

An International Administrative Procedural Law of Fair Trial: Reality or Rhetoric?

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Abstract

Highlighting that the right to a fair trial in international law now forms an aspect of international administrative procedural law, I argue when international administrative tribunals administer justice to international civil servants, fair trial guarantees must be accorded. Particularly, in this paper I assess the two leading international administrative tribunals, the United Nations Dispute Tribunal and the Administrative Tribunal of the International Labour Organisation, in terms of their compliance with fair trial standards. Focusing on the jurisprudence of the International Court of Justice, I first show how what I call an international procedural law of fair trial has been developed and requires that basic due process guarantees must be accorded when delivering international administrative justice. I then develop fair trial standards with greater nuance, especially focusing on the quality of independence and impartiality. Then, the paper engages in a detailed analysis of the leading international administrative tribunals in terms of compliance with fair trial standards, concluding that significant deficits exist. If a fair trial for international civil servants is to be guaranteed, significant structural reforms are necessary.

Keywords

International Dispute Resolution – International Organizations – International Administrative Law – International Administrative Tribunals – Right to a Fair Trial

I Introduction

That everyone seeking resolution of his or her legal claim has the right to access a fair trial is well entrenched in international human rights law.¹ Key fair

¹ See UNGA Res 217 A (III) 'Universal Declaration of Human Rights' (10 December 1948), Art. 10; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered

trial guarantees include the right to access an independent and impartial court or tribunal in the determination of a suit at law;² the right to equality in the administration of justice;³ and the right to a fair hearing without undue delay.⁴ By studying the two most prominent international administrative regimes,⁵ the UN's internal justice system, consisting of the UN Dispute Tribunal (UNDT) and the UN Appeals Tribunal (UNAT) (collectively referred to as the 'UN tribunals'), and the Administrative Tribunal of the International Labour Organization (ILOAT), this article seeks to show that those tribunals are falling short when it comes to delivering justice with fair trial standards.⁶

It is first demonstrated that the dispute resolution machinery created at the international institutional level is based on a human rights rationale, aimed at ensuring access to justice for the workforce of international organizations (II). The article then shows that the procedural rights provided for within the scope of the right to a fair trial, including the guarantees of judicial independence and impartiality, the right to equality, and to access justice without undue delay, as generally understood in international human rights law, have now been incorporated into what I call an 'international administrative procedural law of fair trial' (III).

The paper then goes on to assess whether the delivery of justice to the employees of international organizations is consistent with fair trial guarantees. After providing the method (IV) and criteria (V) used to assess the selected justice systems, particularly referring to the law and practice of the UNDT (the first instance judicial mechanism within the UN's internal justice system) (VI) and the ILOAT (VII), this article considers whether the existing regimes are compliant

into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 14; COE 'Convention for the Protection of Human Rights and Fundamental Freedoms' (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (European Convention on Human Rights), Art. 6; American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José), Art. 8; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter), Art. 7.

2 UN HRC 'General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial' (23 August 2007) UN Doc CCPR/C/GC/32, para. 19.

3 See ICCPR, Arts 2, 14 (1) and 26.

4 General Comment No. 32, para. 27.

5 International Administrative Law is the body of law that governs the employment relationship between international organizations and its officials. International Administrative Tribunals are set up to resolve employment disputes between international organizations and their staff members. For a background, see A. Riddell, 'Administrative Boards, Commissions and Tribunals in International Organizations' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (OUP 2008-), available at www.mpepil.com (last accessed 14 June 2018).

6 See below.

with the right to a fair trial. The analysis will show that various fair trial deficits continue to exist, and that until the structural deficits in the justice machinery are remedied, access to justice for international civil servants will not translate from rhetoric to reality (VIII).

II The Access to Justice Rationale behind Internal Justice Systems

The very creation and existence of internal justice mechanisms at international organizations, symbolized by the existence of international administrative tribunals (IATs), can be explained by the demands of human rights generally, and access to justice specifically. International organizations submit to the jurisdiction of IATs not simply to smooth over staff relations as an exercise of human resources policy, but to implement an organization's obligation to provide appropriate modes of dispute settlement to its staff members, an obligation often enshrined in treaty law.⁷ This obligation to provide appropriate or alternative modes is the flipside to the grant of jurisdictional immunities – Reinisch notes that an international organization's 'immunity from legal process can be regarded as an acknowledgment of the right of access to court as contained in all major human rights instruments'.⁸ It is ultimately the procedural bar of institutional immunities that prevents a national forum from adjudicating employment claims against international organizations, entrenching inequality of access at the national level, creating the very demand for IATs.⁹ It was precisely such a rationale that led the International Court of Justice (ICJ) in

7 See for example Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15, Art. VII (29); Convention on the Privileges and Immunities of the Specialized Agencies (approved 21 November 1947, entered into force 2 December 1948) 33 UNTS 261, Art. IX (31). Both those regimes provide for obligations to third parties (including employees). Note, several Specialized Agencies of the UN subscribe to the jurisdiction of the ILOAT regarding the resolution of staff disputes (see below). For a description of those treaty regimes, see generally R. Gulati, 'Convention on the Privileges and Immunities of the United Nations, 13th February 1946 (1 UNTS 15, 1 UST 1418), OXIO 28', available at <http://opil.ouplaw.com/view/10.1093/law-oxio/e28.013.1/law-oxio-e28> (last accessed 30 May 2018); R. Gulati, 'Convention on the Privileges and Immunities of the United Nations, 13th February 1946 (1 UNTS 15, 1 UST 1418) OXIO 73', available at <http://opil.ouplaw.com/view/10.1093/law-oxio/e28.013.1/law-oxio-e28?rkey=4t2g&result=9&prd=OXIO> (last accessed 30 May 2018).

8 A. Reinisch, 'Convention on the Privileges and Immunities of the Specialized Agencies New York, 21 November 1947, Introductory Note' (UN Audiovisual Library of International Law 1947), available at <http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html> (last accessed 30 May 2018).

9 See K. Wellens, *Remedies against International Organizations* (CUP 2002) 22.

its 1954 Advisory Opinion on *Effect of Awards*¹⁰ to conclude that despite the absence of an express power in the UN Charter, the UN General Assembly had the power to create a judicial organ vested with the jurisdiction to resolve employment disputes between the UN and its employees.

The facts giving rise to the request for the Advisory Opinion in *Effect of Awards* is perhaps one of the darkest periods in UN staff affairs, questioning the very independence of the international civil service.¹¹ Following a secret agreement between the first UN Secretary-General and the US Government regarding the 'US Loyalty Program', during 1952–1953, several UN staff members possessing US nationality were terminated from their employment at the UN for suspected links to the American Communist Party, within the broader context of the witch-hunt of the McCarthy era.¹² All of the affected staff filed claims before the then UN Administrative Tribunal, the predecessor to the UNDT and the UNAT regimes. Ten out of the eleven claims filed by the permanent staff succeeded as their termination was contrary to the relevant staff regulations and staff rules.

The UN Administrative Tribunal decided that the staff members with permanent appointments were unfairly dismissed for they had neither engaged in any misconduct, nor was their performance unsatisfactory: there was no basis on which those staff members could be lawfully terminated.¹³ In respect of the successful claims, the UN Administrative Tribunal awarded a total of approximately US\$ 170,700 in damages.¹⁴ The US protested against the decisions of the UN Administrative Tribunal and the extent of the damages awarded.¹⁵

Attempting to defy the UN Administrative Tribunal's decisions, the UN General Assembly issued a request for an Advisory Opinion to the ICJ asking

10 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47.

11 See for example the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Art. 100 enshrining the requirement of the independence of the international civil service.

12 For a background of those cases, see A. Megzari, *The Internal Justice of the United Nations: A Critical History 1945–2015* (Brill 2015) 130–152 citing UN Administrative Tribunal Judgment No. 38, *Glaser* (21 August 1953); UN Administrative Tribunal Judgment No. 18, *Crawford* (21 August 1953).

13 See A. Megzari citing UN Administrative Tribunal Judgments No. 29, 31, 33, 34, 35, 36, 37.

14 See A. Megzari.

15 *Ibid.*, where it is noted that based on the view that the amounts of damages were excessive, the then Secretary-General proposed a two-year ceiling on the damages that could be awarded.

whether the UN could refuse to implement a decision of the UN Administrative Tribunal.¹⁶ The US, supported by several other Member States, submitted that the General Assembly could refuse to comply with the decisions of the UN Administrative Tribunal for it was the General Assembly that created the tribunal, and the latter could thus not bind the former.¹⁷ After examining its Statute, the ICJ not only said that the UN had validly created a judicial body empowered to render final and binding decisions,¹⁸ but it laid down the human rights and access to justice based rationale behind the creation of a judicial body in the form of the UN Administrative Tribunal. The *Effect of Awards* Advisory Opinion explained the very need for judicial mechanisms to resolve employment disputes between the UN and its employees as protecting the latter's right to access justice at a forum that was independent of the executive or political organs. The ICJ highlighted that the UN as an organization charged with the promotion of human rights generally could not possibly deny the right of its own employees to access justice when their employment rights were allegedly breached: stating in an off-cited passage:

[A]rticle 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.¹⁹

The views of the ICJ in *Effect of Awards* form the earliest exposition of the principle that staff members of international organizations ought to have access to an independent tribunal or arbitral process based on what may only be described as a human rights rationale. Critically, the ICJ left no doubt as to the independence of the UN Administrative Tribunal as a judicial body, with its decisions being final and binding on the other organs of the UN. While the phrase was not expressly used, the substance of the principle of the separation of powers was unambiguously endorsed. The ICJ said:

16 UNGA Res 785 (VIII) 'Supplementary Estimates for the Financial Year 1953' (9 December 1953).

17 *Effect of Awards*, 13.

18 *Ibid.*, 53.

19 *Ibid.*, 57.

This examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.²⁰

IATs thus must be wholly independent from the political or executive organs of an international organization, with the concept of the separation of powers applying within the context of institutional dispute resolution.²¹ Further support for this proposition can be garnered from another important ruling of the ICJ involving yet another case that concerned the impact of the US Loyalty Program. This time, it was UNESCO that had terminated the employment of certain US nationals within its employment following an agreement between the US Government and UNESCO's Director-General.²² On this occasion, the ILOAT went a step further than the UN Administrative Tribunal, not only determining that the termination was contrary to the relevant staff regulations and staff rules, but questioning the very propriety of the agreement between the Director-General and the US Government concerning the US Loyalty Program.²³

Similar to the UN's reaction in *Effect of Awards*, unhappy with the ILOAT's findings, UNESCO triggered the mechanism seeking the ICJ's Advisory Opinion regarding its obligation to comply with certain decisions of the ILOAT which it considered to be beyond its competence as it concerned political questions.²⁴ The ICJ held that the ILOAT was empowered to hear and determine the relevant cases, and issue final and binding decisions.²⁵ Propounding a liberal interpretation of the ILOAT's jurisdiction pertaining to its subject matter competence.²⁶

20 Ibid., 53.

21 See UNGA 'Administration of Justice at the United Nations: Report of the Internal Justice Council' (24 July 2017) UN Doc A/72/210, para. 3 (hereinafter 'IJC 2017 Report').

22 *Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints made against the United Nations Educational Scientific and Cultural Organization (Advisory Opinion)* [1956] ICJ Rep 77 (hereinafter '*UNESCO Advisory Opinion*').

23 See *Duberg* (1955) ILOAT Judgment No. 17; *Leff* (1955) ILOAT Judgment No. 18; *Wilcox* (1955) ILOAT Judgment No. 19; *Bernstein* (1955) ILOAT Judgment No. 21; *Froma* (1955) ILOAT Judgment No. 22; *Pankey* (1955) ILOAT Judgment No. 23; *Van Gelder* (1955) ILOAT Judgment No. 24. For analysis, see A. Megzari 181–2. In each of the cases, the ILOAT said the decisions to dismiss the officials was unfounded and impinged on the independence of the international service.

24 *UNESCO Advisory Opinion*, 17.

25 Ibid., 65.

26 Ibid.

As long as the ILOAT had personal jurisdiction over a defendant organization, as an independent judicial body, it was empowered to issue a final and binding decision upon its determination that the claim pursued was an employment one; dismissing UNESCO's argument that the permissibility of the US Loyalty Program was a political question and allegedly non-justiciable. What is clear is that the administrative tribunals subject to the ICJ's scrutiny so far have been conceived as full-fledged judicial mechanisms that are empowered to determine the scope of their jurisdiction in light of their statutes. In short, they possess decisional independence (a concept I will further discuss later).²⁷ Political or executive organs must not interfere in the administration of justice by wrongly colouring legal disputes as political ones.

The UN's internal justice regime, as well as the ILOAT, were designed to provide independent dispute resolution forums to the employees of international organizations submitting to the jurisdiction of either of those tribunals. Bearing in mind that those two most prominent international administrative regimes were created with the intention to ensure access to an independent forum to aggrieved employees, that rationale has had a substantial impact on the practice of several other institutions. The access to justice and human rights imperative behind the creation of IATs can now be said to be accepted wisdom.²⁸ In explaining the reasons for the creation of the World Bank Administrative Tribunal (WBAT), C.F. Amerasinghe, a leading authority in the field and a former Registrar of the WBAT, stated extra-curially 'where administrative power was exercised, there should be available machinery, in the event of disputes, to accord a fair hearing and due process to the aggrieved party'.²⁹

Not only at the World Bank but at numerous other organizations, independent judicial mechanisms have been created for employees to seek justice. In addition to the ILOAT, UNDT, and the WBAT (the three best-known IATs), there are at least 22 more IATs currently in operation.³⁰ Nowadays, IATs have come

27 See below.

28 See Wellens, 14.

29 C.F. Amerasinghe, 'International Administrative Tribunals' in C.P.R. Romano, K.J. Alter and Y. Shany, *The Oxford Handbook of International Adjudication* (OUP 2014) 316, 319.

