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The international civil service: redefining its independence

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CONCLUSION AND RECOMMENDATIONS

International secretariats are microcosms of multilateralism. A well-functioning and credible secretariat is indicative of healthy cooperation in a particular field. Conversely, an ineffective secretariat is usually a sign of a dysfunctional cooperation system. If nations and individuals cannot build international secretariats animated by the desire to foster international cooperation, they will stand no chance of creating a united world.¹

As discussed in Chapter 1, initially, the main reason for creating permanent and integrated machinery for collective action (i.e., embryonic forms of international institutions) was the will to centralise the activities of states. The desire to achieve *une centralité quelconque* through a multinational arrangement was mentioned by Prussia as early as 1815.² International secretariats also helped states to avoid gaps between two conferences, ensure continuity in agreements reached during previous conferences, and prevent prolonged interruptions between meetings from thwarting the benefits of cohesion achieved by contracting nations.³ Initially, primitive forms of international secretariats employed national public servants. There is evidence only towards the end of the 19th century that nations preferred cooperation but were reluctant to collaborate because they did not trust one another.⁴ Yet, they also knew that the success of international cooperation largely depended on the amount of trust among them. Hence, they needed international institutions to remedy this mistrust.⁵ Nevertheless, it was also evident to states that institutions could be effective and credible go-betweens only if they were neutral and impartial. The opposite is equally true: international institutions could exacerbate the existing mistrust if they favoured some member nations to the detriment of others.

Consequently, from the 1870s until the creation of the League of Nations, states experimented with international secretariats, steadily adding structural and institutional safeguards to increase their independence from the governments of member states. Some of the initial measures consisted of recruiting officials from nations other than the host state and placing international secretariats under the

¹ Aghnides H E Thanassis, "Standards of Conduct of the International Civil Servant" (1953) 19:1 *Int Rev Adm Sci* 179 at 187.

² Congrès de Vienne: Recueil de pièces relatives à cette assemblée, des déclarations qu'elle a publiées, des protocoles de ses délibérations et des principaux mémoires qui lui ont été présentés, Tome III (Paris: Librairie Grecque Latine Allemande, 1816), p. 280.

³ Georges Langrod, *La fonction publique internationale* (Leiden: Sythoff, 1963) at 191; See also Alain Plantey & François Loriot, *Fonction Publique Internationales*, 2d ed (Paris: CNRS Éditions, 2005) at 31.

⁴ Brian C Rathbun, "Before Hegemony: Generalized Trust and the Creation and Design of International Security Organizations" (2011) 65:2 *Int Organ* 243 at 246.

⁵ Xu Yi-Chong & Patrick Weller, "To Be, But not To Be Seen: Exploring the Impact of International Civil Servants" (2008) 86:1 *Public Adm* 35 at 42.

authority and control of a multinational governing body instead of the host nation's government. In a few cases, international officials were even granted limited privileges and immunities.

Looking back in history, the League of Nations may seem to have grown out of nowhere. However, as mentioned above, the Concert of Europe, The Hague Conferences, and public international unions appeared as the forerunners of the League.⁶ "The foundation of the League was little more than an attempt to recognise that international conferences were becoming a regular and frequently recurring part of international practice."⁷ While the League's Covenant was innovative, its institutional features were not entirely novel. International secretariats and civil servants existed before the League's creation. Similarly, multinational governing bodies and simple forms of immunities had already been introduced before the League's establishment. Nevertheless, the League, and to some extent the ILO, were the turning point in the evolution of international secretariats mainly because they became the first intergovernmental institution that expressly expected their staff to be truly 'international.' Staff were required to pledge loyalty to the organisation and to act in the interests of the organisation only. It is noteworthy that apart from staff regulations, no legal instrument of the League imposed any obligations on member states or the League's staff to safeguard the independence of the League's secretariat and civil service. As seen in Chapter 1, the Secretary-General of the League, Sir Eric Drummond, was instrumental in shaping and safeguarding the principle of independence, even though he had no analogy or precedent to guide him in setting up an independent civil service. Despite Eric Drummond's remarkable efforts, the independence of international secretariats and civil servants remained a nascent concept under the League. Independence was an ambiguous and abstract notion; it was not well understood and did not attract much attention. This concept began taking shape with the establishment of the United Nations and continues to evolve.

Chapter 2 argued that independence must be from member states.⁸ It is recognised that the independence of the international functionaries is designed to liberate them from individual state influence.⁹ It shields international secretariats and their staff from improper interferences or political pressures so that they are not inclined to act in the interests of certain member states to the detriment of others. Its

⁶ Inis L Jr Claude, *Swords into Plow Shares: The Problems and Progress of International Organization*, 4th ed (New York: Random House, 1984) at 42-44.

⁷ Charles Howard-Ellis, *The Origin, Structure and Working of the League of Nations* (London: George Allen & Unwin, 1928) at 67.

⁸ Michael Barnett & Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2012).

⁹ David B Michaels, *International Privileges and Immunities A Case for a Universal Statute* (The Hague: Martinus Nijhoff, 1971) at 21.

purpose is to ensure that officials of IGOs have nothing to lose by doing what is right and nothing to gain by doing what is wrong so that they can devote their best efforts to the conscientious performance of their duties. Independence is intrinsically linked to the credibility of the international organisation and the trust nations place in bureaucratic machinery designed to promote international cooperation. Consequently, all actors interested in or responsible for enhancing international cooperation must safeguard the independence of international secretariats and officials.

The main stakeholders of international cooperation are states. As such, they are interested in preserving the independence of institutions through which they cooperate. Each member state owes an obligation towards all other states not to undermine the independence of institutions they collectively set up to facilitate their cooperation. If member states do not protect the independence of international civil service, international organisations cannot be trustworthy agents and will be unable to facilitate inter-state cooperation. Without such independence, IGOs cannot ensure that their secretariats and staff will carry out their official functions impartially and neutrally. Impartiality and neutrality of international civil service is a *sine qua non* condition of member states' trust. And if member states do not trust international civil servants, they will have no incentive to create intergovernmental organisations. A lack of confidence in international institutions can erode the fabric of international cooperation. Let us recall that two out of four purposes for establishing the United Nations were "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" and "to be a centre for harmonising the actions of nations in the attainment of these common ends."¹⁰ The UN cannot achieve either goal unless its secretariat and civil servants are impartial and neutral. The same logic applies to any intergovernmental organisation set up to help nations cooperate in a specific field. Hence, it is in the best interests of all member states to protect the independence of international secretariats and their personnel.

Although member states are the main stakeholders, they are not the only actors interested in protecting the independence of intergovernmental institutions, international secretariats, and civil servants. International organisations also have a vested interest in protecting the independence of their secretariats and personnel. Like any bureaucracy, intergovernmental organisations "are interested in power, prestige

¹⁰ Charter of the United Nations, Articles 1(3) and 1(4).

and amenities.”¹¹ They try to maximise their budget, staff, and independence to achieve these objectives.¹² Since their survival depends on their ability to remain independent, they have a strong incentive to foster the independence of their secretariat and staff. For this very same reason, international officials also have an interest in preserving their independence and the independence of their secretariats, without which they can have no employment as international civil servants. As one scholar points out, international civil servants are recruited from highly diverse backgrounds; therefore, “there is little else they can agree on but to pursue their common bureaucratic interest.”¹³ They know that unless their bureaucratic apparatus is independent, it cannot be successful in facilitating international cooperation and states will have no incentive to continue funding ineffective institutions.¹⁴ Hence, all three actors – states, international organisations, and international civil servants – are motivated to maintain the independence of international secretariats and staff. And yet, all three categories of actors frequently and often knowingly fail to act in their own interests through actions and omissions that erode this independence.

Chapters 3, 4, and 5 of this work describe practices that erode the independence of international secretariats and their personnel.

As explored in Chapter 3, the independence of international secretariats and international civil servants requires states to take several measures. First, they must enable international secretariats to act on behalf of the international organisation on the territory of any member state. Without such autonomy, the IGO will rely on the host nation or all member nations to fulfil routine and simple tasks. Such reliance could expose the secretariat to undue pressure from national governments. For this reason, international secretariats are given not only an international juridical personality but also a domestic one.

Chapter 3 also linked the independence of international secretariats with the privileges and immunities of international organisations. To avoid harassment by national law enforcement authorities, independence requires member states to respect the inviolability of the international organisation’s premises, assets, documents, and archives. Similarly, to prevent governments from interfering with the activities of the IGOs through national judicial authorities, independence requires member states to recognise jurisdictional immunity to international organisations. For the same reason, international organisations are generally shielded against harassment by taxation

¹¹ Roland Vaubel, “Bureaucracy at the IMF and the World Bank: A Comparison of the Evidence” (1996) 19:2 *The World Economy* 195 at 195.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ See for instance Sandhya Chandrasekhar, “Cartel in a Can: The Financial Collapse of the International Tin Council” (1989) 10:2 *Northwest J Int Law Bus* 309.

authorities, which usually entails an obligation of member states to grant international organisations fiscal privileges.

The obligations of member states described in Chapter 3 also extend to preserving the independence of international civil servants, which is like that of international secretariats in many regards with a few variations. For instance, whilst international organisations, and by extension their secretariats, should normally enjoy broad jurisdictional immunity, most international civil servants are entitled to functional immunities only.¹⁵ These immunities protect international civil servants against abusive or frivolous legal proceedings by national authorities for acts carried out or words spoken in the performance of their official duties. To ensure that this protection is meaningful and effective, nations must expressly recognise that the authority to decide whether the international civil servant committed the alleged wrongful act while performing their official functions belongs to the executive head of the IGO. States should resist the temptation to make such determinations unilaterally.

Like international organisations, international officials should also enjoy fiscal privileges. However, unlike IGOs, international civil servants are generally exempt from income taxes only in relation to emoluments received from the IGO and not on revenues from sources unrelated to their international functions.

