Union Syndicale Fédérale

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USF input to:
Mr Volker Ullrich, Rapporteur of the Committee on Legal Affairs and Human Rights
Mr Stefan Schennach, Rapporteur for opinion

On: Draft Report AS/Jur (2017) 12
Improving the judiciary of International Organisations
Art.11, Rules of Procedure ILOAT
Extension of the European Committee of Social Rights Mandate

Brussels, 23rd Oct.2017

Dear Mr Ullrich, dear Mr Schennach,

USF read most carefully the draft resolution, draft recommendation and report adopted by the Committee on Legal Affairs and Human Rights on the 11th October 2017, "AS/Jur (2017) 12", as well as the Resolution 1979 (2014) of the Parliamentary Assembly of the Council of Europe.

Union Syndicale Fédérale (USF) is the largest federation of employees` unions in the European Public Service, with about 20 branches in European Institutions, agencies and other European International Organisations. USF is an affiliate of EPSU (European Public Service Unions, which is an affiliate of ETUC), PSI (Public Services International) and the European Movement.

1. Introduction: from Resolution 1979 (2014) to draft Report and Resolution AS/Jur (2017) 12

USF confirms that safely meeting ECHR standards in International Organisations (IOs) has been an unresolved issue for many years and that globally the situation has deteriorated. The Staff of IOs are indeed suffering from obvious gaps in the currently available legal protection systems. Therefore, USF welcomes the commitment of the Committee on Legal Affairs and Human Rights and the Parliamentary As-

sembly of the Council of Europe on the issue of Human Rights and employment disputes in International Organisations.

USF also thinks that the analysis (see Chapter 3, Par. 14-19 of the draft report) should not be narrowed too much on Art.6 ECHR and excessive breadth of immunity issues. The issue of the discrimination of these staff as compared to citizens and workers encompassed by the effects of the ECHR (beyond Art.6 and 11) and the European Social Charter (ESC) should be tackled as well. A narrow analysis falls short of the invitation expressed in Resolution 1979 (2014) of the Parliamentary Assembly:

> "7.1 ensure that international organisations are subject, as appropriate, to binding mechanisms to monitor their compliance with human rights norms and, where such internal accountability mechanisms exist, to ensure that their decisions are enforced;"

and the Draft recommendation in AS/Jur (2017) 12:

> "1.3. initiate reflection on whether the Organisation's system for dealing with employment disputes complies fully with the requirements of the European Convention on Human Rights (ETS No. 5) and, where appropriate, **on how this system can be improved**;" (emphasis added).

USF refers back to the resolution 1979 (2014) and point 1.3 of the draft recommendation in AS/Jur (2017) 12 and submits a concrete concept designed to strengthen the IOs' ability to handle the conformity with human rights issue. This strengthening is not mutually exclusive with the recommendations of draft resolution (6.1 to 6.4), on the contrary. USF is also sure that the proposal (see Par. 3 below) is not mutually exclusive with:

- any claim of academics, unions or other circles put forward in order to "limit the breadth of the immunity" IOs enjoy before national courts;
- improving standards in the light of Art.6 ECHR requirements;
- the establishment of a central appellate judicial body for IOs.

Under no circumstance should this USF proposal be read as a disagreement to such claims or recommendations, which are also supported by USF.

2. Possible approaches following point 1.3, draft recommendation in AS/Jur (2017) 12

USF's analysis has two starting points:

1) The assumed determination of the Member States of the European Council to ensure equal, non-discriminatory treatment of all workers under the ECHR and the European Social Charter on the territory of the Council of Europe / European Social Charter Member States (see also the narrowly defined restrictions under Art.G ESC) and

2) Art.11 of the Rules of Procedure of the ILOAT (RoP).

Par.45 of the draft Report is in line with the first assumption and reads:

> "The right of access to a tribunal and a fair hearing is a paramount right and staff members of IOs should benefit from this right to the same extent as those subject to national employment law rules. This is particularly necessary in cases involving significant psychological suffering, such as cases of harassment or discrimination at work, as the arbitration or mediation mechanisms in place in the majority of IOs are unable to solve these problems and provide appropriate legal protection to the victims."

USF thinks that "discrimination at work" is to be understood broadly, including the situations covered by the European Social Charter. As to the addressees of the European Social Charter, it seems that there has never been any declared intention of the Member States or IOs to exclude IOs and their staff from the scope of the ECHR or the European Social Charter. The determination of the Member States to include these IOs and their staff into the scope must be assumed.

Art.II of the ILOAT Statute (most other internal judicial bodies feature similarly defined empowerments) determines what rules the ILOAT Judges are asked to apply to individual cases: Terms of appointment and applicable Service Regulations. Art.II of the ILOAT Statute does not preclude the application of any other international legislation or principles, only national legislation is excluded from application unless codified in the applicable service regulations.

The ICJ too confirmed that the ILOAT may well be legitimated when deriving individual rights from agreements between the Member States, see the ICJ's Advisory Opinion of 1st February 2012 on ILOAT Judgement No. 2867 ("FIDA"), Par. 93-95.