30 These are the UNRWA Dispute Tribunal; the International Monetary Fund Administrative Tribunal; the European Bank for Reconstruction and Development Administrative Tribunal; the Asian Development Bank Administrative Tribunal; the Administrative Tribunal of the African Development Bank; the Administrative Tribunal of the Bank for International Settlements; Inter-American Development Bank Administrative Tribunal; the Nordic Investment Bank Arbitral Tribunal; the Black Sea Trade and Development Bank Administrative Tribunal; the OECD Administrative Tribunal; the NATO Administrative Tribunal; the European Space Agency Appeals Board; the European Organization for the Exploitation of Meteorological Satellites Administrative Tribunal; the Administrative Tribunal for the Organization of American States; the Administrative Tribunal of the African

to be seen as mechanisms created to ensure that the employees of international organizations can exercise their right to access an independent forum to resolve their employment claims. In addition to the guarantee of 'independence', other fair trial guarantees now constitute an aspect of international administrative procedural law as well.

III A General Principle of International Administrative Procedural Law of Fair Trial

1 *The Right to 'Equality' in the Administration of Justice*

Since the *Effect of Awards* Advisory Opinion was rendered in 1954, through one label or another the ICJ has explicitly incorporated the suite of fair trial guarantees as applicable to the resolution of international administrative disputes. Particularly significant is the right to equality and non-discrimination in the administration of justice. Given its significance to the realization of a fair trial, the right to equality before the courts and tribunals is contained in the first sentence of Art. 14 (1) of the ICCPR which states that '[e]veryone shall be equal before the courts and tribunals'.

The right to equality in the administration of justice has two principle aspects. First, the right of an individual to equal treatment before a court or a tribunal; or, for that matter, any other public authority charged with administering justice. This right firstly demands the right to equal and non-discriminatory access to the courts.³¹ Second, all parties to the proceedings must be treated equally in procedural terms. This latter aspect of the right to equality is referred to as the concept of 'equality of arms'. Equality of arms, also a fundamental rule of 'fairness',³² requires that all parties to the proceedings are given an equal opportunity to present their case fully and are not subjected to discriminatory treatment. The UN Human Rights Committee states in its General Comment No. 32 that:

There is no equality of arms if, for instance, only [one party] is allowed to appeal a certain decision. The principle of equality ... demands, inter alia,

Union; the MERCOSUR Administrative Tribunal; the European Court of Justice (to which EU officials have access); the Complaints Board of the European Schools; the Administrative Tribunal of the European Stability Mechanism; the Council of Europe Administrative Tribunal; the Commonwealth Secretariat Arbitral Tribunal; and the Appeal Commission of the International Organization for the Francophonie.

³¹ General Comment No. 32, para. 8.

³² *Ibid.*, paras 15–29.

that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.³³

The principle of equality provided for by the ICCPR and replicated in all other human rights instruments³⁴ was endorsed and incorporated into the institutional setting via the principle of 'good administration of justice'. The ICJ's jurisprudence has been developed in the context of its advisory jurisdiction concerning the review of decisions of the two major international administrative regimes, being the UN Administrative Tribunal (abolished in 1995) and the ILOAT (abolished recently).³⁵ Those regimes permitted the ICJ to render Advisory Opinions where it could be shown that in delivering justice, the tribunal seized had failed to comply with fundamental rules of procedure. The ILOAT regime was contained in Art. XII of the ILOAT Statute which provided that:

1. In any case in which the Governing Body of the [ILO] challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an Advisory Opinion, to the International Court of Justice.
2. The opinion given by the Court shall be binding.

Two distinct intrusions into the right to equality prevailed in the Art. XII regime. First, Art. XII only allowed the organization to seek the ICJ's Advisory Opinion where the very employee who initiated the litigation at the ILOAT had no ability to do so.³⁶ Second, due to the limitations in the ICJ Statute, as individuals cannot appear before the ICJ, as they have no standing, the litigating employee could not exercise his or her fair trial rights on an equal basis with

33 Ibid., para. 14.

34 ICCPR, Arts 2, 14 (1) and 26 and European Convention on Human Rights, Arts 6 and 14 read together; American Declaration of Rights of and Duties of Man (adopted 2 May 1948) (1949) 43 AJIL Supp 133, Art. 2 and American Convention on Human Rights, Arts 1 (1) and 24 read together; African Charter on Human Rights, Arts 2, 3 and 19 read together and African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (May 2001) OS(XXX)247, Principle A (2); Arab Charter on Human Rights (adopted 15 September 1994) (1997) 18 HRLJ 151, Art. 12; see also Association of Southeast Asian Nations, 'Human Rights Declaration' (18 November 2012) General Principle 3.

35 A. Megzari, Chapter 17. Regarding the recent abolishing of the Article XII regime of the ILOAT, see the amendments to the Statute of the ILO Administrative Tribunal adopted at its 105th Session (June 2016) which repealed Article XII of the ILOAT Statute.

36 See below.

the organization.³⁷ Both those factors on their face contravened the principle of equality of arms. When confronted by the equality deficit in the Art. XII regime, in its *UNESCO Advisory Opinion*,³⁸ the ICJ allowed the employee to make submissions through the organization, and dispensed with oral hearings altogether to bring about so-called 'actual equality'.³⁹ The Court justified creating 'actual equality' without providing detailed reasons for its rationale for doing so, simply observing that the 'principle of equality of the parties follows from the requirements of good administration of justice'.⁴⁰

In a flash, the principle of 'good administration of justice' was first introduced in 1956 via the *UNESCO Advisory Opinion*, and through it, the right to equality became a right applicable within the international administrative law context. It was precisely to alleviate inequality of treatment that the ICJ introduced the principle of 'good administration of justice'. That principle is not merely a moral or aspirational standard, but constitutes a legal principle grounded in the right to a fair trial. In the preceding decades, as the human rights framework has consolidated, the incorporation of an even broader suite of fair trial guarantees has been achieved through the ICJ's subsequent jurisprudence.

2 *Incorporation of Other Component Fair Trial Rights into International Administrative Procedural Law*

The ICJ has had further occasion to expand on the requirements of the fair delivery of international administrative justice in the context of its jurisprudence regarding the review function in respect of the decisions of the now abolished UN Administrative Tribunal. Between 1956 and 1995, Art. 9 of the UN Administrative Tribunal's Statute provided the possibility for the ICJ to render an Advisory Opinion which was binding on the parties, to determine the question whether the UN Administrative Tribunal had made a 'fundamental error in procedure having occasioned a failure of justice'. What is currently important is the observations of the ICJ on what a fair delivery of 'justice' demands. In its Advisory Opinion in the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*,⁴¹ reinforcing the guarantees of 'independence' and equality, the ICJ went on to further introduce to international administrative procedural law several other component fair trial rights, stating:

37 For limitations as to standing, see Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832, Art. 66.

38 *UNESCO Advisory Opinion*, 86.

39 See below.

40 *UNESCO Advisory Opinion*, 86.

41 *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep 166.

[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings, the opponent; and the right to a reasoned decision (emphasis added).⁴²

In applying the right to a fair trial to the international administrative context, the ICJ again did not expand upon its rationale with precision, although the conclusions reached cannot be doubted. The 'well recognized' procedural guarantees falling within the scope of the right to a fair trial are best understood as a general principle of law; a source expressly mentioned in Art. 38 (1) (c) of the ICJ Statute. In fact, it is procedural law where the ICJ has invoked the general principles of law most frequently, often without using that label.⁴³ I. Brownlie states:

The most frequent and successful use of domestic law analogies has been in the field of evidence, procedure, and jurisdiction. Thus there have been references to the rule that no one can be judge in his own suit, to litispendence, to *res judicata*, to various 'principles governing the judicial process', and to 'the principle universally accepted by international tribunals ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given ...'.⁴⁴

The ICJ's lack of methodological analysis is not to be overstated for the right is so central to the administration of justice that its application may be readily assumed. The ICJ has used different formula to refer to what is in effect the implementation of the right to a fair trial in the resolution of international administrative disputes; each of which leads to the same result, but through different routes.

After setting out the human rights and access to justice-based rationale behind the very creation of IATs in 1954 through the *Effect of Awards* Advisory

42 Ibid., para. 92.

43 See generally, R. Yotova, 'Challenges in the Identification of the 'General Principles of Law Recognized by Civilized Nations': The Approach of the International Court' (Research Paper No. 38/2017, University of Cambridge, August 2017).

44 I. Brownlie, *Principles of International Public Law* (6th edn OUP 1979) 18–19.

Opinion, in 1956, via the principle of 'good administration', the rule of equal treatment was endorsed in the *UNESCO Advisory Opinion*. In 1973, the Court endorsed a broad suite of fair trial guarantees applicable to international administrative disputes, including the guarantee of judicial independence and impartiality, the principle of equality, the right to access to justice without undue delay, the right to a defence, and the right to a reasoned judgment. Finally, as recently as 2012, through the *IFAD Advisory Opinion*,⁴⁵ certain judges of the ICJ have gone further and presumed the application of fair trial provisions contained in human rights treaties as creating individual rights enforceable against international organizations.⁴⁶

The ICJ's advisory jurisdiction concerning the aforementioned review mechanisms led to binding judgments. In this sphere, the ICJ's Advisory Opinions effectively constitute directions to the respective IAT as to how international administrative justice is to be delivered. Thus there ought to be little controversy that the right to a fair trial together with its key component parts is now incorporated into the corpus of the procedural law relevant to the resolution of international administrative disputes,⁴⁷ giving rise to what I have called an international administrative procedural law of fair trial.⁴⁸ Whether the selected justice systems deliver justice in compliance with those standards ultimately to be sourced in human rights law is the issue considered in the remainder of this paper.

iv The Method Used to Assess the Selected Justice Systems

Whether or not the right to a fair trial is being complied with depends not only on the characteristics of the justice machinery put in place, but ultimately on

45 *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion)* [2012] ICJ 10 (hereinafter '*IFAD Advisory Opinion*').

46 *IFAD Advisory Opinion* (Separate Opinion of Judge Cançado Trindade); also note *South West Africa (Ethiopia v. South Africa) (Second Phase)* [1966] ICJ Rep 6, 250 (Dissenting Opinion of Judge Tanaka).

47 While the ICJ's jurisprudence has direct relevance for the UN tribunals and the ILOAT, it has been adopted by other leading IATs as well: see *De Merode v. World Bank* (5 June 1981) 1 WBAT Rep 734, decision discussed by R. Gulati at OXIO 229, available at <http://opil.ouplaw.com/view/10.1093/law-oxio/e229.013.1/law-oxio-e229?prd=OXIO> (last accessed 30 May 2018).

48 The right to a fair trial has also been transported from international human rights law to other spheres of international law, including international humanitarian law; see generally D. Weissbrodt, 'International Fair Trial Guarantees' in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 410.

how that machinery is brought to bear in a particular case.⁴⁹ In a study of this nature, while the emphasis remains on the character of the justice machinery installed (the environmental factors), every attempt is made to demonstrate how the machinery is operating in practice. I consider both the situation *de iure*, and as much as possible, *de facto*. International human rights law demands that the right to a fair trial is practically realized, and not just formally prescribed.⁵⁰ With that background in mind, in this section, I provide the method adopted to assess internal justice systems in terms of the justification for selecting the UN and ILOAT regimes for assessment; the rights considered; and where to find the precise content of the applicable standards.

1 *The Internal Justice Regimes Considered*

By selecting the principal justice regimes that exercise jurisdiction over more than 60 international organizations and well in excess of 100,000 international civil servants operating around the world,⁵¹ this chapter identifies the fair trial deficits for the workforce of a vast number of international civil servants. To the extent that the justice regimes not presently considered possess similarities with the regimes included within the scope of this paper, analogies may be drawn. The conclusions drawn in this paper may thus apply equally to other internal justice systems as well.⁵²

49 General Comment No. 32, para. 58.

50 Ibid.

51 At the time of writing, according to the available information, 39,651 people were employed by, and thus had access to, the UN Tribunals, see UNGA 'Composition of the Secretariat: Staff Demographics: Report of the Secretary-General' (11 July 2017) UN Doc A/72/123. The UNDT is also open to, amongst others, UN Offices Away from Headquarters, and UN Funds and Programmes; so its personal jurisdiction would be significantly higher. See <http://www.un.org/en/oaj/dispute/jurisdiction.shtml> (last accessed 2 June 2018). According to its website, the ILOAT is currently open to more than 58,000 international civil servants; see <http://www.ilo.org/tribunal/lang--en/index.htm> (last accessed 3 June 2018). However, it appears that the ILOAT is open to at least 63,000 persons from 58 different international organizations.