Chapter 4 examined acts and omissions of international organisations that corrode the independence of their secretariats and personnel. When international organisations exceed their constitutional mandate and engage in activities not explicitly or implicitly authorised by their constitutive instruments, they undermine their jurisdictional immunities and expose themselves to legal proceedings before national courts. Likewise, when international organisations do not offer adequate legal recourses that an individual is reasonably expected to have in an internal legal order, they inevitably invite domestic courts to disregard their jurisdictional immunities and entertain disputes to which they are a party. Hence, to discourage national courts from getting involved in internal disputes, international organisations should propose to their member states to establish adequate dispute resolution mechanisms for settling contractual, pre-contractual, employment, and pre-employment disputes with bidders, contractors, members of personnel, and candidates for vacant posts.

¹⁵ Although a few high-ranking officials of international organisations enjoy immunities ordinarily accorded to diplomatic agents or envoys, such immunities are not well suited in the context of international organisations as there is no “sending state” (within the meaning of the Vienna Convention on Diplomatic Relations) which can ultimately exercise jurisdiction over an international official.

International organisations also have a responsibility to protect the independence of their staff. There are several measures that international organisations may take to ensure that their members of personnel remain impartial and neutral. First, they must assert the privileges and immunities of international officials each time they become aware of their breaches by national authorities. Second, to prevent external pressures in matters of personnel administration, IGOs should adopt policies governing recruitment, promotions, and separations from service based on meritocracy. Such policies should be very detailed and contain sequential and transparent steps for completing competitive processes for recruiting and promoting members of personnel. Policies should also prohibit separations from service based on demands from member states. Personnel administration policies must eliminate any opportunity for member states to intervene in decision-making. This will disincentivise serving staff members or candidates for vacant posts from seeking support from the governments of their country of nationality. Furthermore, to reinforce an international *esprit de corps*, international secretariats should endeavour to recruit geographically and culturally diverse teams to dilute the national identities and encourage the formation of an international outlook. To achieve further internationalisation of their staff, international organisations should promote or, where appropriate, impose geographical mobility, requiring staff to move periodically between duty stations.

Chapter 5 covered acts and omissions of international civil servants that erode their independence and the independence of their secretariats. International civil servants are expected to meet standards of conduct much more exacting than ordinary legal standards¹⁶ not only while performing their official functions but also in their personal lives. They owe the obligation to conduct themselves at all times in a manner befitting the status of an international civil servant to the IGO employing them. Staff rules or regulations of most international organisations describe the types of conduct that are prohibited. The most detailed rules this research revealed are those contained in the Staff Regulations and Rules of the United Nations.¹⁷ Nevertheless, irrespective of how intricate the staff rules and regulations of a specific international organisation are, international officials must, in addition to carrying out tasks assigned to them, strive “to show such dignity of behaviour as not to harm the good name that the organisation must enjoy if it is to do its job properly.”¹⁸ This means they must exhibit integrity, loyalty, impartiality, neutrality, and independence. Only if staff members

¹⁶ UNGAOR, 8th sess., agenda item 51, Report of the Secretary-General of the UN on Personnel Policy, UN Doc. A/2533 (2 November 1953) at para. 72.

¹⁷ The standards of conduct listed in the Staff Regulations and Rules of the United Nations are based on the 1954 report of the International Civil Service Advisory Board.

¹⁸ *In re Souilah*, [1997] Judgement No. 1584 (ILOAT) at para. 9.

honour these essential obligations can the IGO effectively protect them against political interference. As discussed in Chapter 5, most transgressions of the highest standards of conduct lead to disciplinary proceedings and culminate in sanctions without affecting the independence of international officials or their secretariats. However, the most egregious types of wrongful conduct can disproportionately affect the independence of international secretariats and their staff.

SECTION 1 - CONCLUDING REMARKS ON THE NATURE OF INDEPENDENCE AS A CONCEPT AND ITS PRACTICAL APPLICATION

The main purpose of this research was to explore the genesis and meaning of the concept of independence of the international civil service. The impetus of this research was also its main challenge - interpretations of the term 'independence' used in the context of international secretariats and civil servants are as many as the number of international organisations. There are no member states, international organisations, or civil servants who, on a conceptual level, flatly reject the need for international secretariats and civil servants to be independent. All states and international organisations firmly believe that international secretariats and civil servants must have a reasonable degree of independence to fulfil their mission. The review of staff regulations, staff rules, and codes of conduct of 35 IGOs carried out in Chapter 5 demonstrates that the independence of the international civil service is a universally accepted principle even if it is not interpreted and applied consistently. Nevertheless, it is not yet clear whether the independence of the international civil service exists only when it is expressly recognized in the constitutive documents of international organizations or whether it applies even when treaties establishing international organizations are silent on this point. In other words, is the independence of the international civil service a notion that can derive exclusively from a treaty or has it become a general principle? This concept is so firmly grounded that it could reasonably be regarded as a general principle of law within the meaning of Article 38.1(c) of the Statute of the International Court of Justice. This question is important because not all constitutive instruments for international organizations contain identical or even similar guarantees of independence. If the independence of the international civil service requires an express written recognition in a treaty or an international agreement, then certain international organizations necessarily enjoy a greater degree of independence. If, on the other hand, the independence of the international civil service has become a general principle of law, then the absence of an express recognition in a treaty or international agreement is not a decisive element in determining the degree and scope of that independence.

1.1 - INDEPENDENCE OF INTERNATIONAL CIVIL SERVICE AS A GENERAL PRINCIPLE OF LAW

Article 38.1(c) of the Statute of the International Court of Justice provides that the “Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply [...] the general principles of law recognised by civilised nations.” The phrase ‘law recognised by civilised nations’ is not only ‘anachronistic’ and ‘unjustified’,¹⁹ but also vague. It is unclear which legal systems should be considered and how many must recognise the principle.²⁰ This relic of European supremacism is today regarded as a term of art referring merely to states with well-developed legal systems and implying no racial or cultural prejudice.²¹

A term that is even more difficult to evaluate is the adjective ‘general’. What characteristics does a principle need to have to become a *general* principle of law within the meaning of Article 38.1(c) of the ICJ Statute?

Two main approaches exist for finding general principles of law. According to the first approach – the comparative approach – a principle can be regarded as ‘general’ when it is recognised within the municipal systems of the majority of states or when it can be drawn from principles of international law.²²

The second approach – called ‘categoricism’²³ – identifies general principles as those “that have a universal validity as found in the law of nature or [...] a reflection of the legal conscience of civilised peoples and are foundational so that the superstructure of all law is built upon them.”²⁴ Where the comparative approach requires a horizontal generality, assessed laterally across legal systems, *categoricism*

¹⁹ *North Sea Continental Shelf*, Separate Opinion of Judge Fouad Ammoun, [1969] ICJ Rep 3 at 134.

²⁰ Imogen Saunders, *General Principles as a Source of International Law: Art. 38(1)(c) of the Statute of the International Court of Justice* (Oxford: Hart Publishing, 2020) at 15.

²¹ Christopher A Ford, “Judicial Discretion in International Jurisprudence: Article 38(1)(c) and ‘General Principles of Law’” (1994) 5 *Duke Journal of Comparative & International Law* 35 at 65.

²² Report of the International Law Commission, UN Doc. A/78/10, (24 April – 2 June and 3 July – 4 August 2023) at 9; See also International Law Commission, *First Report on General Principles of Law*, UN Doc. A/CN.4/732, (29 April–7 June and 8 July–9 August 2019) at paras. 174 and 253: “For purposes of the present section, it suffices to note that, despite the different approaches in the literature, there seems to be agreement on the point that recognition in the sense of Article 38, paragraph 1 (c), can take place at the international level, without the need to look at the national legal systems of States. As shown in the next section, this position appears to be somewhat supported by the practice of States and the decisions of international courts and tribunals. [...] General principles of law comprise those: (a) derived from national legal systems; (b) formed within the international legal system.”

²³ Ford, *supra* note 21 at 72.

²⁴ Frances T Freeman Jalet, “The Quest for the General Principles of Law Recognized by Civilized Nations - A Study” (1963) 10:5 *UCLA Law Rev* 1041 at 1085. See also Oscar Schachter, “International law in theory and practice: General course in Public International Law”, (1982) 178 *Collected Courses of the Hague Academy of International Law* 9 at 74–75.

requires a more vertical generality, looking to abstractions of principles rather than lateral commonality.²⁵

One can reasonably argue that the independence of international secretariats and civil servants can be characterised as a general principle of law under both approaches. For instance, if one applies the first approach, one can distil this principle from the judgements of international and national courts and tribunals, international legal instruments, and national laws. The ICJ, national courts, and international administrative tribunals have often associated the independence of the international civil service with the proper functioning of international organisations.²⁶ Moreover, the establishment of intergovernmental organisations is usually accompanied by legal instruments that guarantee at least to some degree their independence. These guarantees can be contained in separate treaties on the status, privileges, and immunities of the organisation²⁷ or in host country agreements.²⁸ Such guarantees can also be found in many constitutive instruments of international organisations.²⁹ There are no significant IGOs whose independence has been left entirely unaddressed. Similarly, many states have laws dedicated to international organisations, containing

²⁵ Saunders, *supra* note 20 at 16.

²⁶ *Reparation for injuries suffered in the services of the United Nations, Advisory Opinion*, [1949] ICJ Rep 174; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, [1999] ICJ Rep 62; *JMB v Organisation for the Prohibition of Chemical Weapons*, [2003] Judgement No 2232 at para. 16 (ILOAT); *Bertucci v Secretary-General of the United Nations*, 2010-UNAT-062 (UN Appeals Tribunal). *Contra Ligue des États arabes c. T.M.*, No. S990103FV 12 March 2001 (Cour de cassation of Belgium) p. 390-395; *Groupeement d'entreprises Fougerolle c. CERN*, 21 December 1992, (Tribunal Fédéral suisse): « Les raisons de cette différence doivent, notamment, être recherchées dans le fondement juridique même de l'immunité octroyée aux organisations internationales, à savoir une convention internationale et non pas une règle de droit international général [...] ».

