs to contribute to JIOS through our Insider's View section.

Reviews: We do not as yet have a list of books to review, however we do accept suggestions for reviews or completed reviews. If you have recently published a book and would like it reviewed in JIOS, please get in touch.

Visit us online at www.journal-iostudies.org

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