52 It is noted that other international administrative regimes do undergo periodic reforms. Those matters are outside the scope of this work. See, for example, the reforms carried out within the internal justice system of NATO: H. Dijkstra, 'Functionalism, Multiple Principals and the Reform of the NATO Secretariat after the Cold War' (2015) 50 *Cooperation and Conflict* 128; for a rating of various justice systems in terms of compliance with fair trial standards, see the brief observations in R. Dhinakaran and A.P. Haines, 'Internal Justice Systems of International Organizations Legitimacy Index 2017', available at http://www.ialcoe.org/wp_site/wp-content/uploads/2017/10/6190BWL_CoE_Legitimacy_Index_2017.pdf (last accessed 3 June 2018).

2 *The Fair Trial Guarantees Considered*

The right to access an independent and impartial court is the key component guarantee against which the selected justice systems are measured. As will be further discussed below, the content of independence and impartiality also require the right and duty of a court to deliver justice ‘fairly’, thus incorporating within its rubric other key component fair trial guarantees. It is in that broader sense of ‘independence’ against which the selected justice systems will be assessed. Due to limitations of space, only the most pressing fair trial deficiencies in the selected justice regimes are identified. No doubt, numerous other deficits would exist and need addressing. If the significant deficiencies identified are effectively tackled, realizing the right to a fair trial for the workforce of international organizations will already receive a significant boost.

3 *Where to Find the Relevant Standards?*

While the right to a fair trial is now an aspect of international administrative procedural law, its content needs substance. That content is located in the law of international human rights. Guidance may be drawn from the jurisprudence of human rights courts and monitoring mechanisms, IATS, and critically, soft law instruments that have played a significant role in developing modern standards of independence and impartiality. In the latter respect, those standards are primarily contained in the International Bar Association’s Minimum Standards of Judicial Independence 1982 (hereinafter ‘IBA Standards’),⁵³ the UN Basic Principles on the Independence of the Judiciary, 1985 (hereinafter ‘UN Basic Principles’);⁵⁴ the Bangalore Principles of Judicial Conduct 2002 (hereinafter ‘Bangalore Principles’);⁵⁵ the Commonwealth (Latimer House) Principles on the Three Branches of Government 2003 (hereinafter ‘Commonwealth Principles’);⁵⁶ and the Burgh House Principles on the Independence of

53 International Bar Association ‘IBA Minimum Standards of Judicial Independence’ (1982), available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=10917543-8F09-4A68-8324-9228BB6237A1> (last accessed 3 June 2018).

54 UN Congress on the Prevention of Crime and the Treatment of Offenders (7th) ‘Basic Principles on the Independence of the Judiciary’ (26 August–6 September 1985) UN Doc A/CONF.121/22/Rev.1, 5.

55 Judicial Group on Strengthening Judicial Integrity, ‘The Bangalore Draft Code of Judicial Conduct’ (2002), available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (last accessed 4 June 2018):

56 ‘The Commonwealth Latimer House Principles: Practitioner’s Handbook’ (2017), available at <http://thecommonwealth.org/sites/default/files/news-items/documents/LatimerHousePrinciplesPH7Jul17.pdf> (last accessed 4 June 2018).

the International Judiciary 2004 (hereinafter 'Burgh House Principles').⁵⁷ The Burgh House Principles have been especially developed bearing in mind the particularities of international courts, applying to international judicial mechanisms such as IATs), as well as in respect of mechanisms and individuals performing roles of a judicial character (including arbitrators).⁵⁸ While the Burgh House Principles have direct relevance to the work of IATs,⁵⁹ as was clarified in the Universal Declaration on the Independence of Justice 1983 (hereinafter 'Montreal Declaration'),⁶⁰ the principles of independence and impartiality, applicable in the national context, equally apply internationally.⁶¹ As will become apparent, all the aforementioned standards providing for similar guarantees, reference each other,⁶² making them individually and cumulatively significant for the purposes for developing and giving content to the criteria for independence, impartiality, and fairness.

v The Criteria for the Assessment

Human rights law demands that a court or tribunal must be 'independent and impartial' for justice to be delivered in compliance with the requirement of a fair trial.⁶³ The concept of independence demands that the judiciary makes decisions based on the merits of the case and not on any ulterior motives or political considerations. If a court or a tribunal is not independent and impartial, then the right to a fair trial cannot be effectively realized: the substantive right to an effective remedy provided for in all major human rights conventions is

57 Study Group of the International Law Association on Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 'The Burgh House Principles on the Independence of the International Judiciary' (2004), available at https://www.ucl.ac.uk/international-courts/sites/international-courts/files/burgh_final_21204.pdf (last accessed 4 June 2018).

58 *Ibid.*, Preamble.

59 According to the Preamble, the Principles 'shall apply primarily to standing international courts and tribunals ... to full-time judges. The Principles should also be applied as appropriate to judges ad hoc, judges ad litem and part-time judges, to international arbitral proceedings and to other exercises of international judicial power'. Burgh House Principles, para. 1.2 establishes their applicability to IATs and similar judicial bodies.

60 Universal Declaration on the Independence of Justice (10 June 1983), available at <https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf> (last accessed 4 June 2018).

61 *Ibid.*, paras 1.06 and 1.07.

62 For example, the Burgh House Principles refer to the UN Basic Principles in their Preamble.

63 General Comment No. 32, para. 3.

then impermissibly restricted.⁶⁴ Given its significance, the UN Human Rights Committee states that the requirement of ‘independence and impartiality ... is an absolute right that is not subject to any exception.’⁶⁵

While there may be some overlap, independence and impartiality are different things. The point has been neatly made in the following terms:

‘Independence’ means putting judges in a position to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, armies, or any other source of State power or inappropriate influence that may possibly bear upon them. ‘Impartiality’, on the other hand, is the judicial characteristic of disinterest towards parties and their causes in litigation.⁶⁶

A brief description of the components of independence and impartiality, how they can overlap, and how the concepts apply in international administrative law is provided below.

1 *‘Independence’*

Judicial independence triggers considerations around the judiciary’s structural design, with the central demand being that the executive and the legislature must not interfere in the performance of the judicial function.⁶⁷ This concept, referred to as the separation of powers, is fundamental to the rule of law.⁶⁸ It is as much applicable to the administration of justice in national systems, as it is in the international (including the international administrative) context.⁶⁹ As has been said in the context of the UN’s internal justice system:

64 A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 61–62.

65 General Comment No. 32, para. 19.

66 G. Robertson, ‘Judicial Independence: Some Recent Problems’ (Thematic Paper No. 4, International Bar Association’s Human Rights Institute, June 2014) 3.

67 See Burgh House Principles, paras 1.1 and 1.2; Montreal Declaration, paras 1.02, 1.03 and 1.07; UN Basic Principles, para. 1.

68 See for example Commonwealth Principles, Principle 1. As Nollkaemper (at 54) points out: Independence in the second sense is a key component of the rule of law. In its minimal form, the rule of law requires that public power is effectively limited by law. By protecting the courts from political pressures, independence enables courts to settle disputes in conformity with the law, rather than politics.

69 Burgh House Principles, para. 1.2: ‘Where a court is established as an organ or under the auspices of an international organization, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organization ...’; see also Montreal Declaration, para. 1.7.

In a formal setting, independence of the judiciary is directly related to the separation of powers in respect of the arms of the governance structures of the United Nations. If there is no separation of power properly recognized and supported, not only do the necessary checks and balances not function properly in respect of the matters within the jurisdiction of the Dispute Tribunal and the Appeals Tribunal, but there can be no proper assertion of the rule of law or provision of justice for staff or the Organization.⁷⁰

Judicial independence can be further understood through the lenses of institutional and individual independence,⁷¹ although overlaps exist. Institutional independence requires that the judiciary at large must be independent of the other branches of government,⁷² particularly requiring: ‘operational independence’ (involving both administrative and financial independence); decisional independence (requiring that court decisions be enforced and the judiciary have the autonomy to determine its jurisdiction); and the judiciary has both ‘the right and the duty to ensure fair court proceedings and issue reasoned decisions’.⁷³

Individual independence demands the personal and substantive independence of individual judges.⁷⁴ Personal independence means that ‘the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control’.⁷⁵ Substantive independence demands that individual judges ‘have a right and a duty to decide cases before them according to law, free from outside interference including the threat of reprisals and personal criticism’.⁷⁶ In General Comment No. 32, the UN Human Rights Committee clarified that ‘to safeguard their independence, the status of judges, including their term of office, their independence,

⁷⁰ IJC 2017 Report, para. 27.

⁷¹ Bangalore Principles, Value 1; Commonwealth Principles, Principle IV.

⁷² See for example IBA Standards, para. 2.

⁷³ Each of these criteria are reflected in the various standards and principles on judicial independence discussed later. For a helpful summary and discussion of three criteria, see, Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, ‘Professional Training Series No. 9: Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers’ (UN 2003) (hereinafter ‘OHCHR Report’) 119–20; regarding the duty to provide a fair hearing, see especially para. 4.5.8.

⁷⁴ IBA Standards, para. 1.

⁷⁵ IBA Standards, para. 1 (b); Basic Principles, para. 11; Bangalore Principles, Value 1.1; Montreal Declaration, para. 2.2.

⁷⁶ OHCHR Report, 133; see IBA Standards, para. 1 (c).

security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law'. In light of the above, the criteria against which the selected justice systems are assessed vis-à-vis individual independence are: method of appointment; minimum qualifications required; security of tenure in terms of length; financial security; and judicial accountability and the method of removal.

The following discussion outlines each of the aforementioned criteria relating to institutional and individual independence.

a Institutional Independence

(i) *Operational Independence*

Operational independence is necessary to maintain the judiciary's autonomy from the executive and the legislature. It requires that courts and tribunals possess both, administrative and financial independence from the other branches of government.⁷⁷ As Principles 1.2 and 1.3 of the Burgh House Principles state in respect of international courts and tribunals:

Where a court is established as an organ or under the auspices of an international organization, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organization. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.

Thus, to secure operational independence the judiciary should be adequately funded so that it can perform its functions effectively, and without interference from the executive.⁷⁸ In The international administrative law context, this would amount to an IAT's administrative and financial independence from the executive and political organs of the relevant international organization.

⁷⁷ IBA Standards, para. 7; Montreal Declaration, para. 2.40; Burgh House Principles, para. 1.2, and 1.3.

⁷⁸ Especially note Burgh House Principles, para. 6: 'States parties and international organizations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively'; see also IBA Standards, para. 7; UN Basic Principles, para. 7; Commonwealth Principles, Principle IV (c); Montreal Declaration, para. 2.41.

(ii) *Decisional Independence*

Institutional independence also requires decisional independence be possessed by the judiciary: meaning that the court is able to autonomously determine its own jurisdiction;⁷⁹ and judicial decisions are enforced and respected.⁸⁰ The former means that vis-à-vis employment disputes, an IAT may decide conclusively its own jurisdiction and competence. Regarding the latter, its decisions must be binding, enforced, and respected by the administration. Without decisional independence, a court cannot be said to be institutionally independent. Both aspects of decisional independence have been expressly endorsed in the context of international administrative dispute resolution several decades ago. Recall that in the *UNESCO Advisory Opinion*, the ICJ had stressed on the ability of the ILOAT to determine its own competence in the sphere of its subject matter jurisdiction; and in the *Effect of Awards* Advisory Opinion, the court had endorsed the requirement of the final and binding nature of UNAT judgments. More recently, the UNDT has emphasized the need for the respect and enforceability of its judgments to ensure the due process of law is followed, and the separation of powers maintained.⁸¹

(iii) *The Right and Duty to Provide a Fair Hearing*

The final component of institutional independence relates to the right and duty of a court to render justice 'fairly'.⁸² No barriers ought to be placed before the justice machinery so that it is able to deliver justice in compliance with the entire range of fair trial guarantees, provided by human rights law generally, and international administrative procedural law specifically. Principle 6 of the UN Basic Principles states:

The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.⁸³

The requirement that independent justice also demands that it be rendered fairly incorporates the other key component fair trial guarantees within the

79 See UN Basic Principles, para. 3: 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'; see also Montreal Declaration, para. 2.5.

80 IBA Standards, para. 7; UN Basic Principles, para. 4; Montreal Declaration, para. 2.48.

81 See for example, *Tadonki* (30 October 2009) UNDT/2009/058, paras 9.1, 9.3 and 9.5–9.6.

82 For a discussion, see OHCHR Report, para. 4.5.8.

83 See also Montreal Declaration, para. 1.8 and 2.45.

rubric of the right to an independent and impartial court or tribunal. These include, but are not limited to, the principle of equality in the administration of justice (equality and non-discrimination is also a general principle of international administrative law);⁸⁴ the right to a fair trial without undue delay (a due process right specifically endorsed by several IATs);⁸⁵ and the provision of a reasoned judgment. Increasingly, the right to an oral hearing;⁸⁶ and the right to an appeal;⁸⁷ are also said to constitute aspects of international administrative procedural law.⁸⁸ These latter component fair trial rights should then also be taken into account when determining whether justice is rendered 'fairly'.⁸⁹

b Individual Independence

(i) *Selection Process: Method of Appointment; and Minimum Qualifications*

Who appoints judges, and how and on what basis (including minimum qualifications required) are judges appointed, constitute the central matters of concern under this head.⁹⁰ To uphold the doctrine of separation of powers, it is increasingly considered that the executive or legislature ought to have a minimal role in the selection and appointment of judges. And that only appropriately qualified persons be appointed to judicial office. On the former, if the executive has undue influence on the appointment process, then there could

84 See *De Merode v. World Bank* (5 June 1981) 1 WBAT Rep 734.

85 See below.

86 UNGA 'Report of the Redesign Panel on the United Nations System of Administration of Justice' (28 July 2006) UN Doc A/61/205, paras 10 and 92.