²⁷ See *Convention on Privileges and Immunities of the United Nations*, 13 February 1946, 1 U.N.T.S. 15; *Agreement on the status of the North Atlantic Treaty Organisation, National Representatives and International Staff* signed in Ottawa, 20 September 1951, 200 U.N.T.S. 3; *Supplementary Protocol No. 2 to the Convention on the OECD*, 14 December 1960, 888 U.N.T.S. 179; *General Convention on the Privileges and Immunities of the Organisation of African Unity*, 25 October 1965, 1000 U.N.T.S. 394.

²⁸ See, for instance, the *Headquarters Agreement between the Organisation of American States and the Government of the United States of America*, 11 U.N.T.S. 11; *Agreement between the Government of the Republic of Indonesia and the Association of Southeast Nations (ASEAN) on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat*; *Agreement between the International Atomic Energy Agency ('IAEA') and the Republic of Austria regarding the Headquarters of the IAEA*, 11 December 1957, 229 U.N.T.S. 110; *Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations*, UN Doc. A/RES/169(II); *Agreement regarding Headquarters of the Organisation of the Petroleum Exporting Countries ('OPEC')*, 18 February 1974, 2098 U.N.T.S. 416; *Headquarters Agreement between the Federal Republic of Germany and the European Molecular Biology Laboratory of 10 March 1974*; *Agreement concerning the Headquarters of the United Nations Economic and Social Commission for Western Asia*, signed at Beirut on 27 August 1997, 1988 U.N.T.S. 339.

²⁹ See, for instance, Articles 100 and 105 of the *UN Charter*; Articles 133 and 134 of the *OAS Charter*; Article VIII of the *Agreement for the establishment of the IDLO*; Article 19 of the *Convention on the OECD*; Article 30 of the *Constitution of the INTERPOL*; Articles 8(b) and 9 of the *Charter of ASEAN*.

specific measures for protecting their independence.³⁰ Therefore, the concept of independence of the international civil service appears to be well-recognised internationally and by most legal systems. Under the comparative approach, this is a decisive criterion for establishing that the independence of the international civil service is a general principle of law.

If one applies the second approach – that of *categoricism* – the history of intergovernmental institutions covered in Chapter 1 reveals that the international community of states moved from primitive structures of multinational bureaucracies to modern forms of international organisations primarily to ensure their independence from some member states. Chapter 2 drew a link between the credibility of international organisations and their independence on the one hand and international cooperation and trustworthiness of intergovernmental bodies on the other. Two centuries of evolution of intergovernmental bureaucracies seem to support the view that the independence of the international civil service is a general principle of law. International river commissions, bureaux, and unions began functioning with national civil servants and were part of a bureaucracy placed under the command and control of a national administration. Over a century, states were taking small but important steps to enhance the independence of international bureaucracies from their member states. Multinational governing bodies gradually gained control over international institutions and took upon themselves the responsibility to appoint the chief administrative officer. States then reinforced the independence of functionaries by placing them under the authority of this chief administrative officer, thereby increasing the degree of separation between governments and international institutions. The question of the independence of international civil servants and their ties to the governments of member states was addressed head-on at the time of establishing the League of Nations. The views expressed in the Balfour and Noblemaire reports unequivocally tied the independence of international civil servants to their ability to remain loyal, impartial, and neutral.³¹ This link was further

³⁰ See for instance International Organisations Immunities Act of the United States, Foreign Missions and International Organisations Act of Canada, The International Organisations Act of the United Kingdom, Diplomatic Relations and Immunities Act of Ireland, International Organisations (Privileges and Immunities) Act of Australia, Diplomatic Privileges and Immunities Act of New Zealand, Privileges and Immunities Act of Kenya, Diplomatic Immunities and Privileges Act of Nigeria, and Ordonnance n° 2022-533 du 13 avril 2022 définissant la nature, les conditions et les modalités d’octroi par le Gouvernement de privilèges, immunités et facilités à des organisations internationales, des agences décentralisées de l’Union européenne et à certaines associations ou fondations of France.

³¹ A J Balfour, “Procès-verbal of the Fifth Session of the Council of the League of Nations, Report relating to Staff of the Secretariat” (1920) 1:4 *League of Nations O J* 115 at 137; *Report submitted by the Fourth Committee to the Assembly on the conclusions and proposals of the Commission of Experts appointed in accordance with the resolutions adopted by the Assembly of the League of Nations at its meeting of December 17th, 1920*, (26 September 1921) at 8.

reinforced by the preparatory commission of the United Nations.³² In recent history, international endeavours or intergovernmental forums that do not have independent secretariats with ‘*volonté distincte*’, such as the G7, G8 or G20, are not regarded as international organisations. Naturally, the issue of independence does not even arise. In contrast, most international organisations with permanent secretariats have some constitutional safeguards (codified in legal agreements) protecting the independence of their civil service. This is an acknowledgement that without independence, international organisations cannot effectively facilitate international cooperation because states heavily rely on neutral intermediaries to increase their mutual trust. Consequently, the independence of the international civil service is so deeply ingrained in our conception of intergovernmental organisations that we cannot imagine IGOs whose functionaries would take instructions from or be otherwise dependent on member states. This situation also supports the view that the independence of international civil service may have crystalized as a general principle of law under the second approach of *categoricism* as well.

1.2 – INCONSISTENCIES IN THE APPLICATION OF THE PRINCIPLE OF INDEPENDENCE

States and international organisations operationalise the principle of independence differently. There is no common understanding or interpretation of this concept, with a few exceptions. States and international organisations share views only on a few fundamental characteristics of independence of international secretariats and civil servants. For instance, they agree that international secretariats must enjoy a certain degree of autonomy and have a distinct will or *volonté distincte*. As Majone puts it, independence in the context of intergovernmental institutions means that states’ preferences may differ from those of the institution of which they are members.³³ Abbott and Snidal call this form of independence “the authority to act with a degree of autonomy, and often with neutrality, in defined spheres.”³⁴ Neutrality implies that the IGO “has the ability to operate in a manner that is insulated from the influence of other political actors – especially states.”³⁵ As a corollary of this conceptualisation, it is understood by all that international secretariats and civil servants cannot favour one member state over another. Therefore, the prohibition for international officials to seek instructions from member states and for member states to influence international officials are common in many IGOs.

³² Report of the Preparatory Commission of the United Nations, UNCIO, 1945.

³³ Giandomenico Majone, “Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance” (2001) 2:1 *European Union Politics* 103 at 110.

³⁴ Kenneth W Abbott & Duncan Snidal, “Why States Act through Formal International Organizations” (1998) 42:1 *Conflict Resol* 3 at 9.

³⁵ Yoram Z Haftel & Alexander Thompson, “The Independence of International Organizations: Concept and Applications” (2006) 50:2 *J Confl Resolut* 253–275 at 256.

Other similarities can be observed in relation to measures adopted by states and IGOs to strengthen the independence of international secretariats and civil service. Specifically, most intergovernmental organisations enjoy some privileges and immunities on the territory of their member states, especially the host state. International civil servants typically enjoy some privileges and immunities as well. This is not surprising because even the abundant academic literature on this topic tends to study the independence of international organisations primarily through the prism of privileges and immunities.³⁶

However, apart from these broad commonalities, member states and intergovernmental organisations do not have a consistent approach to or understanding of the term independence as it relates to IGOs. They implement the principle differently. In relation to state practices, one can observe significant differences in the way states recognise IGOs' legal personality, domestic courts apply jurisdictional immunity enjoyed by IGOs, tax authorities grant fiscal privileges or delegates interfere with decisions pertaining to personnel administration.

Notable differences also exist in the practices of international organisations, namely in their choice of internal dispute resolution mechanisms, personnel administration policies, codes of conduct, extent to which they protect their members of personnel from interferences by governments, and other internal arrangements. Considerable differences can be observed in the attitudes and conduct of international civil servants as well. Behaviour that is unethical in some organisations may be widespread in others. For instance, outside activities that are prohibited in some organisations may be permitted in others, and frequent interactions with delegates of member states may be frowned upon in some IGOs but tolerated in others. Functionaries of some organisations do not believe they are accountable for their actions outside of working hours and premises of their employer while officials of

³⁶ Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organisations* (The Hague: Martinus Nijhoff, 1964); CF Amerasinghe, *Principles of the Institutional Law of International Organisation*, 2nd ed (New York: Cambridge University Press, 2005); Niels Blokker, "International Organisations: The Untouchables" (2014) 10:2 *Intl Org L Rev* 259; Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organisations* (Oxford: Oxford University Press, 2018); Maxwell Cohen, "The United Nations Secretariat--Some Constitutional and Administrative Developments" (1955) 49:3 *Am J Int Law* 295-319; Éric David, *Droit des Organisations Internationales* (Bruxelles: Bruylant, 2016); Norman A Graham & Robert S Jordan, *The International Civil Service: Changing Role and Concepts* (New York: Pergamon Press, 1980); Josef L Kunz, "Privileges and Immunities of International Organisations" (1947) 41:4 *Am J Int Law* 828-862; Jacques Lemoine, *The International Civil Servant: An Endangered Species* (The Hague: Martinus Nijhoff Publishers, 1995); Theodor Meron, "Status and Independence of the International Civil Service" (1980) 167 *Recueil des Cours de l'Académie de Droit International* 289; Anthony J Miller, "Privileges and Immunities of United Nations Officials" (2007) 4:2 *Int Org Law Rev* 169-258; Plantey & Loriot, *supra* note 3; S M Schwebel, "The International Character of the Secretariat of the United Nations" (1953) 30 *Brit YB Int'l L* 71-115; Michaels, *supra* note 8.

other IGOs firmly believe that their conduct should always be irreproachable because it reflects on the reputation of the IGO.