In the meantime, Art.XII of the ILOAT Statute was abolished (2016). USF agrees in principle that the unequality of arms provided with Art.XII ILOAT Statute was unfortunate, but regrets that the abolishment was preferred to a new cooperation scheme between Judges of ILOAT and ICJ as submitted by USF to the ILO Governing Body on the 25th January 2016.

There is still no justification for excluding the ECHR or the European Social Charter from applicable legislation in IOs, as far as the Member States never stated such an intention.

USF still reads Art.II of the ILOAT Statute as allowing international legislation to be applied. Art.11 of the ILOAT Rules of Procedure opens up the option of a cooperation scheme between the ILOAT Judges and an appropriately shaped quasi-judicial body:

> "Article 11
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> 1. The Tribunal may**, on its own motion or on the application of either party**, order such measures of investigation as it deems fit, including the appearance of the parties before it, the hearing of expert and other witnesses, **the consultation of any competent international authority**, and expert inquiry." (emphasis added).

The USF proposal is based on a quasi-judicial body designed to cooperate with the judicial bodies of IOs. Such a body could be created from scratch (at Council of Europe level), or the mandate of an adequate existing body could be extended. The latter option is developed below: the extension of the mandate of the European Committee of Social Rights.

3. Extended mandate of the European Committee of Social Rights

As the ILOAT is competent for a number of IOs, as internal judicial bodies of other IOs may also feature an equivalent to Art.11 ILOAT Rules of Procedure (RoP), a universal harmonisation on Human Rights conformity would be achieved over time, as the European Committee of Social Rights develops its case law when providing legal opinions requested under Art.11 RoP. There seems to be no compelling reason to limit the access of internal judicial bodies of IOs to the procedure of getting legal opinions from the ECSR.

A key aspect, of course, is that the European Committee of Social Rights may easily qualify as a real quasi-judicial body: independence, impartiality of the members, highest qualification (Judges), adequate nomination procedures according to existing standards as set by the CoE. Real improvement cannot be

achieved with an ad hoc committee or panel – in contrast, real improvement can be achieved with a body of case law developed by the ECSR.

The advantages of this approach are manifold:

- The ILOAT Judges would stay within the remit of their mandate but obtain clarifications on whether Service Regulations are up-to-date with ECHR and ESC standards;
- The European Committee of Social Rights would stay within its remit defined by the ESC, not anymore excluding IOs and their staff;
- The body of case law developed by the ECSR would be coherent with the substance of the reports established under Chapter IV ESC;
- The body of case law developed by the ECSR would ensure unified and coherent protection of human rights across all cooperating IOs;
- A split examination of the conformity with the ECHR / ESC and the application of Service Regulations would be avoided as the decisions would result from a single judicial procedure;
- Equal treatment between workers and citizens covered by the effects of the ECHR and ESC inside and outside IOs would be achieved by compensating weaker and slower judicial systems at the IOs with a procedure that directly provides an opinion of the European Committee of Social Rights made available to the competent judiciary with individual effect on a case; flooding of the ECSR by IO internal judicial bodies is not to be expected, as the judges will decide whether a clarification is required or not (Art.11 ILOAT RoP);
- ILOAT and other case law obtained with legal opinions of the ECSR would compensate for the lack of "national reports" (e.g. IOs' reports) to be examined by the ECSR under normal procedures (Chapter IV of the European Social Charter);
- The burden of Member States of IOs would be alleviated, as far as they indeed should "remain accountable for breaches of international human rights norms by international organisations when the latter cannot be held directly accountable", Point 7.4 of Resolution 1979 (2014).

4. Further procedural steps

Art.IV.C and Art.V I.1.d ("Implementation of the undertakings given", "d. other appropriate means") of the European Social Charter may be the right chapter to be applied or reviewed under Art.V. J in the light of the proposal above. A broad debate will be necessary, including at some stage the ILO Governing Board and the Judges of the ILOAT.

Once the ECSR's mandate is extended, IOs which recognize the ILOAT jurisdiction will have to define their position. ILOAT judges will need to know whether conformity with the ESC is wished by using the cooperation scheme under Art.11 RoP of the ILOAT, or whether other methods are to be used for this purpose (reduced breadth of the IO's immunity before national courts, for example).

IOs with a Membership constituency that differs too much from the Member States of the ECHR could decide that other solutions to the HR conformity problem are envisaged for any particular IO and therefore the internal judiciary will not request legal opinions under Art.11 RoP.

Union Syndicale Fédérale shares the conclusion at Par.47 of the draft report:

> "The Council of Europe, as an international organisation tasked with the protection of human rights and the rule of law, should look more closely at these questions."

USF strongly encourages the exploration of a cooperation scheme as described above and respectfully suggests that this option be included in your report. USF remains available for any form of consultation

in order to support preparatory work on this issue which is essential for International Organisations in Europe and their staff.

Sincerely yours,

Bernd Loescher, USF
President

cc: Syndicat des Agents du Conseil de l'Europe SACE, J.W. Goudriaan, EPSU