87 *Ibid.*, para. 95.

88 In disciplinary cases, it may be argued that due to the severity of the sanctions that may be imposed, those rights ought to be provided to every aggrieved person. There is some debate whether the right to an oral hearing and appeal should be made available as of right in non-criminal proceedings as Art. 14 of the ICCPR only expressly provides for those rights in the criminal context.

89 See below.

90 Traditionally, there is no strict criteria regarding the method of appointments or qualifications for appointment required. For method of appointment, see IBA Standards, para. 3 (appointments should preferably be done by bodies comprising of members of the judiciary); Montreal Declaration, para. 2.12 states that judicial appointments should be non-discriminatory allowing for nationality to be a criterion for appointments to international courts. For requirements on qualifications: see IBA Standards, para. 26 (only appointments based on merit are permissible); UN Basic Principles, para. 10 (requiring that: 'Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives ...').

be raised serious questions about the motives behind the appointment.⁹¹ Principle 10 of the UN Basic Principles relevantly states:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.

While judicial appointments made by the executive alone may not automatically cause the breach of the principle of individual independence,⁹² the grater the role of the executive, the more scrutiny ought to be given when issues of independence and impartiality are engaged. In such cases, there should be enacted other safeguards that mitigate the independence deficit caused by the appointment process, such as by providing for strong guarantees regarding the security of tenure.⁹³

This would be especially the case where the executive is the defendant before the courts whose judges are appointed by the former. In the international administrative context, as the Respondent before an IAT is always the defendant organization, any significant role by the executive in the appointment of judges should be treated as highly suspect.

To remove this very risk of an improper motive in the appointment of judges, transparency is critical. Principle IV (a) of the Commonwealth Principles provides that to achieve judicial independence 'appointments should be made

91 See for example, UN Human Rights Committee, 'Communication No. 486/1991, *Oló Bahamonde v. Equatorial Guinea*', Annex 'Views' (10 November 1993) para. 5.1: The complainant claimed that the judges in Equatorial Guinea could not 'act independently or impartially, since all judges and magistrates were directly nominated by the President'. At para. 9.4, the Committee found that 'a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the form is incompatible with the notion of an independent tribunal'.

92 E. Cannon and I. Warlam, 'The Judicial Independence of the International Labour Organization Administrative Tribunal: Potential For Reform' (Amsterdam International Law Clinic 2007) 34–35 (hereinafter 'Amsterdam Report'): 'In sum, the jurisprudence confirms that while appointment by the executive is not in itself cause to question the independence of a tribunal, such a circumstance should be counter-balanced with guarantees that insure the independence of the tribunal at hand'.

93 UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Art. 40 of the Covenant – Concluding Observations of the Human Rights Committee – Slovakia' (4 August 1997) UN Doc CCPR/C/79/Add.79, para. 18. In ECtHR *Lauko v. Slovakia* (19 October 1995) App No. 26138/95, the combination of appointment by the executive and the 'lack of any guarantees against outside pressures and any appearance of independence' led the Court to conclude that the bodies in question could not be considered to be independent of the executive.

on the basis of clearly defined criteria and by a publicly declared process', where 'merit and proven integrity' is the criteria of eligibility for appointment to public office.⁹⁴ Similarly, Principle 2.3 of the Burgh House Principle states that '[i]nformation regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organization or other body responsible for the nomination, election and appointment process'.⁹⁵

Transparent processes that are independent of the executive or legislature in the appointment of judges are required not only to ensure that the executive does not make appointments based on ulterior motives, but also to guarantee that the best possible candidates are identified and appointed to judicial office. Establishing independent and appropriately constituted bodies responsible for judicial selection, the particularities of which may differ from jurisdiction to jurisdiction, with a well-defined mandate, would be thus a key factor in ensuring the individual independence of a judge who is able to competently decide cases without fear or favour.⁹⁶

It follows that judicial appointments must be made on merit and based on legal qualifications as the primary consideration.⁹⁷ Regarding the qualifications required, while no precise standards have been prescribed in the various instruments, it is stressed that without relevant experience and minimum qualifications required before an individual may be considered for a judicial role, not only there are raised concerns about the personal and substantive independence of a judge; but also whether a judge can discharge his or her role 'competently' – recalling that the right to access a court, is to be accompanied by the qualities of competence, independence and impartiality. As the Burgh House Principles provide in Principle 2.1 'appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges'.

In the IAT context, in addition to requirements of diversity of nationality, criteria typical to international judicial appointments, proven experience in the

94 Commonwealth Principles, Principle V (a).

95 See *Ibid*; see also Burgh House Principles, para. 2.22.

96 The Commonwealth Principles do not specify the mechanism by which judges should be appointed. However, the Commonwealth Principles (at 59) indicate that an 'independent process' should be used and recommend that genuinely independent judicial appointments commission be established where no such mechanism exists.

97 The UN Human Rights Committee has said that judges should be selected primarily on the grounds of their legal qualifications: 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding Observations of the Human Rights Committee – Sudan' (19 November 1997) UN Doc CCPR/C/79/Add.85, para. 21.

area of IAL, or related fields, must be a pre-condition for judicial selection.⁹⁸ It is hard to imagine how an inexperienced candidate lacking in minimum qualifications can deliver justice competently, independently and impartially.

(ii) *Security of Tenure: Length of Term; Financial Security; and Judicial Accountability*

First, the length of the term of a judge is key to assessing individual independence, with guaranteed tenures necessary to ensure individual independence. Short renewable terms tend to decrease independence; and relatively longer non-renewable terms enhance it.⁹⁹ The assumption that a judge would wish for his or her term to be renewed is an obvious one. That being the case, subconsciously or perhaps on occasions consciously, a judge's decision making may be compromised. Instead of basing the decision on the law and facts of a given case, the decision may be driven by ulterior motives, jeopardizing the individual independence of a judge.¹⁰⁰ Following an extensive analysis that included interviews with several judges from various international courts and tribunals, Dunoff and Pollack reach the conclusion that longer terms that cannot be renewed maximize judicial independence.¹⁰¹ Notably, the reasons for creating nine-year non-renewable terms for the judges of the European Court of Human Rights were rooted in the need for enhanced independence. An Evaluation Group appointed by the Council of Europe to assess the working of the European Court of Human Rights had said that a nine year non-renewable judicial term for judges of the European Court of Human Rights would 'offer a further guarantee of the Court's independence'.¹⁰²

Implementing relatively lengthy tenures with limited to no possibilities for renewal (if at all) ought to then be the standard for judicial appointments. An

98 The UN regime is considered below; another example is provided by the Statute of the World Bank Administrative Tribunal. Art. IV (1) provides that the 'Tribunal shall be composed of seven members, all of whom shall be nationals of Member States of the Bank, but no two of whom shall be nationals of the same State. The members of the Tribunal shall be persons of high moral character and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence'. In relevant fields such as employment relations, international civil service and international organization administration.

99 See generally Dunoff and Pollack.

100 In this regard, see especially Burgh House Principles, paras 3.1 and 3.2. Para. 3.2 provides that: 'The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner'.

101 See generally Dunoff and Pollack.

102 Justin Harman (Chair of Evaluation Group), 'Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights', para. 89.

example of best practice is provided by the UN's internal justice system which has created seven year non-renewable terms for UNDT judges. Moreover, a matter especially relevant to IATs is that of the contract judge. The position of a judge on temporary contracts is akin to the situation of a judge whose tenure is short and renewable, with the judicial officer in question relying on one of the parties for renewal what is effectively a private contractual arrangement. Where the renewing person or authority is frequently a defendant before the judge (as will be the case at IATs). There is little doubt that structural independence is seriously and adversely affected in such circumstances.¹⁰³ Arguing against the practice of certain IATs, Robertson correctly notes that 'a subtle psychological pressure applies to the 'contract judge', whose appointment is up for renewal every few years'.¹⁰⁴

The *Effect of Awards*, and *UNESCO Advisory Opinion* provide abundant evidence of the defendant organization seeking to avoid judgments rendered by IATs, blatantly trying to compromise their independence. Without security of tenure, a court or tribunal cannot said to be independent especially where the party appearing before the court is also responsible for not only appointing judges, but determining whether their terms should be renewed. Where one party to the litigation can influence the renewal process, short renewable terms will almost always present such a structural deficit that the perception of independence possibly cannot be maintained.¹⁰⁵

Second, the financial security of a judge is also necessary to maintain individual independence. Generally, judicial salaries and pension rights ought not to be subject to reduction by the executive or the legislature for such a threat of action or its carrying out may compromise the financial security of judges, creating a risk that decisions adverse to the government of the day are not made for fear of retaliation.¹⁰⁶ Financial security ultimately constitutes an aspect of the security of tenure. As a recent commentary to the Commonwealth Principles explain, guarantees of financial security 'serve to shield judges from

103 See Cannon and Warlam, 38.

104 Robertson, 'Judicial Independence: Some Recent Problems'. Also note that international instruments state that temporary appointments must be avoided: see IBA Standards, para. 22 (b).

105 See especially Bangalore Principles, Values 1.2 and 1.3 that state: 'A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate' and '[a] judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom'.

106 See Burgh House Principles, para. 4.2; IBA Standards, para. 15 (b); Commonwealth Principles, Principle IV (b); Montreal Declaration, para. 1.14.

external pressures and conflicts of interest when they hold powerful individuals or government bodies legally to account'.¹⁰⁷

Finally, judicial accountability – one way in which the executive or the legislature can intrude into the independence of the judiciary is through the process of dismissal. In that regard, it is now well accepted that dismissal is only permissible for the most exceptional reasons, such as in cases of proven misbehaviour or where a judge is of unsound mind.¹⁰⁸ Moreover, should a judge be dismissed, he or she must be accorded the full protections of a fair trial.¹⁰⁹

2 *'Impartiality'*

Whereas judicial independence concerns the structural design of the judiciary, the rules on impartiality relate to the conduct of the judge/s in a particular case. 'Judges who are not independent of the State [or organization] will be perceived (and may actually become) partial to the State [or organization] when it is a party to litigation in their court'.¹¹⁰ Issues of independence and impartiality may especially intersect in such instances. Here, the concepts of independence and impartiality coincide for the structural deficits regarding judicial independence are sufficient to raise justifiable concerns relating to the impartiality of a court or tribunal.

At IATS, independence and impartiality will invariably overlap. Thus, the need for statutory protections against conflicts of interest; and absolute compliance with those standards is necessary to guarantee that impartiality on part of judges in individual cases is maintained. In so far as the *de iure* guarantees pertaining to impartiality are concerned, the standards require that the judiciary does not promote the interests of one party over the other.¹¹¹ Specifically, a judge should be free from objective and subjective bias. The UN Human Rights Committee has said in General Comment 32:

107 J. van Zyl Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice' (Report, British Institute of International and Comparative Law 2015) 19–20.

108 Burgh House Principles, para. 17.1–17.4; IBA Standards, paras 4 (a)–(b) and 30; UN Basic Principles, para. 12; Commonwealth Principles, Principle IV (d).

109 Burgh House Principles, para. 17.2; UN Basic Principles, para. 17; Montreal Declaration, paras 2.30 and 2.33.

110 Ibid.

111 See UN Human Rights Committee, 'Communication No. 802/1998, *Rogerson v. Australia*' (3 April 2002) UN Doc CCPR/C/74/D/802/1998, para. 7.4. The UN Human Rights Committee held that the '[i]mpartiality of the court implies that judges must not harbour preconceptions about the matter before them, and they must not act in ways that promote the interests of one of the parties'.

The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.¹¹²

Instances where a judge's conduct, such as demonstrable hostility towards a particular party, or corrupt conduct is proved, subjective bias may readily be established. Most cases however concern objective bias as it can be difficult to produce compelling evidence regarding the personal conduct of a judge. Objective bias, also known as apparent or apprehended bias requires an assessment from the perspective of the reasonable person. The question asked is whether the court or the tribunal can reasonably bring an impartial mind to the case before it: if not, the judge must be disqualified from hearing the case.¹¹³ It is trite to say that justice should not only be done, but justice must be seen to be done.¹¹⁴

Any conflict of interest, such as previous involvement in a case, personal knowledge of the facts, or economic interest in the outcome, ought to disqualify a judge from hearing it for such matters raise concerns around both, subjective and objective bias.¹¹⁵ Moreover, a judge's overall conduct must also be beyond reproach. Value 11 of the Bangalore Principles states that '[i]mpartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made'. Applying this value, Principle 11 of the Bangalore Principles encapsulates the rules that appear in various instruments in one form or another.¹¹⁶ The rules focus on the judge's behaviour and conduct. First, a 'judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary'.¹¹⁷ Second, a 'judge shall, so far as is reasonable, so conduct

112 See General Comment No. 32, para. 21; ECtHR *Findlay v. The United Kingdom* (25 February 1997) App No. 22107/93, para. 73. In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see *Findlay v. The United Kingdom*, para. 76).

113 See for example, Burgh House Principles, paras 9.1, 9.2, 11.1 and 11.2; IBA Standards, para. 44; Bangalore Principles, Value 2.5; Montreal Declaration, para. 2.27.