Chapters 3, 4, and 5 illustrated through concrete examples differences in understanding and applying the concept of independence. This observation raises a question about what makes a specific practice acceptable or tolerable in one organisation but not in others. Why are the best practices and measures advocated by some IGOs for preserving the independence of international secretariats and officials unacceptable to other IGOs? Some may call this phenomenon 'unity within diversity'³⁷ others call it 'diversity within unity'.³⁸

Several reasons may explain why intergovernmental organisations interpret and apply independence differently. One of the main reasons may be related to the organisation's history. An organisation operating in a certain way for several years cannot envisage fundamentally different ways of functioning. Values, beliefs, and practices that exist for extended periods become part of an organisation's institutional culture. As Plischke puts it, "existing practice tends to become the accepted way of life - the *de facto* situation crystallising as *de jure* behaviour."³⁹ The way an organisation begins to interact with its member states and officials - particularly its ability to secure greater autonomy from nations and to instil an international *esprit de corps* in its staff - depends primarily on the personality of its first chief administrative officer. The values and beliefs of the first chief administrative officer can be decisive in shaping the organisation's institutional culture. The leadership style of the first executive head of an organisation matters a great deal in secretariat development from the outset when the first executive head introduces national bureaucratic traditions.⁴⁰ Chapter 1 illustrated how Eric Drummond introduced the Westminster tradition of independent, neutral, and anonymous civil service in the Secretariat of the League and how this had a positive influence during the first ten years of the League's existence. In Chapter 4, we saw the fundamental mistake made by the first Secretary-General of the UN - Trygve Lie - when he dismissed American citizens suspected of sympathising with communist regimes. This mistake opened the door for similar interference by other member states throughout the UN's existence. Hence, an organisation's civil service is more likely to be independent if its first chief

³⁷ Henry G Schermers & Niels Blokker, *International Institutional Law*, 6th ed (Leiden: Nijhoff, 2018) at para 22.

³⁸ Franck Elong Mboulé, *Le régime juridique des biens des organisations internationales* (Geneva: Schulthess Médias Juridiques, 2022) at 693.

³⁹ Foreword by Professor Plischke in Michaels, *supra* note 8 at xi.

⁴⁰ Bob Reinalda, *International Secretariats: Two Centuries of International Civil Servants and Secretariats* (Routledge, 2020) at 4.

administrative officer instils the importance of independence during the first years of the organisation's existence.

Another important variable that may determine the degree of independence of an international secretariat and its personnel is the funding mechanism. Some of the most contentious political struggles that have imperilled international organisations have swirled around their financing.⁴¹ International organisations that depend on voluntary funding are more vulnerable to political interferences and are structurally less independent than those funded through assessed appropriations.⁴² Precarious funding compels international organisations to tolerate a degree of interference. For instance, an organisation funded through voluntary contributions may be willing to accept seconded staff or officials loaned by national administrations to satisfy its personnel needs. Similarly, to obtain funding for some projects, the organisation may feel compelled to comply with the instructions of the donor nation.

Another factor that may impact the independence of an international secretariat and its staff is the mandate of the intergovernmental organisation. The International Bureau of Weights and Measures, the International Hydrographic Organisation, and the Universal Postal Union have a technical mandate that can be interpreted and understood much easier than that of the United Nations, the European Union, or the African Union. Since the activities of technical IGOs are seldom controversial, they are less likely to conflict or interfere with the sovereign powers of their member states. Hence, there may be little incentive for member states to influence the actions of such organisations. For this same reason, technical organisations may not find it necessary to put in place extensive safeguards to protect the independence of their secretariats and functionaries. Organisations with political or broad mandates are more likely to encroach on sovereign prerogatives of their member states. Thus, member states will try to retain some control on decisions and actions of the organisation.

The location of the organisation's headquarters or offices may also affect the independence of its secretariat and staff. Chapter 3 contrasted the approach of the

⁴¹ Jeffrey Laurenti, "Financing" in Thomas G Weiss & Sam Daws, eds, *Oxford Handbook of the United Nations*, 2nd ed (New York: Oxford University Press, 2018) at 250. Although the United States is often associated with the use of non-payment of its assessed contributions to bend the United Nations to its will, the first financial crisis experienced by UN was triggered by France and USSR when they refused to pay their respective shares of the expenses for the peacekeeping missions in Suez (UNEF I) and Congo (ONUC). The General Assembly sought from the International Court of Justice an Advisory Opinion on the obligation of all member states to pay for peace and security operations carried out by a limited number of nations. In the *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] ICJ Rep 151, the ICJ determined that the phrase "expenses of the Organisation" found in Article 17 of the UN Charter must be understood as "the amounts paid out to defray the costs of carrying out its purposes [including] the political, economic, social, humanitarian, and other purposes of the United Nations."

⁴² Alexandre Tavadian, *United Nations Law, Politics, and Practice* (Toronto: Irwin Law, 2021) at 207.

Supreme Court of the United States in the *Jam* case,⁴³ which eroded the jurisdictional immunity of the International Finance Corporation, with that of the Dutch Supreme Court, which recognised the jurisdictional immunity of the Supreme Headquarters Allied Powers Europe of NATO based on international customary law.⁴⁴ In the first case, the Supreme Court of the United States disregarded a treaty provision expressly requiring signatory states to respect the jurisdictional immunity of the IFC. In contrast, in the second case, the Dutch Supreme Court recognised the jurisdictional immunity of SHAPE even though it was not expressly identified in any written instrument. Therefore, an organisation's independence may depend on the policies and approaches adopted by the legislative, executive, and judicial branches of the host nation's government.

While these reasons may explain differences in the interpretation and application of independence among international organisations, they do not make these differences justifiable. The independence of international secretariats and civil service is a fundamental principle that nurtures member states' trust in international bureaucracies and cooperation. The values and personalities of the first chief administrative officer should not determine the extent to which the institution's civil service is independent of its member states. Similarly, the funding mechanism cannot prescribe the degree of independence enjoyed by an international secretariat and its staff. Even the technical nature of an organisation's mandate is irrelevant in assessing how much independence its secretariat and officials need.

The essential characteristics of independence remain the same from one organisation to another. The only variable that can change is the degree of independence the secretariats and civil servants of different organisations enjoy. In other words, if we place international organisations on a spectrum (or continuum) of independence, some organisations' secretariats and civil servants will inevitably be less independent than those of other international organisations.⁴⁵ Hence, an organisation whose secretariat and staff enjoy little independence necessarily accepts a greater risk of political interference by its member states. Whether or not such interference occurs is irrelevant to determining the degree of an organisation's independence from its member states. States may be tempted to exert pressure on intergovernmental organisations only in certain circumstances, namely in times of crisis. As Michaels correctly points out, "in time of strife, and faced with the fluid and

⁴³ *Jam v. International Finance Corporation*, 139 S Ct 759 (2019), s I.B.

⁴⁴ *Supreme Site Services v. Supreme Headquarters Allied Powers Europe (SHAPE)*, Judgement of 24 December 2021. See also *Spaans v. Iran-United States Claims Tribunal*, Judgement of 20 December 1985, ECLI:NL:HR:1985:AC9158; *Eckhardt v. Eurocontrol (No. 2)*, (1985) 16 NYIL 464 judgement of 12 January 1984 (Maastricht District Court).

⁴⁵ Haftel & Thompson, *supra* note 34 at 260.

violent atmosphere of periods of national and international stress, [measures for preserving their independence] become safeguards and necessities for the accomplishment of the duties incumbent upon international officials.”⁴⁶

To measure the degree of independence enjoyed by secretariats and staff members of various organisations and to assess their tolerance to risk, one needs a standardised definition of independence and objective yardsticks for measuring degrees of independence. The dimension of independence has attracted less attention from scholars than other dimensions of institutional variation and design, including the degree of formality, hierarchy, legalisation, and institutionalisation.⁴⁷

This work deconstructs independence by breaking it down into actors and their corresponding obligations. It demonstrates that member states, IGOs, and international civil servants are responsible for preserving this independence. The principle can be upheld only if all three actors comply with their obligations in good faith. If either one category of these three actors fails to comply with its obligations, the independence will be imperfect or partial.

SECTION 2 - RECOMMENDATIONS FOR OPERATIONALIZING THE PRINCIPLE OF INDEPENDENCE

The previous section posited that the independence of international civil service is so ubiquitous in international law and national laws and indispensable to international cooperation that it can be regarded as a general principle of law. Nevertheless, designating a particular standard or legal norm as a general principle of law does not necessarily assist in understanding how it should be applied. As explained in Chapter 5, principles are not legal rules. Principles are standards that must be observed because they require justice, fairness, or some other dimension of morality.⁴⁸ They underlie, explain, or provide reasons for rules. Whereas rules answer the question *what*, principles answer the question *why*.⁴⁹ They act as a guide in the process of interpreting rules. Principles cannot be applied as easily as rules, which is why it is not surprising that states and international organisations operationalise the

⁴⁶ Michaels, *supra* note 9 at 27.

⁴⁷ Judith Goldstein et al., eds. *Legalization and World Politics* (Cambridge, MA: MIT Press, 2001); Charles Lipson, “Why are some international agreements informal?” (1991) 45 *International Organisation* 495; David Lake, *Entangling Relations: American Foreign Policy in Its Century* (Princeton, NJ: Princeton University Press, 1999); Yoram Z Haftel, “From the outside looking in: The effect of trading blocs on trade disputes in the GATT/WTO” (2004) 48 *International Studies Quarterly* 121; Stone Sweet, Alec, Wayne Sandholtz, and Neil Fligstein, eds. *The institutionalization of Europe* (New York: Oxford University Press, 2001); Katja Weber, “Hierarchy amidst anarchy: A transaction costs approach to international security cooperation” (1997) 41 *International Studies Quarterly* 321.

⁴⁸ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) 25.

⁴⁹ Gerald Fitzmaurice, “The General Principles of International Law considered from the Standpoint of the Rule of Law” (1957) 92 *Recueil des Cours de l’Académie de Droit International* 7.

principle of independence so differently. To harmonise the interpretation and application of this principle, we need rules governing the independence of international secretariats and officials. Rules can successfully harmonise the application of principles only if they are embraced universally.

The easiest way to achieve a universal codification of rules on the international plane is through the UN General Assembly. General Assembly declarations, resolutions, and decisions⁵⁰ usually are not binding on member states and do not normally set legal norms. They are not regarded as a formal source of international law.⁵¹ Although, in most cases, General Assembly resolutions are only recommendatory, they often lead to the formation of international rules in two different ways.

First, a General Assembly resolution can lead to the adoption of international conventions. For example, the Universal Declaration of Human Rights of 1948 is an important General Assembly declaration. In its initial form, it was not a legally binding instrument, but it led to a series of legally binding conventions, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Similarly, several resolutions on the question of peaceful use of outer space⁵² resulted in an international treaty on the same topic.⁵³

⁵⁰ When the required majority of member states present in the General Assembly vote in favour of a proposal, they adopt a declaration, resolution, or decision. From a legal point of view, there is no difference between these three types of actions; they all have the same legal status. From a political or symbolic viewpoint, they are different. General Assembly declarations connote a high political importance and almost invariably embrace particularly significant legal principles. General Assembly resolutions are just another form of decisions by the General Assembly. Although they may also express important legal principles, the majority of resolutions deal with relatively routine matters. Resolutions are more common than declarations. General Assembly decisions deal with procedural questions such as elections, appointments, time, and place of future sessions. They may also be used to record the adoption of a text representing the consensus of the members of a given organ. Decisions have the lowest symbolic importance among the three types of decisions that the General Assembly makes.

⁵¹ Pursuant to Article 38(1)(a) of the Statute of the International Court of Justice, the only formal sources of international law are: international conventions, international custom, general principles of law, and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁵² *Question of the Peaceful Use of Outer Space*, General Assembly Resolution 1348 (XIII), UN Doc A/Res/1348(XIII) (13 December 1958); *International Cooperation in the Peaceful Use of Outer Space*, General Assembly Resolution 1472 (XIV), UN Doc A/Res/1472(XIV) (12 December 1959); *International Cooperation in the Peaceful Use of Outer Space*, General Assembly Resolution 1721 (XVI), UN Doc A/Res/1721(XVI) (20 December 1961); *International Cooperation in the Peaceful Use of Outer Space*, General Assembly Resolution 1802 (XVII), UN Doc A/Res/1802(XVII) (14 December 1962); *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space* General Assembly Resolution 1962(XVIII), UN Doc A/Res/1962(XVIII) (13 December 1963).

⁵³ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, annexed to the General Assembly Resolution 2222(XXI), UN Doc A/Res/2222(XXI) (19 December 1966).

Second, declarations and resolutions can trigger the formation of new customary international norms or help crystallise an emerging customary international law.⁵⁴ They can even become customary rules themselves if member states adopt a uniform and consistent practice of complying with them and feel compelled to respect them. A General Assembly resolution may even allow the International Court of Justice to rely on it in support of its reasoning aimed at clarifying the obligations of member states and international organisations in protecting the independence of the international civil service.⁵⁵

The General Assembly may also direct the International Law Commission to propose rules for protecting the independence of international secretariats and functionaries. Specifically, paragraph 13(a) of the UN Charter mandates the General Assembly to initiate studies and make recommendations for the purpose of “encouraging the progressive development of international law and its codification.” In 1947, the General Assembly established the International Law Commission (ILC) to discharge this responsibility.⁵⁶ The ILC consists of thirty-four members elected by the General Assembly from a list of candidates nominated by the governments of member states. ILC members must be “persons of recognised competence in international law.” They are recognised experts or practitioners in both doctrinal and practical aspects of international law. They are selected from various segments of the international legal community, such as academia, the diplomatic corps, national governments, and international organisations. The members of the commission sit in their individual capacity and not as representatives of their governments. The International Law Commission’s role includes preparing draft conventions and non-binding legal instruments (*soft law*) on subjects that have not yet been regulated by international law or where the law has not yet been sufficiently developed by state practice. The ILC also has the responsibility to formulate and systematise rules of international law in fields where there has already been long state practice. The work of the ILC has led to the creation of several important treaties and other instruments of international law, including the Vienna Convention on the Law of Treaties, the Vienna Convention on Succession of States in Respect of Treaties, the Vienna Convention on Diplomatic Relations, and the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

⁵⁴ See Ian Brownlie, *Principles of Public International Law*, 7th ed (New York: Oxford University Press, 2008) at 15.

⁵⁵ See *Review of the Role of the International Court of Justice*, General Assembly Resolution 3232 (XXIX), UN Doc A/Res/3232(XXIX) (12 November 1974) Preamble.

⁵⁶ *Establishment of an International Law Commission*, General Assembly Resolution 174(II), UN Doc A/Res/174(II) (21 November 1947). As a document simply annexed to a resolution of the General Assembly, the Statute of ILC does not have the status of a treaty. Hence, it may be amended by a subsequent resolution of the General Assembly.

The UN General Assembly can mandate the ILC to prepare an international convention or a non-binding legal instrument on the independence of international secretariats and civil servants. In 1971, a proposal was made by a scholar for a 'universal statute' regulating the privileges and immunities of international organisations and staff.⁵⁷ However, such a statute alone is insufficient to successfully achieve the independence of international secretariats and civil servants. Although privileges and immunities are essential, they are not the only components of independence. A legal instrument dealing exclusively with privileges and immunities would likely contain obligations for member states only. It would therefore be insufficient to guarantee the independence of international secretariats and staff. As stated above, the independence of international secretariats and staff can be effectively protected only if all three actors comply with their respective obligations. Like a Rubik's Cube that cannot be solved one side at a time, the independence of international secretariats cannot be guaranteed by one actor alone. All three actors need to do their part to foster the independence of the international civil service. Therefore, this work proposes a much broader legal instrument, encompassing more elements than merely privileges and immunities. An international legal instrument must regulate all aspects of the independence canvassed in previous chapters to be effective.

If the document developed by the ILC is an international convention, it will pose practical difficulties in that only states would be parties to it. The other two actors – IGOs and international civil servants – would not become parties to this agreement or convention. It would not be feasible to compel all IGOs to become signatory parties to this instrument for several reasons. First, it would be difficult to determine which entity can be regarded as an IGO. Second, there are so many IGOs that negotiating a legal instrument that would be acceptable to all member states and IGOs is not practical or feasible. Third, even if we assume that all IGOs can meaningfully participate in the negotiations and agree on a text, this agreement would be inapplicable to future IGOs. To be effective, the agreement must cover not only existing IGOs but also IGOs that might be established in the future.

Therefore, a non-binding legal instrument would be more effective as it would not exclude international organisations and international civil servants. This legal instrument would provide guidance on policies and institutional setups required to achieve independence of the international civil service.

States play a crucial role in shaping the independence of international secretariats and their staff at four different moments in an organisation's life. First,

⁵⁷ Michaels, *supra* note 9.

they play an important role in negotiating and drafting constitutive instruments and agreements pertaining to the mandate, funding, status, privileges and immunities of an IGO. This normally occurs immediately before the establishment of the IGO. Second, states play a key role in adapting their domestic legislation and regulation to give full effect to international agreements that establish IGOs. This part is imperative for ascertaining that international obligations can be meaningfully implemented in the legal order of each member state. Third, member states play an important role in shaping the independence of international secretariats and civil servants when they negotiate seat agreements or host-country agreements. Each nation that intends to host an international organisation must be prepared to make significant concessions to ensure the independence of the IGO's secretariat and civil service. Finally, states play an important role in fashioning the internal regulations and institutional structure of IGOs through their voting and decision-making powers in governing bodies. If these powers are exercised judiciously, the organisation will be compelled to issue rules, regulations, and operating procedures that are designed to protect the independence of international secretariats and officials.

2.1 – OBLIGATIONS FOR MEMBER STATES

“States, as founding fathers of international organisations, are in the best position to steer their governance in a responsible manner”.⁵⁸ They can play a crucial role in strengthening the independence of international secretariats and civil servants by making difficult concessions that are essential to effective international cooperation.

2.1.1 – Funding Mechanisms

As pointed out above, an organisation's ability to shield its secretariat and personnel from improper interferences by governments of member states depends on funding arrangements. When an organisation relies mainly on voluntary contributions instead of predetermined appropriations, it is necessarily more vulnerable to the political pressure of its member states, particularly the most significant contributors and donors. Hence, the organisation may feel compelled to tolerate a higher degree of external interference by interpreting and applying loosely or liberally the independence of its secretariat and staff. Voluntary contributions are not conducive to protecting the independence of international secretariats and civil servants. To ensure that the organisation's survival and ability to deliver its mandate are not at risk as soon as a significant donor decides not to contribute funds to bully

⁵⁸ Martina Buscemi, “The Duty of States to Ensure Respect of the Duty of Care through Their Membership in International Organizations” in Andrea de Guttry et al, eds, *Duty of Care of International Organizations towards Their Civilian Personnel* (Berlin: Asser Press, 2018) at 128.

the organisation into submission, member states should establish a scale of assessment to apportion the organisation's essential expenses. Voluntary contributions should fund exclusively optional or additional activities of the organisation and not the essential ones. The proposed legal instrument could specify that,

Essential activities set out in the programme of work of international organisations shall be funded through appropriations.

Although optional activities may be funded through voluntary and discretionary contributions, such funds shall carry no conditions or restrictions that could require international organisations to seek or obtain instructions from any government.