114 Bangalore Principles, Value 3.2.

115 Burgh House Principles, para. 9.1, 9.2, 11.1 and 11.2; Bangalore Principles, Value 2.5.

116 See for example, IBA Standards, para. 40 and 45.

117 Bangalore Principles, Value 2.2.

himself or herself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases'.¹¹⁸ Third, judges are expressly prohibited from showing hostility to a party to litigation indicating the presence of bias.¹¹⁹

For IATS, guarding against actual or apparent bias becomes greatly significant as one of the parties to litigation is always the person exercising a degree of explicit or implicit control on the justice regime, i.e., the defendant organization. International administrative regimes must enact a compliant regulatory regime that protects and promotes judicial independence and impartiality, incorporating the broader guarantees of 'fairness'. Particularly, the statutes of courts and tribunals must provide for a judge's disqualification where subjective or objective bias exists.¹²⁰ To secure impartiality, it would be highly desirable to establish a judicial complaints procedure given the heightened risks involved in the context of international administrative dispute resolution. Following this brief survey, the task now is to go on to assess the selected justice regimes in accordance with the stated criteria concerning institutional independence, individual independence, and impartiality.

VI Assessing the UNDT and the UNAT

The two tier justice system at the UN consisting of the UNDT and the UNAT said to constitute an independent, professionalized, expedient, transparent and decentralized justice system,¹²¹ created in 2009 following decades of reform efforts,¹²² no doubt provides a regime the independence and impartiality

¹¹⁸ Ibid., Value 2.3.

¹¹⁹ Ibid., Value 2.4: 'A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.'

¹²⁰ Burgh House Principles, para. 14.2: 'Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case. Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.'

¹²¹ See UNGA Res 61/261 (30 April 2007) para. 4.

¹²² R. Gulati, 'The International Dispute Resolution Mechanism of the United Nations' (2011) 15 Max Planck Yearbook of United Nations Law 489.

of which is a significant improvement from the situation that preceded the existence of those tribunals. But as will be shown, deficiencies remain and need immediate addressing.

1 *Institutional Independence*
a Operational Independence

(i) *Administrative Independence*

In so far as the ability of the UNDT to organize its own internal administration is concerned, the UNDT is empowered to enact its own rules of procedure pertaining to, amongst other things, the organization of its work, functions of the Registry, evidentiary procedure, or any other matters relevant to the functioning of the tribunal.¹²³ The UNDT's ability to however determine the number of judges that should hear a case is curiously limited. While the UNDT's Statute gives the UNDT the ability to institute a three member panel in complex or important cases (the default position being that a case is to be heard by one judge), it limits the UNDT's administrative freedom by requiring prior authorization from the President of the UNAT before a three-judge panel can be instituted.¹²⁴ A role for the UNAT is created where none should exist.¹²⁵ Despite this somewhat curious requirement, by and large, the *de iure* standards for establishing administrative independence at the UNDT would be probably satisfied as far as the UNDT's own statutory arrangements are concerned.

However, the rules and practices limiting the administrative independence that the UNDT itself has seriously criticized are one of the most significant issues facing the work and credibility of the UNDT.¹²⁶ One egregious deficit identified by the UNDT itself is the conflation in the relationship between the judiciary, i.e., the UNDT and the UNAT, with the Office of the Administration of Justice (OAJ). The OAJ, a purportedly independent statutory body headed by a senior member from Management is charged with the overall responsibility for the coordination of the UN system of administration of justice, as well as

123 UNDT Statute, Art. 7 (1); see also UNDT Rules of Procedure, Art. 18 (evidentiary requirements); Art. 19 (case management powers); Art. 21 (rules concerning support from the Registry).

124 See UNDT Statute, Art. 10 (9); UNDT Rules of Procedure, Art. 5; and UNDT, 'Practice Direction No. 1 on Three Judge Panels' (17 December 2010), available at <http://www.un.org/en/internaljustice/undt/forms-filing-guidelines.shtml> (last accessed 3 June 2018).

125 As the UNAT itself has said, the consideration of the President of the UNDT regarding the permissibility of a three-judge panel should suffice: IJC 2017 Report, 'Views of the UNDT', paras 64–65.

126 *Ibid.*, para. 9.

providing 'substantive, technical and administrative support to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal through their Registries'.¹²⁷ Not only do issues arise due to the legislative scheme implemented in respect of the operation and functions of the OAI, but also in terms of how the relationship between the OAI and the judiciary manifests in practice.

As to the situation *de iure*, pursuant to the relevant UN legislation, the Executive Director heading the OAI advises and reports to the Secretary-General,¹²⁸ who is the only respondent before the UNDT.¹²⁹ At the same time, the Executive Director is also mandated to provide support to the UN tribunals ultimately questioning the operational independence of the latter in a structural sense. The UNDT has commented that the 'Executive Director cannot bona fide serve two masters whose interests are in conflict'.¹³⁰

Further undermining the administrative independence of the UN tribunals is the position and role of the Principal Registrar of the UNDT and the UNAT who is charged with overseeing their operations.¹³¹ The Principal Registrar, who is based within the OAI, appears to have been granted judicial powers to enforce compliance with the Rules of Procedure (that power belongs to the relevant tribunal only and cannot belong to the Registrar);¹³² the Principal Registrar performs his or her functions in respect of both the UNDT and the UNAT creating conflicts of interest and the potential of undue influence;¹³³ and bizarrely, the Principal Registrar is placed under the authority of the Executive Director (whose position is already conflicted),¹³⁴ and is thus ultimately answerable to the Secretary-General, the Respondent.¹³⁵ The inability of the UN tribunals to recruit Registry staff independently of the Administration as officers of the court,¹³⁶ and the practice of the Administration to second lawyers

127 Through UNGA Res A/62/228 'Administration of Justice at the United Nations' (6 February 2008) para. 10, the UN General Assembly established 'the Office of Administration of Justice, comprising the Office of the Executive Director and the Office of Staff Legal Assistance, as well as the Registries for the United Nations Dispute Tribunal and the United Nations Appeals Tribunal'; see also UNGA Resolution 61/261 (n 126) para. 28; see also UNSG 'Organization and Terms of Reference of the Office of Administration of Justice' (7 April 2010) UN Doc ST/SGB/2010/3, Section 1.1.

128 UN Doc ST/SGB/2010/3 (n 132), Sections 2.1, 3.4 and 3.5.

129 UNDT Statute, Art. 2 (1).

130 IJC 2017 Report, para. 34.

131 UN Doc ST/SGB/2010/3 (n 132), Sections 1.2 and 4.3.

132 *Ibid.*, Section 1.3 (a); see also IJC 2017 Report, Annex II 'Views of the UNDT', para. 36.

133 IJC 2017 Report, Annex II 'Views of the UNDT', paras 37–8.

134 UN Doc ST/SGB/2010/3 (n 132), Section 1.1 and 4.2.

135 IJC 2017 Report, Annex II 'Views of the UNDT', para. 38.

136 *Ibid.*, para. 40.

to the Registry of the tribunals who have previously acted for the Respondent and are clearly conflicted;¹³⁷ are just some other instances that constitute grave interference into the UNDT and the UNAT's administrative independence.

The conflation and lack of clarity in the roles of the key actors responsible for the administration of justice at the UN is not limited to the legal standards in place, but also in the practice of the organization concerning the day-to-day realities of the administration of justice. For instance, one of the Registries of the UNDT is located within the same building as the OAI with no physical differentiation created: the 'sharing of premises has given rise to the impression that the judges are subservient to and accountable to the Administration through the Executive Director';¹³⁸ a perception has been created through, amongst others, the website of the OAI that the tribunals are a part of the former (which they are not);¹³⁹ the tribunals are denied any role in the legislative process concerning laws related to the functioning of the Tribunals;¹⁴⁰ and they are blocked from any dialogue with the General Assembly as a legislative body.¹⁴¹ These are all matters substantially diminishing the administrative independence of the judiciary.

(ii) *Financial Independence*

A degree of interaction between the UN tribunals and the Administration is inevitable. Pursuant to Art. 6 (1) of the UNDT Statute, the Administration is responsible to make administrative arrangements for the overall functioning of the UNDT (including funding its operations).¹⁴² While the UN's funding of the tribunals is in fact required, for operational independence to be ensured, the Administration must not unduly control the resources and finances of the tribunals so as not to breach the latter's institutional independence.

The UNDT however cannot be said to be financially independent from the Administration. In addition to concerns expressed by that tribunal about the denial of its 'role in deciding budget, training needs and staffing',¹⁴³ the most significant intrusion into the UNDT's institutional independence is caused by equating UNDT judges with a Director level (D-2) staff member at the UN. Doing so not only has resulted in compromising operational independence

137 Ibid., paras 41–2.

138 Ibid., paras 28 and 55; see also the IJC 2017 Report at paras 87–8, where it is recommended that the location of the tribunals be changed.

139 Ibid., para. 28.

140 Ibid., para. 29 and 52–4.

141 Ibid.

142 UNDT Statute, Art. 6.

143 IJC 2017 Report, paras 29 and 50–51.

generally, but also has an adverse impact on the individual independence of the judges; in particular cases, has resulted in the UNDT remarkably declaring that it does not provide an independent and impartial forum for the complainant in question.¹⁴⁴

Particularly, a significant structural deficiency at the UNDT concerns the Administration's ability to affect changes to the emoluments of an UNDT judge by reference to the pay-scale applying to the Director-level (D-2) at the UN.¹⁴⁵ This means that whenever the Administration affects a change to the salary of a D-2, the salary of an UNDT judge is also affected, compromising the financial independence of the judiciary at large (for each UNDT judge is in a similar position); and creating a risk of apprehended bias in particular cases due to obvious conflicts of interest.¹⁴⁶ Where a UN staff approached the UNDT contesting a reduction of her salary,¹⁴⁷ the UNDT embarked on an analysis whether the judge seized of the case should recuse himself due to an obvious conflict of interest for the process reducing the complainant's salary equally caused a reduction to the emoluments of the judge, giving rise to an apprehension of bias.¹⁴⁸ Relying on human rights jurisprudence concerning the standards of independence and impartiality,¹⁴⁹ while Judge Downs concluded that 'the Dispute Tribunal, as a whole, is not in a position to provide the Applicant the guarantees of independence and impartiality to which she is entitled under Art. 19 of the Universal Declaration of Human Rights and Art. 14 (1) of the International Covenant on Civil and Political Rights',¹⁵⁰ the judge nevertheless decided not to recuse himself as doing so would have resulted in denying the applicant justice.¹⁵¹

As no other jurisdiction could provide the applicant access to justice given the UN's immunities before national courts, and all other UNDT judges were in a similar position to Judge Downs,¹⁵² based on the 'principle of necessity'

144 IJC 2017 Report, Annex II 'Views of the UNDT', para. 30.

145 *Ibid.*, para. 55.

146 As the UNDT has said: 'A conflict of interest is inherent in the arrangement in which judges of the Tribunal, when subject to the Staff Rules regime, as augmented, modified and interpreted by the Office of Human Resources Management, are exposed to the risk of disputing those rules and interpretations in their own cases and taking positions which would then compromise their impartiality in all similar disputes' (IJC 2017 Report, Annex II 'Views of the UNDT', para. 48).

147 UNDT Order No. 113 (GVA/2017) para. 1.

148 *Ibid.*, para. 6, relying on the ECtHR in *Harabin v. Slovakia* (20 November 2012) App. No. 58688/11, para. 131.

149 *Ibid.*, paras 6 and 14

150 *Ibid.*, para. 22.

151 *Ibid.*, paras 16 and 19.

152 *Ibid.*, paras 26–7.

(a principle of last resort),¹⁵³ despite the obvious structural deficits in the UNDT's independence and impartiality, the judge had no choice but to retain carriage of the case. The approach taken by Judge Downs cannot be doubted for in order to ensure full compliance with one fair trial right (independence and impartiality), the judge was not willing to contravene another, i.e., the very right to access to a court that adjudicated her claim expeditiously.¹⁵⁴ The structural deficiency identified by the UNDT is a matter of serious concern for it adversely impacts the judiciary's independence generally; and creates a perception of bias in relevant cases. The UNDT itself offered a ready solution to ensure independence and impartiality, stating if 'the judges of the Dispute Tribunal had their conditions of service determined independently, not having their remuneration linked to that of staff members, this matter would not have arisen'.¹⁵⁵

Similarly, calling for 'a revised compensation package for the Dispute Tribunal judges that negates the equivalency linkage to staff compensation',¹⁵⁶ the Internal Justice Council (IJC) noted in its most recent report '[w]hen remuneration for judicial service is expressly linked to staff remuneration, litigants may well perceive the judges as simply another branch of the staff, not the independent and impartial arbiters of justice that they are'.¹⁵⁷

In sum, as the administrative and financial independence of the UN tribunals is significantly compromised, the answer to the question whether the UNDT and the UNAT can be said to satisfy the applicable standards for operationally independent justice mechanisms can only be answered in the negative. The UNDT judges have themselves tellingly concluded that in all aspects relevant to the tribunals' operational independence, 'international standards of judicial independence are being breached'.¹⁵⁸

b Decisional Independence

(i) *Respect for and Enforcement of Judicial Orders and Decisions*

On the enforceability of its decisions and orders: As a matter *de iure*, the UNDT's decisions and orders are binding on the parties.¹⁵⁹ In practice though,

153 Ibid., at para. 29, Judge Downs stated: 'This situation forces the undersigned Judge to consider applying the doctrine of necessity, which enables a judge, who would otherwise be disqualified, to hear and determine a case where failure to do so may result in an injustice through an inability to adjudicate the matter'; see also Bangalore Principles, Value 2.5.