2.1.2 – Recognition of Legal Personality

Typically, international agreements in which founding member states confer legal personality to IGOs provide that the organisation “shall possess juridical personality”.⁵⁹ The main problem with such wording is that the provisions confer rights on the IGOs but place no corresponding obligations on signatory states to ensure these rights are respected. In other words, governments of member states are not required to take any concrete steps to ensure that their governmental agencies recognise the IGOs' legal personality. Nor do these provisions specify the courses of action available to the IGO whose rights are breached by governments of signatory states.

The ambiguity of the provision effectively enables each government to interpret and implement it as it sees fit, giving rise to inconsistent application of the same rule by different member states. The proposed legal instrument must depart from the style of existing agreements by imposing explicit obligations on member states to take concrete actions and by giving corresponding rights to IGOs. For instance, it could provide as follows:

Each Member State shall endow intergovernmental organisations with juridical personality. It shall ensure that intergovernmental organisations have under its domestic legislation the capacity to

⁵⁹ Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15; Agreement on the status of the North Atlantic Treaty Organisation, National Representatives and International Staff signed in Ottawa, 20 September 1951, 200 U.N.T.S. 3; Agreement on the Privileges and Immunities of the International Criminal Court, 9 September 2002, 2271 U.N.T.S. 3; Convention on the Organisation for Economic Co-operation and Development (with Supplementary Protocols Nos. 1 and 2), 14 December 1960, 888 U.N.T.S. 179.

exercise all rights enjoyed by legal and natural persons, adapted as required, including the capacity to perform all forms of juridical acts.

2.1.3 – Recognition of Jurisdictional Immunity

Chapters 2 and 3 described inconsistent interpretations and applications of jurisdictional immunity of IGOs by member states. In some countries, international organisations enjoy absolute jurisdictional immunity, while in others, they only enjoy restrictive or functional immunity.

Founding member states of some international organisations perpetuate and exacerbate the problem by including ambiguous provisions in the text of legal agreements governing their privileges and immunities. The Agreement for the Establishment of the International Development Law Organisation⁶⁰ is a case in point. Article VIII of this agreement provides that IDLO and its staff shall enjoy in the country of its headquarters (Italy) such rights, privileges and immunities as shall be stipulated in a headquarters agreement and that member states shall endeavour to grant comparable rights, privileges, and immunities in support of the Organisation's activities in such countries. This provision gives absolute discretion to member states in deciding whether the organisation and its staff will be given privileges and immunities on their territory. However, as already examined in this work, privileges and immunities are inseparable from the independence of the organisation's secretariat and staff, which is intrinsically linked to the organisation's success. Such important matters cannot be left to the discretion of individual member states.

To minimise the risk of inconsistent or contradictory interpretations of the same agreement by national courts of different member states, legal instruments relating to privileges and immunities must always opt for absolute jurisdictional immunities subject to waiver either by the executive head or the governing body of the organisation. The instrument must expressly exclude the theory of restrictive or functional jurisdictional immunity, which due to its vague nature, inevitably leads to inconsistent interpretations by domestic courts. It could contain an obligation on member states to enact domestic legislation making suits against international organisations not receivable before national courts. The instrument should also compel member states to take concrete steps not only to recognise the legal personality, privileges, and immunities of IGOs but also to ensure that all branches of their governments (legislative, executive, and judicial) respect them. This could be in the form of an obligation for member states to enact legislation compelling

⁶⁰ Agreement for the Establishment of the International Development Law Organisation of February 5, 1988, as amended on June 30, 2002, November 30, 2002, March 28, 2008, December 13, 2012, and November 28, 2017.

governmental entities and organs to respect the legal personality, privileges, and immunities of the organisation and its staff. For instance, the relevant provision could read as follows:

Intergovernmental organisations, their property, and assets shall enjoy absolute immunity from every form of legal process except in so far as in any particular case an authorised official acting on behalf of an organisation may expressly authorise the waiver of this immunity. No waiver of immunity shall extend to any measure of execution or detention of property.

Where not already provided for by existing laws, each Member State shall take the necessary steps, in accordance with its constitutional processes, to adopt such legislative measures as may be necessary to give effect to the absolute jurisdictional immunity of intergovernmental organisations of which it is a member.

It may be prudent to include in the ILC instrument a provision compelling governments of member states to assert and defend the privileges and immunities of international organisations before their national courts. Indeed, on more than one occasion, ministries of Foreign Affairs of member states refused to represent the interests of international organisations before their national courts under the pretext that the rules of civil procedure of their country do not authorise the executive branch of the government to intervene in judicial proceedings of their national courts and to assert the IGO's jurisdictional immunity from all forms of legal process. This is an implied admission by member states that due to procedural limitations of their domestic legislation, their government is unable to give effect to its international obligation requiring it to respect the organisation's jurisdictional immunity. This lacuna exposes organisations to the risk of having national courts disregard their jurisdictional immunity and make rulings prejudicial to their interests, thereby making the IGOs' jurisdictional immunity devoid of its meaning. To avoid such eventuality, the relevant provision of the proposed legal instrument could require as follows:

Each Member State shall take the necessary steps, in accordance with its constitutional processes, to adopt such legislative measures as may be necessary to allow its ministry of foreign or external affairs to assert

before its courts and tribunals the jurisdictional immunity of intergovernmental organisations of which it is a member.

2.1.4 – Recognition of Privileges and Immunities

Often, national law enforcement authorities and domestic courts unilaterally determine that the actions of an international civil servant are unrelated to their official functions and, therefore, not covered by their functional immunities. However, international civil servants have very diverse roles and responsibilities. National authorities are not well-placed to determine whether certain acts were performed as part of an official's functions. Governments of some states have sometimes taken the view that, in certain instances, there can be no doubt that functional immunities do not cover some acts. Indeed, it would be unreasonable to argue that drug trafficking, driving under the influence of alcohol, domestic abuse, physical altercations, or theft are related to an international civil servant's official functions. Hence, it is tempting to consider that in these circumstances, national authorities should have no obligation to seek a determination from the international organisation that the acts were not performed as part of the international official's functions. Although this argument has some merit, it is based on two erroneous assumptions.

First, an act that constitutes a serious criminal offence in a particular nation and shocks the consciousness of its population may not be an offence in many other countries. Homosexuality and polygamy are two such examples. Homosexual staff members may expose themselves to prosecution in some countries by their mere presence. A staff member's sexual orientation is not related to their official functions; however, their physical presence in a country that criminalises homosexuality may be related to their functions.

Second, this argument also assumes that national authorities always act in good faith and prosecute international civil servants to enforce national laws. However, the UN Juridical Yearbook is rife with incidents of abusive attempts by certain governments to influence UN staff members through law enforcement agencies or judicial institutions. International officials have often been arrested and detained in relation to official acts performed on behalf of the organisation.⁶¹ If national authorities had the discretion to determine what constitutes an act in performing an international official's functions, they could easily make functional immunities nugatory. For this reason, the International Court of Justice opined that the chief administrative officer of an IGO should be responsible for assessing whether the organisation's agents acted

⁶¹ *Immunity from Legal Process of a Special Rapporteur*, *supra* note 25; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, [1989] ICJ Rep 177 at para 47. See also *In re Stulz*, [1993] Judgement No. 1232 (ILOAT).

within the scope of their functions.⁶² The Court did, however, point out that the determination by the chief administrative officer creates a strong presumption but an irrefutable one. This presumption “can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.”⁶³ The ICJ’s ruling implies that where national courts believe that the IGO’s chief administrative officer is abusing their power by refusing to waive functional immunities of staff members who commit wrongful acts unrelated to their functions, they can set aside this determination and exercise their jurisdiction.

Multilateral agreements conferring functional immunities typically do not specify who determines whether international civil servants were acting within the scope of their functions or how this determination is made. To avoid unnecessary tensions between member states and international organisations, the proposed legal instrument should expressly recognise that only the organisation can determine whether a staff member’s alleged wrongful act was performed as part of their official functions. It would be judicious to require the IGO to make that determination within a prescribed time limit. For example, the relevant provision could provide:

If any Member State considers that an official of an intergovernmental organisation has abused any immunity or privilege, it may request the chief administrative officer of the organisation to waive the immunity or privilege accorded to that official to facilitate the proper administration of justice.

The chief administrative officer shall reply to the request referred to in the paragraph above within 60 days of receiving it, failing which the immunity or privilege shall be deemed waived.

Another important element on which agreements regulating the status, privileges, and immunities of international organisations are often unclear is the fiscal privileges of the international organisation itself. International organisations are typically exempt from all forms of direct taxes. Regarding indirect taxes, such as value-added taxes, they usually have a right to remission or return under certain conditions, namely that the purchase is made ‘for official use’.

As pointed out in Chapter 3, it is however unclear whether purchases for official use relate to goods and services procured by the organisation for its own usage (such as furniture, IT equipment, and office supplies) or may also include purchases made in the furtherance of the organisation’s mandate and mission. It is also unclear whether the determination of what constitutes ‘official use’ must be made by the IGO

⁶² *Immunity from Legal Process of a Special Rapporteur*, supra note 26 at para 60.

⁶³ *Ibid* at 61.

itself or by fiscal authorities of the state. This question is not merely theoretical; it has been a source of disagreement between member states and international organisations on several occasions.⁶⁴ Most recently, NATO was confronted with this problem when fiscal authorities of some Allies expressed the view that not all purchases made by NATO were exempt from value-added taxes, while others insisted on preserving the VAT-exempt nature of all purchases made by NATO. It took nations several years to agree on a common interpretation of Article X of the Ottawa Agreement, which regulates exemptions from indirect taxes.⁶⁵ The provision of the proposed legal instrument could specify as follows:

Intergovernmental organisations, their assets, income, property, and purchases shall be exempt from all direct and indirect taxes, customs duties, and quantitative restrictions on imports and exports. This exemption shall not apply to purchases made by the intergovernmental organization as an agent acting on behalf of a state or any third party.