154 Ibid., paras 21 and 30.

155 Ibid., para. 14.

156 IJC 2017 Report, para. 57.

157 Ibid., para. 56.

158 Ibid., para. 29.

159 See Art. 9 (1) of the UNDT Statute on the power of the UNDT to order production of documents; Art. 11 (3) provides that the 'judgments and orders of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the

significant issues with enforcement have been a prevailing feature of the UN internal justice system since its inception, rooted in a culture where the senior most members of the Administration do not seem to consider the UNDT and UNAT's decisions as binding. Where the UN failed to disclose documents pursuant to the UNDT's orders in numerous cases,¹⁶⁰ the then Secretary-General was reported as saying: 'Sometimes there may be some cases of decisions which are not totally in line with what the Secretariat has been doing But we will try to respect all the decisions'.¹⁶¹ The use of such ambiguous language by the Chief Administrative Officer of the UN, the Secretary-General can only be regretted for it seriously undermines the decisional independence of the UNDT. Remarkably, at the end of his term as an UNDT judge, in 2010, Judge Adams (whose judicial orders were being openly defied by the Administration) reportedly said: 'You have to look at the culture here. Someone in the position of undersecretary general is never confronted with the requirement that particular questions be answered'.¹⁶² The issue of the judges of the UN tribunals being equated with the rank of D-2 does not help the situation either for this can create a perception that staff members ranked D-2 or higher can simply ignore the decisions of the UN tribunals.¹⁶³

Perhaps the early issues faced by the internal justice system could be explained (but not justified) as teething problems. However, issues with enforceability have persisted until this day. On several occasions, the UN has failed to comply with the UNDT's orders relating to protective measures aimed at preventing retaliation against witnesses;¹⁶⁴ the production of documents (especially making full disclosure to the applicants);¹⁶⁵ and the UN's failure to follow-up on referrals for accountability by the UNDT where the tribunal has found that officials may have engaged in serious wrongdoing, including serious criminal activity (such as corruption and sexual assault).¹⁶⁶ Such an attitude

United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal. Case management orders or directives shall be executable immediately'.

160 See the discussion in R. Gulati, 'The International Dispute Resolution Mechanism of the United Nations', especially jurisprudence cited at fn 178–182.

161 'Review Panel Judges See a Culture of UN Secrecy' (16 June 2010) *The New York Times*.

162 *Ibid.*

163 '[J]udges were assigned an administrative rank that puts them below an assistant secretary general, so those who rank higher often feel that answering the tribunal is beneath them' (*ibid.*).

164 IJC 2017 Report, para. 27 pointed out that contractors are especially vulnerable in such situations.

165 IJC 2017 Report, Annex II 'Views of the UNDT', para. 59.

166 *Ibid.*, paras 54 and 58; the UNDT's power to refer cases to the UN to enhance accountability is provided for in Art. 10 (8) of the UNDT Statute.

by the Administration defies the UNDT's Statute, and is squarely contrary to the *Effect of Awards* rationale enshrining the doctrine of separation of powers within the UN's internal justice system,¹⁶⁷ and an affront to the rule of law. While a litigant can apply to the UNDT for the execution of its orders,¹⁶⁸ if the Administration refuses to comply, in the absence of a contempt power vested with the UN tribunals, there is little an applicant, or for that matter the relevant tribunal can do to seek enforcement, short of the applicant approaching an alternative forum. The *de facto* enforceability deficit means that the decisional independence of the UN tribunals is currently impermissibly limited.

(ii) *Jurisdictional Independence*

As to the UNDT's autonomy to determine its jurisdictional competence, Art. 2 (6) of the UNDT's Statute gives it the competence to determine who has standing to make a claim and at what stage a claim may be made (only administrative decisions or disciplinary sanctions can be challenged). Some commentators suggest that such provisions limit the subject matter jurisdiction of IATs impermissibly, creating a gap relating to other private law claims that aggrieved personnel may wish to raise.¹⁶⁹ IATs, including the UNDT, are employment tribunals as such, and not courts of general jurisdiction. Any other claims in private law that a staff member may have ought to be pursued elsewhere (although significant issues persist due to jurisdictional immunities). As a practical matter, IATs generally are already significantly overburdened, and at this stage, it would be unwise to enhance their subject matter competence for it would only cause even more delays in the delivery of justice vis-à-vis employment disputes.

While the UNDT's *de iure* subject matter jurisdictional competence concerning hearing and determining employment disputes at the UN appears to be generally sufficient, there are limitations on its powers to grant a remedy. Pursuant to Art. 10 (7), the UNDT cannot award exemplary or punitive damages; and Art. 10 (5) that enshrines unequal treatment between the Administration and the applicant), also limits its powers, providing:

5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:
 - (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision

167 The separation of powers rationale was endorsed in IJC 2017 Report, para. 3.

168 UNDT Statute, Art. 12 (4).

169 R. Silverstein, 'Revisiting the Legal Basis to Deny International Civil Servants Access to a Fundamental Human Right' (2017) 25 Mich. St. Int'l L. Rev. 375.

concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that *the respondent* may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision (emphasis added).

A prohibition of exemplary damages may be permissible as a matter of policy set by the legislature; however, a two-year cap on compensation (subject to a discretion to grant greater compensation) is more problematic. In the latter respect, it is notable that such limiting provisions are an accident of history stemming from the Effect of Awards saga where the organization was unhappy with the extent of damages provided by the old UN Administrative Tribunal in the loyalty cases discussed above. That history dictates that arbitrary caps on compensation ought to be treated with caution.¹⁷⁰ Be that as it may, given the inbuilt discretion in Art. 2 (6), the situation *de iure* would probably be by and large consistent with the concept of decisional independence but for the lack of good faith shown by the Administration. A three-judge bench in the case of *Nakhlawi v. Secretary-General of the United Nations*¹⁷¹ noted that:

[T]he reality is that in cases where the Tribunal found that a staff member had been wrongly separated, through no fault of his/her own but rather as a result of managerial error, the decision was systematically taken to pay compensation, instead of considering the reintegration of the staff member. The Tribunal expressed its concern that the failure of management to give individual consideration to each case in which rescission of

¹⁷⁰ The Appeals Tribunal recalled in *Hersh v. Secretary-General of the United Nations* (2014-UNAT-433) what it had held in *Mmata v. Secretary-General of the United Nations* (2010-UNAT-092), namely that 'Art. 10.5 (b) of the UNDT Statute does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation'.

¹⁷¹ UNDT/2016/204.

a termination decision is ordered, contradicts the spirit and legislative intent of the General Assembly of Art. 10.5 of its Statute ...¹⁷²

The simplest and most effective option to ensure that the Administration implements the UNDT' and the UNAT's orders in good faith is to grant the tribunals the power to make specific orders that leave no choice concerning the applicable remedy. The IJC has in fact so recommended.¹⁷³ At the very least, the provisions should be amended to ensure equality between the litigants where not only the Administration, but the applicant may also elect to receive compensation in lieu of rescission or specific performance; and there are discretionary criteria put in place that guide an election of a remedy by the Administration where a choice exists. As a matter of course, the applicant then will be free to approach the internal justice system should he or she considered that the discretion has been abused in a particular case. Without such amendments, the decisional independence of the UNDT and the UNAT continues to be compromised.

c The Right and Duty to Render Fair Court Proceedings

Under this criteria, the reformed UN internal justice system, subject to some caveats, provides robust protections in law, and increasingly in practice. The UNDT Statute and its Rules of Procedure require the provision of reasons;¹⁷⁴ all judgments are to be published;¹⁷⁵ oral hearings are the norm;¹⁷⁶ and the complainant can access a second instance UNAT to challenge UNDT decisions. However, issues remain concerning access to legal representation, engaging the principle of equality.

¹⁷² Ibid., paras 104–105.

¹⁷³ Ibid., para. 83.

¹⁷⁴ See Art. 11 (1) of the UNDT Statute, and Art. 25 (1) of the UNDT Rules of Procedure which provides that: 'Judgments shall be issued in writing and shall state the reasons, facts and law on which they are based'.

¹⁷⁵ See Art. 26 of the UNDT Rules of Procedure regarding the publication of judgments, which requires that all judgments of the UNDT be published on the website of the UNDT, and personal data must be protected.

¹⁷⁶ See Art. 7 (e) and (f) that empower the UNDT to make rules of procedure regarding oral hearings and publication of judgments; Art. 9 (3) requires that oral hearings be held in public unless exceptional circumstances exist; and UNDT Rules of Procedure, Art. 16 (1) and (2) give the judge a discretion to hold an oral hearing, providing that in disciplinary cases, 'a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure'.

The Office of Staff Legal Assistance (OSLA), based at the OAI faces significant underfunding. In this latter respect, some may argue that international civil servants are well remunerated, and strictly speaking, international human rights law does not demand that they be always granted free legal assistance. The provision of legal assistance to staff however engages the doctrine of equality of arms. The institution has available to it the vast resources of the organization, and is invariably represented by the organization's lawyers. Relative to the individual applicant, the institution of course has considerably deeper pockets. Equality would demand that staff be accorded legal assistance not only to guarantee that the applicant can put forward his or her case in full equality with the Respondent, but also to ensure that other litigants can receive justice without undue delay, as unrepresented litigants 'have a negative impact on the workload of the Tribunal'.¹⁷⁷

Whether representation is achieved through a body such as the OSLA, or through another mechanism, such as via legal insurance that can fund private lawyers, or staff contributions,¹⁷⁸ is a matter for the organization's institutional preference. Given that the OSLA regime is the principal way in which equality of arms at the UN's internal justice system is currently maintained, it ought to be sufficiently funded. As the UNDT itself observed:

The right to representation, guaranteed by the Universal Declaration of Human Rights and enshrined in the principle of equality of arms, is an essential element of the new system of administration of justice, and the role of the Office of Staff Legal Assistance should continue to be that of assisting staff members not only in processing claims, but in representing applicants before the Tribunals.¹⁷⁹

The IJC noted that the OSLA suffers from serious underfunding; lacks sufficient staff, with the senior most official belonging to the P-3 category; and is in need of urgent budgetary and personnel enhancements.¹⁸⁰ No doubt the lack of resources prevents OSLA from providing representation to more aggrieved staff members than is presently the case. According to the most recent

¹⁷⁷ IJC 2017 Report, Annex II 'Views of the UNDT', para. 66.

¹⁷⁸ There was a scheme introduced in 2014 opposed by the staff union regarding the opt-out contribution towards the OSLA, see UN Staff Union Vienna, 'New Payroll Deduction from Staff to Fund Establishment of Additional Legal Posts – SAY NO and OPT OUT' (7 March 2014), available at <http://staffunion.unov.org/su/en/osla--voluntary-supplemental-funding-mechanism.html> (last accessed 14 June 2018).

¹⁷⁹ IJC 2017 Report, Annex II 'Views of the UNDT', para. 68.

¹⁸⁰ *Ibid.*, para. 79.

data available, in 2016, OSLA provided representation before the UNDT only in 79 of the 383 applications received, and staff were self-represented in 258 applications;¹⁸¹ and during the same period, OSLA represented staff only in 70 of the 170 appeals received by the UNAT, with 63 staff members being self-represented.¹⁸² If the UN's internal justice regime is to be considered compliant with fair trial standards, enhanced legal representation for affected staff is necessary.

Overall, despite the significant improvements made to the UN's internal justice regime in 2009, the UNDT cannot be said to constitute a judicial institution that is sufficiently free from the control of the Administration so as to comply with international human rights law, as applied in the delivery of international administrative justice. The UNDT judges have stated:

The Dispute Tribunal judges have serious concerns about the persistent lack of institutional autonomy and independence of the Dispute Tribunal ... The Administration appears to operate upon an assumption that independence is protected as long as it refrains from exerting pressure on the results in individual cases. Judicial independence in a broader, institutional sense of autonomy and independence is structurally and practically absent, and has the effect of impeding justice being done and being seen to be done.¹⁸³

2 *Individual Independence*

a Method of Appointment and Judicial Qualifications

The system put in place at the UN's internal justice system provides for arguably best practice. The judges of the UN tribunals are appointed by the General Assembly on the recommendation of an independent Internal Justice Council chaired by a distinguished jurist.¹⁸⁴ As opposed to States putting

181 Office of Administration of Justice, 'Tenth Activity Report' (1 January to 31 December 2016) para. 23.

182 *Ibid.*, para. 43.

183 IJC 2017 Report, Annex II 'Views of the UNDT', para. 27.

184 See Art. 4 (2) of the UNDT Statute; see also UNGA Res A/62/228, paras 35–8, which creates the IJC as a body aimed at enhancing the independence of the UNDT and the UNAT, and comprising of a staff representative, a management representative and two distinguished external jurists, one nominated by the staff and one by management. It is chaired by a distinguished jurist chosen by consensus by the four other members, and makes recommendations to the UN General Assembly regarding candidates for vacancies in the UNDT and the UNAT.

forward nominees, the IJC invites individual applications from potential candidates, and following a competitive examination, makes recommendations to the General Assembly suggesting two candidates for each available post.¹⁸⁵ The General Assembly then elects one person out of the two options presented.¹⁸⁶ While judicial appointments through elections are said to adversely undermine independence, the mechanism at the UN internal justice system removes to a significant extent the influence of States in the appointment of judges.¹⁸⁷

Further, there are minimum qualifications necessary to qualify as a candidate for appointment to either tribunal, requiring at least ten years of judicial experience for an UNDT judge and 15 for an UNAT judge.¹⁸⁸ When compared with other international administrative regimes, as will soon become evident, in so far as the selection of judges is concerned, the UN system is worth replicating.

b Security of Tenure: Length of Tenure; Financial Security; Judicial Accountability

Regarding security of tenure, the UN internal justice system has taken significant steps, and may constitute best practice in some respects. The judges are to serve in their personal capacity and enjoy 'full independence';¹⁸⁹ the judges of the UNDT are appointed for one non-renewable seven year term, enhancing structural independence to a significant extent,¹⁹⁰ and a judge may only be removed in cases of misconduct or incapacity,¹⁹¹ although there remain issues whether an affected judge will be granted his or her fair trial guarantees relating to contesting his or her removal should the situation arise.¹⁹² The

185 See the summary provided in M. Ebrahim-Carstens, 'Gender Representation on the Tribunals of the United Nations Internal Justice System: A Response to Nienke Grossman' (2016) 110 *AJIL Unbound* 98, available at <https://www.asil.org/blogs/gender-representation-tribunals-united-nations-internal-justice-system-response-nienke> (last accessed 18 June 2018).