2.1.5 – Immigration Status and Other Forms of Restrictions

As described in Chapter 3, some member states, especially those hosting peace operations, often oppose the appointment of international civil servants who hold critical views of their governments or are nationals of a state that they consider unfriendly. The most frequent ways of opposing appointments or employment of such individuals by international organisations are refusals to grant credentials or *agrément*, declarations of *persona non grata*, or refusals to issue immigration papers. Not to jeopardise its mission to maintain peace and stability in the country and to continue providing humanitarian assistance, international organisations succumb to pressure and comply with unlawful and unreasonable requests of harassing states. One way of preventing such conduct is to have all member states police each other. When one state harasses international civil servants, others must know it. Unfortunately, in most cases, the secretariats of the organisations themselves are responsible for the inaction of other member states. Not to embarrass the non-compliant member state, secretariats often negotiate bilaterally with the government of the concerned state without informing other member states of the problem. Since the bargaining power of the host state is usually greater, international organisations often capitulate by accepting terms and conditions that erode the independence of their secretariats and civil servants. However, the independence of international

⁶⁴ See for instance Rutsel Silvestre Martha, “Exemptions from Taxes and Customs Duties (Article III Sections 9-10 Specialized Agencies Convention)” in August Reinisch, ed, *Convention on the Privileges and Immunities of UN and Its Specialized Agencies* (Oxford: Oxford University Press, 2016) 235 at 238–239.

⁶⁵ Agreement on the status of the North Atlantic Treaty Organisation, National Representatives and International Staff signed in Ottawa, 20 September 1951, 200 U.N.T.S. 3.

secretariats and civil servants does not only concern the IGO and the host state; it affects all member states. Therefore, an organisation's chief administrative officer is obligated to bring to the attention of the governing body all attempts by a member state to encroach on the independence of international civil servants.

Another way of mitigating the risk of facing such actions by rogue governments is to include in the proposed legal instrument an obligation prohibiting states from requiring *agrément*s for international civil servants or expelling them for reasons other than unlawful conduct. For instance, the relevant provision could state:

Each Member State shall exempt officials of intergovernmental organizations, together with their spouses and dependents, from immigration restrictions and registration. For greater clarity, no Member State may require agréments from officials of intergovernmental organisations. No Member State may expel officials of intergovernmental organisations without first providing written reasons in support of its decision and consulting with the chief administrative officer of the organisation.

2.1.6 – Applicability of Domestic Law

Member states where international organisations establish their seat or headquarters normally conclude a 'seat agreement' or 'host country agreement'. Arguably, one of the most controversial issues that arises in interpreting and applying these agreements is the applicability or inapplicability of national laws to international organisations.⁶⁶ There appears to be a consensus that in certain fields – such as employment law – the applicable regime is the IGO's internal law; thus, the legislation of the host nation is inapplicable. Similarly, there is little doubt that certain categories of local laws, including those regulating health and safety, transport, and environment, apply to IGOs irrespective of their immunity from jurisdiction. However, practitioners struggle to determine the applicability of a wide range of other important areas of law. For instance, legal advisors of international organisations do not have a unified position on whether the EU General Data Protection Regulation⁶⁷ (commonly known as the 'GDPR') should apply to international organisations headquartered or operating in EU member states (even if the GDPR expressly exempts IGOs). The answer to this question is important because if an IGO decides to comply voluntarily with the regulation, national authorities responsible for monitoring compliance with the GDPR may have the power to entertain complaints lodged

⁶⁶ See Finn Seyersted, *Common Law of International Organizations* (Leiden: Brill, 2008) at 525.

⁶⁷ Regulation of the European Parliament and the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data *O.J. L 119, 4.5.2016, p. 1–88*.

against the organisation. It is therefore essential to specify in the host country agreement categories of national laws from which the organisation is or is not exempt. The provision dealing with the applicability of national legislation to international organisations could read as follows:

Rules of public order of a Member State hosting an intergovernmental organisation shall apply to it. Where an intergovernmental organisation does not have an internal policy regulating a specific field or activity, the legislation of the host nation shall normally apply to it mutatis mutandis. The applicability of national laws shall in no case authorise any fine or enforcement measure against intergovernmental organisations in cases of non-compliance.

2.2 – OBLIGATIONS FOR INTERGOVERNMENTAL ORGANISATIONS

Chapter 4 explored acts and omissions of international organisations that affect the independence of their secretariats and officials. One of the most perilous omissions is the organisation's failure to set up mechanisms for settling disputes with its personnel, external candidates for vacant posts, contractors, and bidders that are unsuccessful in securing contracts.

As mentioned in Chapter 1, the exact number of international organisations is unknown and depends on how they are defined. Many estimate the number of intergovernmental organisations to be between 500 and 700,⁶⁸ while the Union of International Associations lists approximately 300 traditional intergovernmental organisations.⁶⁹ Even by retaining the most conservative figure of 300 IGOs, only one-third of IGOs offer an acceptable legal recourse to their staff. At least two-thirds of international organisations do not have independent and impartial mechanisms for resolving employment disputes with their personnel.⁷⁰ An even smaller number of

⁶⁸ Gerhard Ullrich, *The Law of the International Civil Service: Institutional Law and Practice in International Organisations* (Berlin: Duncker & Humblot, 2018) at 37.

⁶⁹ Statistics published by the Union of International Associations (UIA) in the Yearbook of International Organisations, Number of IGOs by type. Although the YBIO statistical data lists more than 7,000 international organisations, it includes inactive and dissolved entities. In addition, UIA has many categories of organisations. The definition of an international organisation retained by UIA is too broad and encompasses subsidiary organs and international administrative tribunals as distinct international organisations. When the categories are narrowed down to traditional intergovernmental organisations, the number of active IGOs is approximately 300.

⁷⁰ Approximately 60 international organisations recognise the jurisdiction of the ILOAT. Three international organisations recognise the jurisdiction of the Administrative Tribunal of the Council of Europe. Approximately 15 UN entities – primarily UN Funds and Programmes – are subject to the jurisdiction of the UN Dispute Tribunal. Between 35 and 40 international organisations have their own administrative tribunals or appeals boards. Half a dozen of organisations allow for some form of arbitration by impartial and independent panel. In total, there are between 100 and 115 international organisations that seem to offer adequate dispute resolution mechanisms to their staff.

international organisations offer legal recourses to all categories of personnel, including consultants and individual contractors. Only two international organisations allow unsuccessful candidates for vacant posts to challenge decisions not to select or recruit them.⁷¹ Similarly, international organisations normally do not allow unsuccessful bidders to challenge decisions to award contracts to competitors. As pointed out in Chapter 4, the absence of legal recourse exposes the IGOs to the jurisdiction of national courts.

In employment law, it is paramount for all IGOs to either accept the jurisdiction of another international administrative tribunal, set up their own administrative tribunal, or establish procedures allowing for affordable arbitration. It is equally vital for international organisations to extend the jurisdiction of existing dispute resolution mechanisms to unsuccessful applicants for vacant posts with whom the organisation does not have a contractual relationship. This will not only give external candidates a legal recourse but also ensure that selection and recruitment decisions are subject to some oversight. Such oversight will discourage decisions based on favouritism, nepotism, or cronyism and will in the long run foster fairer and more transparent recruitment decisions. The main reason for not offering external candidates any legal recourse is the fear of exorbitant costs triggered by a barrage of challenges. This fear is vastly exaggerated.

First, establishing dispute resolution mechanisms for external candidates can be relatively inexpensive. To limit its exposure to financial hardship, an IGO may require external applicants wishing to challenge an administrative decision to advance a deposit that would be reimbursed only if the appellant prevails. This will dissuade frivolous and abusive legal challenges by external candidates who are not confident they will succeed. Of course, imposing an obligation to pay a deposit may have the effect of dissuading even strong cases; nevertheless, a restrictive legal recourse is infinitely better than no legal recourse.

Second, it is very likely that the IGOs will initially face many legal challenges from external candidates. However, these challenges will compel organisations to improve their policies and to perfect their decision-making processes. As a result, the number of appeals will gradually drop because administrative decisions made by international organisations will withstand much better judicial scrutiny.

⁷¹ Article 14.10.1 of the Staff Regulations of the Council of Europe of January 2023 provides that “In addition to staff members, the complaints and appeals procedure shall be open *mutatis mutandis* to [...] job candidates, insofar as their complaint or appeal concerns irregularities of the selection process directly affecting them”. Article 1(c) of the Statute and Operation of the Administrative Tribunal of the OECD (adopted in December 1991) states that the Tribunal shall have jurisdiction over applications filed by persons who are not members of staff of the Organisation, challenging the refusal of their application for appointment where it is alleged that such refusal was the result of discrimination.

Third, not all proceedings need to be equally complex; summary proceedings may suffice to adjudicate disputes with third parties with whom the organisation does not have an employment contract.

In contract law, international organisations should set up impartial and independent mechanisms allowing unsuccessful bidders to challenge decisions not to award them commercial contracts. Allowing bidders to challenge contract awards through impartial and independent mechanisms will improve the organisations' procurement processes and decisions. It will also curb fraud and corruption because contract awards would be constantly monitored by commercial entities and subjected to legal scrutiny by external experts. Most importantly, however, it will shield the organisation against challenges brought before national courts for want of alternative mechanisms.

The most economical and efficient way of establishing such a mechanism is to select through a competitive process impartial and independent experts who can be convened when needed to adjudicate complaints from unsuccessful bidders. To limit the organisation's expenses, the bidder may be asked to advance a deposit of arbitration fees reimbursable only in case the bidder prevails. To compel international organisations to establish adequate dispute resolution mechanisms, the legal instrument could require the following:

Intergovernmental organizations shall propose the establishment of an independent and impartial dispute resolution mechanism for resolving disputes arising out of contracts or other disputes of a private character to which the Organisation is a party.