186 See UN Doc A/70/538 (4 November 2015).

187 Ebrahim-Carstens.

188 UNDT Statute, Art. 4 (3).

189 *Ibid.*, Art. 4 (7).

190 *Ibid.*, Art. 4 (4).

191 *Ibid.*, Art. 4 (10).

192 The 'Mechanism for Addressing Complaints Regarding Alleged Misconduct or Incapacity of the Judges of the UNDT and the UNAT' was adopted through UNGA Res 67/241 (24 December 2012). The mechanism provides an individual the ability to lodge a complaint against a judge of the UNDT or the UNAT for alleged misconduct (breach of the Code of Conduct) or incapacity to the President of the relevant tribunal (Section 1); following an external investigation, and consideration by all the judges (except the judge against

introduction of a Code of Conduct for the judges of both the UNDT and the UNAT (expressly incorporating human rights standards of independence and impartiality) has also strengthened the legal infrastructure in place, already bearing results in terms of the application of the code.¹⁹³

However, despite the above structural protections, significant deficits remain. Particularly, a compromised institutional independence also impacts individual independence, and vice-versa. There is no better example of such an overlap than the deficits in the financial independence of UNDT judges caused by the lack of financial security of every judge. To remedy the compromise of each judge's individual independence, the IJC recommended 'the status of the judges of the Tribunal, including remuneration, be sufficiently "secured by law"'.¹⁹⁴

If individual independence of the UNDT is to be secured, immediate reforms to enhance the financial security of the UNDT judges is necessary. This does not mean that the salaries of judges can never be reduced for reasons of genuine resource constraints.¹⁹⁵ What is demanded is that judges' salaries are determined through a mechanism where the executive is not seen to bear undue influence on a judge/s that may prevent him or her from determining a case without fear or favour.

3 *Impartiality*

As to impartiality, the UNDT Statute provides for various *de iure* guarantees,¹⁹⁶ including enshrining a litigant's ability to seek a recusal on grounds of

whom the complaint is lodged) of the relevant tribunal, where there is unanimity that a complaint is well founded, the President of the relevant tribunal is to recommend the removal of the judge to the General Assembly (Section 19 (c)); the affected judge must be granted due process rights during the investigation process (Section 16). While there is absence of a fully independent tribunal or disciplinary commission to undertake a removal, the process is nevertheless a welcome development to the administration of justice in that organization. For best practice concerning the processes that must be followed when removing a judge, see generally van Zyl Smit.

193 The Code of Conduct for the Judges of the UNDT and the UNAT was adopted through UNGA Res A/66/106. It incorporates the principles of independence and impartiality as provided for in human rights treaties and other instruments developed by the international community; see also UNDT Order No. 113 (GVA/2017) para. 11, where a UNDT judge declared a conflict of interest due to the case raising issues that would affect the personal circumstances of the judge demanding disclosure under Art. 2 (e) of the Code of Conduct.

194 IJC Report, para. 49.

195 *Ameratunga v. Northwest Atlantic Fisheries Organization* [2013] SCC 66; [2013] 3 SCR 866.

196 Art. 4 (3) (a) of the UNDT Statute states that a judge shall be of high moral character and impartial; Art. 4 (6) avoids situations of perceived conflicts by disallowing a UNDT judge to be employed at the UN for a period of five years following his or her term of judicial appointment.

subjective or objective bias.¹⁹⁷ Those provisions are further boosted by the Rules of the UNDT, and the Code of Conduct. The UNDT Rules of Procedure define a conflict of interest including within its meaning situations where a judge has a personal, familiar or professional relationship; previous involvement in a case, such as in the role of counsel or an expert; and any other situation that would objectively doubt the impartiality of the judge.¹⁹⁸ The Code of Conduct further clarifies the meaning of a conflict of interest,¹⁹⁹ including a requirement that a judge's conduct inside and outside of the court must not indicate bias, by for example, the receipt of gifts or benefits creating a perception of impartiality.²⁰⁰

Moreover, Section 3 of the Code of Conduct requires judges to act 'fairly' within its scope, 'fairness' demands amongst other things, judges must: Observe the letter and spirit of the *audi alteram partem* (hear the other side) rule; Remain manifestly impartial; and Publish reasons for any decision.²⁰¹ Fairness also requires that '[j]udges must not conduct themselves in a manner that is racist, sexist or otherwise discriminatory. They must uphold and respect the principles set out in the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Judges must not by word or conduct unfairly discriminate against any individual or group of individuals, or abuse the power and authority vested in them'.²⁰²

Not only *de iure* guarantees ought to be enacted, there must be evidence that they work in practice if the right to an impartial court or tribunal is to be practically realized. At the UN, the trajectory is a positive one, with applications for recusal of a judge starting to constitute a regular feature of the jurisprudence, and judges making disclosures concerning conflicts of interests of their own accord pursuant to the Code of Conduct.²⁰³ As individuals can lodge complaints against judges for alleged breaches of the Code of Conduct, another important mechanism that will most likely play a significant role in keeping the judiciary accountable has been incorporated within the UN's internal justice system.

197 Art. 4 (8) of the UNDT Statute states: 'A judge of the Dispute Tribunal who has, or appears to have, a conflict of interest shall recuse himself or herself from the case. Where a party requests such recusal, the decision shall be taken by the President of the Dispute Tribunal;' see also Art. 28 (2) of the UNDT Rules of Procedure.

198 UNDT Rules of Procedure, Art. 27 (2).

199 Code of Conduct, Section 1.

200 *Ibid.*, see especially Section 1 (h).

201 Code of Conduct, Art. 6 (a).

202 *Ibid.*, Art. 6 (b).

203 IJC 2017 Report, Annex II 'Views of the UNDT', para. 22.

The UN internal justice system provides for significant guarantees of impartiality. However, bearing in mind the significant deficits in the institutional and individual independence of the judges, a real risk of the presence of apprehended bias in certain cases, i.e., where changes to salary structures are impugned, is present. Other instances of apprehended bias may arise given other institutional deficiencies continue to prevail. It is because of these deficits that the UNDT's objective impartiality suffers significantly.

4 *A Concluding Comment on the UN System*

Can it be said that the independence and impartiality deficits within the UN internal justice system on their own deny a complainant the right to a fair trial? While the answer to that question can only be conclusively answered following a consideration of the facts of a given case, some general observations are warranted. The judges of the UNDT ought to be lorded for forthrightly putting their views about the prevailing independence and impartiality deficit. The very fact that the UNDT has taken a stand on the issue; and of its own accord considered the issue of independence and impartiality: evidences the UNDT's motivation to ensure that justice is not only done, but seen to be done. Such an attitude demonstrates that so far, despite the prevailing deficits, on balance, the complainant's right to access an independent and impartial tribunal is being practically realized. However, if UNDT judges do not continue to demonstrate the outstanding vigilance shown so far, the independence deficit may invariably lead to a situation where justice delivered at the UN falls foul of the fundamental right to access a competent, independent and impartial tribunal that renders justice fairly. Finally, perhaps one of the most significant issues still lie in the culture prevailing at the organization, which regularly allows judicial orders to go unenforced and unaddressed. To the extent that the UN's actions frustrate the administration of justice due to non-cooperation or non-compliance with the judiciary, where the facts so warrant, there remains a risk that a national court may breach the UN's immunities in an appropriate case.

VII *Assessing the ILOAT*

The ILOAT, originally known as the League of Nations Administrative Tribunal, is the oldest IAT and, has been in operation for more than 90 years.²⁰⁴ It

²⁰⁴ The ILOAT succeeded the League of Nations Administrative Tribunal through a new name: see D. Petrović, 'Longest-Existing International Administrative Tribunal: History,

exercises jurisdiction over 58 international organizations;²⁰⁵ is open to more than 63,000 international civil servants;²⁰⁶ and has delivered more than 3900 judgments so far.²⁰⁷ Its significance to the realization of the right to a fair trial for a vast number of international civil servants is obvious. Given its status, as will be shown, the well-known deficiencies regarding its objective independence and impartiality are all the more astonishing.²⁰⁸

1 *Institutional Independence*

a Operational Independence

On the ILOAT's operational independence, any meaningful *de iure* guarantees are absent; and the factual situation cannot be readily ascertained for there is a lack of transparency on its administrative and financial independence from the International Labour Office. Art. 2 of the ILOAT Statute creates a Registry, and states that the Registrar is appointed by the Director-General of the International Labour Office.²⁰⁹ The Registrar and key officers of the ILOAT are ILO staff members – who report to the Director-General of an organization who is a Respondent in more than 5 % of its cases. Art. IX of the ILOAT Statute simply provides that the 'administrative arrangements necessary for the operation of

Main Characteristics and Current Challenges' in D. Petrović (ed.), *90 Years of Contribution of the Administrative Tribunal of the International Labour Organization to the Creation of International Civil Service Law* (ILO 2017) 23.

205 Organizations other than the ILO can join the ILOAT regime if they accept its jurisdiction pursuant to the provisions of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization; see <http://www.ilo.org/tribunal/lang-en/index.htm> (last accessed 14 June 2018). The tribunal, amongst others, is open to several UN Specialized Agencies, and currently exercises jurisdiction over at least 59 international organizations: *Ibid.*, 25.

206 *Ibid.*, 28.

207 See the ILOAT's case law database known as Triblex.

208 See generally, Amsterdam Report. For the independence deficits identified, see, G. Robertson, 'Opinion for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters', available at <http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm> (last accessed 14 June 2018); L. Doswald-Beck, 'ILO: The Right to a Fair Hearing Interpretation of International Law' in L. Doswald-Beck and R. Kolb, *Judicial Process and Human Rights: United Nations, European, American and African Systems: Texts and Summaries of International Case-Law* (Engel 2004); I. Seiderman, 'Does the ILO Administrative Tribunal Meet the Standards of an Independent and Impartial Judiciary?', (12 November 2002), available at <http://www.ilo.org/public/english/staffun/info/iloat/seiderman.htm> (last accessed 14 June 2018); O.A. Jefferson and I. Epichev, 'International Organizations as Employers: Searching for Practices of Fair Treatment and Due Process Rights of Staffs' in K. Rubenstein and K.G. Young (eds), *The Public Law of Gender: From the Local to the Global* (CUP 2016) 489.

209 Art. 2 of the ILOAT Rules of Procedure.

the Tribunal shall be made by the International Labour Office in consultation with the Tribunal; Expenses occasioned by sessions of the Tribunal shall be borne by the International Labour Office'. The rules do not provide for any specifics that would guarantee the operational independence of the ILOAT.²¹⁰ As to the practice, the Amsterdam Report²¹¹ concluded:

The ILOAT is not transparent with regard to how it is funded and how those funds are paid out to judges and used for ensuring the proper functioning of the Tribunal. Cases are financed by the defendant in a given case. This means that all cases are financed by the international organization at bar. These concerns are increased when one considers the [very low] success rates of complainants before the Tribunal.²¹²

Bearing in mind the silence of the ILOAT's Statute; with no precise information on the budgetary matters concerning the ILOAT forthcoming; and the Registry not objectively independent from the ILO, or the organizations subscribing to its jurisdiction (the Respondents in any case before the ILO): it can hardly be said that the ILOAT constitutes an operationally independent judicial body.²¹³ Not only there is a significant deficiency concerning operational independence which can only be cured by amendments to the ILOAT's regulatory regime and enhanced transparency; significant deficits continue to prevail concerning decisional independence and the right and duty to provide a fair hearing.

b Decisional Independence

The ILOAT can exercise a degree of control on its jurisdiction, but its decisions are not always respected (with the ILOAT having no contempt powers).²¹⁴

210 Art. X of the ILOAT's Statute empowers it to enact rules governing the conduct of proceedings; and any matters not covered by the Statute. However, the ILOAT's operational independence is not guaranteed by virtue of this somewhat narrow provision.

211 Amsterdam Report.

212 *Ibid.*, 60–1, with the authors noting that the success rate of complainants in the previous 16 years from the date of writing was less than 25%; see also Staff Union of the European Patent Organization, 'Managing the ILO Administrative Tribunal's Workload – Current Challenges and Possible Improvements' (2015) (SUEPO Report), information contained at fn 17 of that report. It points out that between 2000–2014, complainants have prevailed in 30% of the cases. Moreover, in some years, the complainants prevailed in less than 15% of the cases.