Another area where international organisations can play an important role in protecting the independence of their secretariats and staff is personnel administration. Specifically, every organisation must promulgate detailed procedures for making administrative decisions in a way that leaves no room for any external actor to intervene. For instance, all members of personnel, irrespective of their grade, level, or rank, must be recruited and promoted through competitive selection processes. The initial shortlisting of candidates must be carried out by human resources officials not involved in any other stage of the selection process. Policies must expressly prohibit any third party, governmental official, or international civil servant from interfering in the shortlisting process. Subsequent steps must also be based on objective criteria such as anonymised written tests and psychometric assessments administered by external firms. Recruitment and promotion policies should expressly prohibit officials responsible for making the final selection decision to consider factors unrelated to the performance of candidates, including recommendations from governments of

member states. Furthermore, staff rules and regulations of international organisations should expressly specify that favouring candidates in selection processes is a prohibited conduct that may result in disciplinary sanctions. The relevant paragraph of the proposed legal instrument could read as follows:

Intergovernmental organisations shall promulgate regulations and procedures that require recruitment and selection decisions to be based on merit. Such regulations shall provide severe disciplinary sanctions for recruitment and selection decisions based on extraneous considerations, including nepotism and cronyism.

Policies governing the selection and recruitment of personnel must be accessible to the public. Yet, staff rules, regulations, and other internal policies of most IGOs are not available to the public. Websites of many international organisations restrict access to their internal policies to serving staff members and delegates of member states. In some cases, the heads of several international organisations even refused to disclose their staff rules and regulations to the author under the pretext that they were confidential. Public institutions that conceal their legal instruments exhibit short-sightedness. The accessibility of legal rules enhances transparency, which in turn helps to strengthen the independence of international secretariats and civil servants. For instance, the knowledge of rules and procedures can be a significant advantage in recruitment processes. If external candidates cannot easily find rules that an organisation applies to its recruitment processes and decisions, they might be tempted to look for alternative means of obtaining such information, which may often consist in lobbying national delegates, thus indebting themselves before even becoming international civil servants. Hence, by publishing their rules, IGOs create a level playing field for all candidates and remove the incentive to look for underhanded ways of obtaining information that should be public in the first place. The legal instrument could require the following:

Intergovernmental organisations shall publish their policies relating to personnel administration.

Personnel administration policies should also leave no room for governmental officials to participate in decisions that may lead to a staff member's separation from service. Policies should enumerate grounds on which a manager may decide not to recommend the renewal of a staff member's contract. Of course, such grounds may include poor performance, lack of funding, abolition of the post, credible allegations of misconduct, etc. However, under no circumstances can a decision not to extend a staff member's contract be based on complaints or demands made by governmental officials of member states. For this reason, the practice of secondments from national public service and arrangements permitting staff to keep liens on posts in

governments of member states must be discontinued. In their policies, international organisations must signal to all their member states that attempts by governmental officials to interfere in personnel administration are unwelcome and that all such attempts will be recorded and reported periodically to their governing bodies. If nations know that attempts to influence decisions relating to personnel administration might become public, they will be less tempted to interfere. To prevent such problems, the legal instrument could propose as follows:

International organizations shall promulgate personnel administration rules that prohibit the appointment of seconded civil servants of Member States.

The chief administrative officer of international organisations shall report periodically to the governing body any attempt by a government official of a Member State to interfere in an internal decision pertaining to personnel administration.

International organisations are also obligated to ensure that their personnel's behaviour is always appropriate so that governments of member states do not feel compelled to intervene to prevent or punish wrongful conduct. In most situations, interventions of this nature are incompatible with the privileges and immunities of IGOs and their staff. Many international organisations are not equipped to prevent, detect, investigate, and prosecute wrongful behaviour. IGOs must promulgate detailed codes of conduct defining acts and omissions that they consider reprehensible or unethical. They must also issue procedures for investigating and disciplining allegations of misconduct. To implement these policies, IGOs must develop in-house investigative capabilities by recruiting professional investigators or, for smaller organisations with limited financial resources, by training serving staff members to conduct investigations. In addition, victims of wrongful conduct by international civil servants should have a forum for lodging complaints and the right to receive regular updates on actions taken to investigate their complaints. If an organisation fails to investigate a complaint or to sanction reprehensible conduct within a reasonable time frame, the organisation's policies should empower the complainant to challenge its failure and to seek redress before the organisation's independent and impartial dispute resolution mechanism, such as an international administrative tribunal. International organisations should endeavour to have an ethics function for providing confidential advice on conflicts of interest and a robust whistle-blower protection system. The obligations of member states contained in the legal instrument can be formulated as follows:

Intergovernmental organisations shall adopt a code of conduct containing obligations that are at least as exacting as those set out in

the Report on Standards of Conduct in International Civil Service 1954 of the International Civil Service Advisory Board.

Intergovernmental organisations shall establish internal organizational units for preventing, detecting, investigating, and sanctioning all forms of misconduct by members of personnel and contractors of international organizations.

2.3 – OBLIGATIONS FOR INTERNATIONAL CIVIL SERVANTS

Chapter 5 listed four fundamental values that all international civil servants are expected to uphold. These values are integrity, loyalty, impartiality, and independence. Like all public servants, international civil servants are vulnerable to ethics lapses.⁷² Staff members may fail to uphold these values either intentionally or inadvertently.

Developing and maintaining the highest standards of integrity requires unwavering commitment and effort. Some erroneously believe that integrity and ethics are acquired at a very young age; therefore, any effort to teach or learn about ethics in adulthood is fruitless. Other myths about integrity are that ethical people always act with integrity or that issuing a code of conduct is sufficient to eliminate transgressions of integrity. A corollary of these assumptions is that one can learn integrity and ethics only through the ordeal of personal experiences.

These views do not promote ethical and honest behaviour and discourage supervisors, managers, and senior leaders from building integrity and ethics into their organisational culture. Integrity and ethics are not genetic and are not acquired only at an early age. Integrity is learned behaviour that can be relearned and modified if needed. Therefore, mature organisations typically have ethics management strategies which often involve mandatory staff training, the use of ethics as a criterion in performance appraisals, and the adoption of organisational rules that promote an ethical climate, such as requiring financial disclosure and approval of outside activities.⁷³ The most critical component of the strategy is a continuous and ongoing ethics training program which amplifies the message that integrity and ethics matter.⁷⁴ Nevertheless, no measure can be effective unless staff members willingly and actively participate in ethics management strategies. An ethics program will likely be inefficient if it is imposed on staff members. Hence, international civil servants must

⁷² GB Brumback, "Institutionalizing Ethics in Government" in Evan M Berman, Jonathan West & Stephen J Bonczek, eds, *Ethics Edge* (Washington DC: ICMA, 1998) at 66–69.

⁷³ Donald C Menzel, *Ethics Management for Public Administrators: Building Organizations of Integrity* (Armonk: M.E. Sharpe, 2006) at 14.

⁷⁴ *Ibid.* at 22.

find internal motivation to periodically take integrity and ethics refresher training, irrespective of whether their organisation mandates or offers such training programs. Completing training sessions on integrity and ethics must become part of international civil servants' culture. International officials must also familiarise themselves with their organisation's code of conduct and procedures for seeking confidential advice from competent authorities in case they have doubts about the appropriateness of certain acts or omissions, mainly when they believe that a conflict of interests may exist. If their organisation does not provide mechanisms for seeking and obtaining confidential advice, staff members should err on the side of caution and disclose any information that may raise an actual or perceived conflict of interest. This requires the establishment and funding of an independent Ethics Office. The legal instrument could require IGOs to take the following action:

Intergovernmental organizations shall establish a functionally independent ethics office responsible for providing training and advice to their members of personnel. The ethics office shall propose a comprehensive ethics programme, which shall include mandatory annual training sessions for all members of personnel.

Staff members should also avoid soliciting the assistance and support of their national delegations in relation to decisions made by their organisation that may affect their terms of employment or conditions of service. Such decisions may include recruitment, promotions, performance appraisals, investigations into allegations of misconduct, disciplinary proceedings, or non-renewal of contracts. All questions revolving around their employment rights and obligations must be dealt with internally and in accordance with the organisation's policies. Staff members dissatisfied with administrative decisions affecting them normally have an opportunity to challenge such decisions through internal dispute resolution mechanisms. Decisions or judgments of these mechanisms must be accepted as final. Where international organisations repetitively mishandle complaints or make arbitrary decisions, member states may intervene through the governing body to raise awareness among other nations and find a solution to a problem that may be systemic in nature. Member states should not intervene on behalf of individual staff members by engaging directly with the members of the organisation's leadership team. The proposed instrument could state as follows:

Each Member States undertakes not to intervene on behalf of individual members of personnel in any decision relating to personnel administration.

The regulations of intergovernmental organizations shall expressly prohibit staff members from seeking support from their government in relation to any personnel administration matter.

Finally, international civil servants must remain neutral and anonymous. They should not take a stance on conflicts between two more member states, get involved in debates on controversial issues, or release statements and publications without first seeking authorisation from their employer. Staff should avoid political activities or retain formal ties to national administrations, including secondments or liens. The proposed legal instrument may oblige states to deny requests for liens to their public servants intending to accept an appointment with international organisations.

Each Member States undertakes not to grant a lien or another form of right of return to any governmental official intending to accept an appointment with an international organisation.

Intergovernmental organizations shall not appoint to a vacant post any governmental official who has kept a lien or another form of right of return.

In conclusion, the independence of the international civil service is at the core of international cooperation. It is a broad and elusive principle that continues to evolve in an organic and unsystematic manner. Given its importance, it is high time for states to agree on its definition, characteristics, and parameters, and to regulate it through concrete rules. If they do not circumscribe and regulate this principle, international organisations will continue interpreting and applying it as they see fit. This will further exacerbate divergencies and erode the principle of independence.