213 Amsterdam Report, 1; see also Jefferson and Epichev 496.

214 Art. VI (1) of the ILOAT Statute states: 'The Tribunal shall take decisions by a majority vote; judgments shall be final and without appeal'. The absence of the word 'binding' is to be noted. It is difficult to assess the rate of the enforcement of ILOAT decisions due to the lack of verifiable data. However, several examples of non-compliance would exist; G.

Focusing on the former, pursuant to Art. VII (1) of the ILOAT Statute, there is a standard requirement that before approaching the ILOAT, a complainant exhaust all internal remedies in respect of the 'final decision' challenged, or else the complaint is not receivable. Art. II provides for the ILOAT's subject matter and personal jurisdiction/competence. The ILOAT is empowered to hear and determine cases that impugn the employment rights of an official as provided by the applicable international administrative regime, including employment disputes lodged by officials of the ILO or any subscribing organisation;²¹⁵ disputes about the compensation to be paid for work-place injury;²¹⁶ and in relation to claims about the execution of contracts to which the ILO is a party and where the ILOAT's jurisdiction is recognized, presumably through a choice of jurisdiction provision in the disputed contract.²¹⁷

While the ILOAT's subject matter jurisdiction is somewhat broader than a purely employment tribunal, in practice, the focus of its work has been on employment cases. Under Art. II (6) (a), the ILOAT is competent or open to determine complaints from a subscribing organization's 'official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death'. Moreover, compared to the UN's regime, Art. VIII grants the ILOAT broad powers to grant remedies, providing that 'the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him'.²¹⁸ The point of note is that the ILOAT does possess a degree of control on its jurisdictional competence in respect of employment disputes. The particularities of the determination of the scope of its own competence

Robertson pointed out: 'Lack of effective enforcement power and of sanctions against employer organizations which refuse or fail to comply to the letter, with its decisions. 'Some power to enforce its judgments is essential for any tribunal, and the ILO and other client organizations should be prepared to accept an addition to the statute providing it with power to fine (or order compensation against) a party for non-compliance with or contempt of its orders' (Robertson 'Opinion for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters').

²¹⁵ Art. II (1) and (5) of the ILOAT Statute.

²¹⁶ Art. II (2) of the ILOAT Statute. This provision does not seem to have attracted jurisprudence. On the language of the provision, it would seem that it applies not to determine fault; but only disputes about the compensation to be paid.

²¹⁷ Art. II (4) of the ILOAT Statute.

²¹⁸ Although the ILOAT has no power to make interim or provisional orders to protect irreparable harm to a complainant (save for between sessions) (Art. 15 of the Rules of Procedure). The UNDT has a power to suspend a decision under Art. X of its Statute.

by the ILOAT are different matters altogether; different IATs have reached different conclusions on this issue.²¹⁹

Consolidating to an extent the ILOAT's control on its competence is Art. II (7) of its Statute which provides: 'Any dispute as to the competence of the Tribunal shall be decided by it'. Until recently, Art. II (7) however went on to present limitations by also stating that the ILOAT's ability to determine its own competence is 'subject to the provisions of article XII'. As has already been discussed, the Art. XII regime allowed an organization to approach the ICJ should it believe that the ILOAT had acceded its jurisdiction or there existed a fundamental flaw in the procedure followed. While the Art. XII regime had only been occasionally resorted to; and the ICJ has never invalidated an ILOAT decision: such a limitation on the ILOAT's ability to determine its own competence was unparalleled when compared with any of the more than 20 IATs in existence today. Such a limit on the ILOAT's decisional independence was an anathema and its demise is to be welcomed.

c The Right and Duty to Render Fair Court Proceedings

There are present concerns relating to the lack of independent fact-finding by the ILOAT; the routine denial of oral hearings; delays in the administration of justice; and the breach of the principle of equality of arms.

(i) *ILOAT – A Confused Institutional Role and the Lack of Independent Fact-Finding*

Generally, internal justice systems at international organizations require that a complaint against an administrative decision is first filed with an arm of the Management (such as with the human resources department). If the complainant is not satisfied, he or she may appeal to a internal appeals body, which is a peer review body, such as a Grievance Committee or Appeals Committee/board.²²⁰ Such committees usually do not consist of professional judges (they are constituted by members of the Administration);²²¹ and amongst

219 A discussion on such matters is outside the scope of this paper.

220 See L. Fauth, 'Due Process and Equality of Arms in the Internal Appeal: New Developments from Judgments 3586 and 3688' in D. Petrović (ed.), *90 Years of Contribution of the Administrative Tribunal of the International Labour Organization to the Creation of International Civil Service Law* (ILO 2017) 183.

221 Some organizations have taken steps to appoint non-staff members and independent persons with relevant legal expertise to carry out administrative review internally, such as the OECD. For a discussion, see A.-M. Thévenot-Werner, 'Effective Individual Dispute Resolution Mechanisms Prior to Judicial Appeals in International Organizations' in A. Talvik (ed.), *Best Practices in Resolving Employment Disputes in International Organiza-*

other deficits, their recommendations are not binding. In such regimes, perversely, the ultimate decision maker is the very person whose decision is often challenged, i.e., the executive head of an organization. Regardless of the presumable good intentions of the persons constituting such committees, these mechanisms cannot and do not constitute independent judicial mechanisms. As Thévenot recently pointed out:

[I]t should be recalled that bodies which intervene prior to the final decision of the decision-making authority, namely the various internal advisory bodies, which are often joint appeals bodies, only adopt recommendations. However, in law, they may choose not to do so. These bodies are not therefore courts.²²²

The legal infrastructure employed by the relevant international organization means that the responsibility to administer justice to aggrieved officials is dealt with by the Administration/Management twice-over. Should a complainant still be dissatisfied with the outcome following the completion of such reviews, he or she may then approach the ILOAT. The ILOAT is thus the earliest opportunity where a complainant can access a proper first instance judicial mechanism. The ILOAT's role is however somewhat confused—lying somewhere between a truly first instance court (that in principle ought to make its own independent findings of fact which it does not do); and an 'appellant court', where in practice it gives 'significant deference to the findings of fact and conclusions on the merits of the internal appeal bodies'.²²³ The ILOAT relies significantly on the findings of peer review mechanisms for a multiplicity of reasons, including that of efficiency. The ILOAT itself has said that it is 'ill-equipped to act as a trial court' or a first instance court,²²⁴ stating that:

An internal appeal procedure that works properly is an important safeguard of staff rights and social harmony in an international organization

tions: *Conference Proceedings* (ILO 2014) 25; for a study of the work of the independent Management Evaluation Unit within the UN's internal justice system, see generally, R. Gulati, 'The International Dispute Resolution Mechanism of the United Nations'.

²²² *Ibid.*, 33.

²²³ Fauth, 184.

²²⁴ See *Mr A.R.B.B.* (2013) ILOAT Judgment No. 3222, para. 10, where the ILOAT said '[a]nother purpose of Art. VII (1) of the Statute is to ensure that the Tribunal does not become, *de facto*, a trial court of staff grievances and to ensure it continues as a final appellate tribunal. The Tribunal is ill-equipped to act as a trial court and its workload could, potentially, become intolerable or unmanageable if its role was not confined in this way'.

and, as a prerequisite of judicial review, an indispensable means of preventing the dispute from going outside the organization. In the event of a complaint it greatly helps the Tribunal in identifying the material issues of fact and law²²⁵

The ILOAT's approach is probably based on: its own perception about its role as an appellant court; and no doubt, reasons of practicality. The ILOAT has one Registry in Geneva where the judges meet for their sessions, with Respondent organizations and complainants spread around the world. Engaging in fact-finding in such circumstances would no doubt be an onerous exercise, even if electronic means to enhance access to justice are implemented (which they have not been so far). Given the convoluted role of the ILOAT, where in reality it ought to be a first instance court, but behaves like an appellant one, means that the ILOAT is not in a position to provide justice to aggrieved officials consistent with their right to access a truly first instance judicial mechanism that makes independent factual findings, as opposed to relying on conclusions reached by internal appeal boards whose independence and impartiality is seriously compromised. Many have argued for a reformed ILOAT regime so that it can perform a better first instance role. However, this author believes that the way forward is to reform and replace the internal appeal boards by implementing an enhanced first instance justice mechanism, and leave the ILOAT to perform an appellant function, as it already does.

The convoluted role of the ILOAT, which is a cause as well as symptom of the deficient legal infrastructure in place in several organizations, has meant that the ILOAT has been unable to deliver justice in compliance with fair trial guarantees. This ultimately compromises its institutional independence. Further deficits in the fair delivery of justice principally concern the denial of the right to an oral hearing; the right to examine witnesses; inordinate delays in accessing justice; and the contravention of the principle of the equality of arms.

(ii) *The Lack of Oral Hearings*

Since 1989, not a single request for oral hearing has been granted by the ILOAT.²²⁶ The provision in the ILOAT's Statute and Rules of Procedure empowering it to hold oral hearings has been effectively negated, with the ILOAT routinely and in a cursory way dismissing requests for oral hearings or hearing

225 *Amira* (1994) ILOAT Judgment No. 1317, para. 31.

226 Amsterdam Report, 1.

witnesses.²²⁷ This practice raises even graver concerns given the ILOAT's 'Statute and Rules have no formal mechanism for discovery by a complainant of critical documentation or information in the hands of the defendant organization, substantially hampering a complainant's ability to meet his/her burden of proof or impairing their 'right of defence when accused of misconduct'.²²⁸ In the absence of an oral hearing, a complainant then has absolutely no opportunity to properly test the evidence in his or her case.

Presumably because it does not see itself as a fact-finder, the ILOAT refuses all applications for oral hearings. The routine denial of oral hearings is seriously problematic where there is a contest on the evidence regardless of the category of a complaint; and is especially concerning in disciplinary cases where the right to an oral hearing may become necessary due to the existence of disputed facts. Alarming it is that officials can suffer the most serious consequences, including loss of their employment and the destruction of their reputations, effectively based on factual findings made by mechanisms that are anything but independent and impartial. Experts have concluded that the ILOAT's practice of denying an oral hearing is a contravention of the right to a fair trial and contrary to the statutory intention enshrined in the ILOAT's Statute.²²⁹

With the UN system now providing oral hearings regularly, it also may be questioned whether different treatment in respect of the right to access an oral hearing from agency-to-agency can be objectively justified. Until such times that a truly independent and impartial first instance mechanism is made available to aggrieved officials; the one area where the ILOAT itself can enhance access to justice is to grant oral hearings regularly; and especially in cases where there exist disputed issues of fact.²³⁰ Any argument that oral hearings are impracticable due to reasons of geography can be readily overcome by the use of technology, which the ILOAT seems reticent to adopt. The regular denial of

227 Flaherty identifies common phrases employed by the ILOAT to deny oral hearings: "Having examined the written pleadings, the Tribunal has decided not to order hearing for which neither party has applied". "Having examined the written submissions and disallowed the complainants' application for hearings". "Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses": see E.P. Flaherty, 'Legal Protection in International Organizations for Staff—a Practitioner's View' (7 February 2012), available at <http://flahertylawgroup.com/legal-protections/> (last accessed 15 June 2018).

228 SUEPO Report, 9.

229 Robertson, 'Opinion for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters', para. 10.

230 Flaherty points out that the reform process undertaken by the ILO Staff Union in the early 2000s suggesting that the ILOAT be reformed did not provide any clear reasons as to why the ILOAT refuses to hold oral hearings.

oral hearings means that in several cases, the right to a fair trial is being manifestly breached at the ILOAT.

(iii) *Delay*

Leaving to one side the significant time that may take to exhaust internal remedies (which in some cases can take several years);²³¹ the number of years it takes for the ILOAT to render a decision generally breaches the standards of a fair hearing. On one analysis carried out by the Staff Union of the European Patent Office, it could take up to six years before the ILOAT could address its backlog.²³² The ILO points to the ever-increasing case-load of the tribunal (; pointing out that it is working at maximum capacity (rendering around 150 judgments per year); and it does not have capacity to enhance its output without compromising on its quality.²³³ Meaning that some cases may take anywhere between 4–6 years to be processed from their inception at an internal appeals process until the ILOAT decision is rendered, assuming that the ILOAT maintains its higher output achieved since 2014, and no further backlogs are created.

The length of proceedings in terms of compliance with fair trial standards depends on various factors, such as the complexity of a case, and the attitude of the parties.²³⁴ Bearing in mind the employment context, the time it may take a case to be processed at the ILOAT is so excessive that it most certainly breaches the right to access a court without undue delay. Similar delays within the UN's internal justice system that preceded the 2009 reforms were found to be 'egregious'.²³⁵ It is also contrary to the ILOAT's 'firm Tribunal case law that a staff member is entitled to an efficient means of redress and to expect

²³¹ To cite just a few examples, *P.M. (No. 2)* (2016) ILOAT Judgment No. 3688, para. 5 (where the internal review process took 45 months); and *Mrs K.J.L.* (2011) ILOAT Judgment No. 3092, para. 15 (where the internal review took 42 months). In both those instances the delay was held to be unjustified.

²³² SUEPO Report, 1–2. The SUEPO pointed out that as of July 2015, the ILOAT had 450 pending cases; and it could take up to six years for the backlog to be cleared, assuming no new backlogs are created; see also the International Labour Office, 'Matters relating to the Administrative Tribunal of the ILO Workload and Effectiveness of the Tribunal' (15 October 2015) GB.325/PFA/9/1 (Rev.) paras 7 and 14 (hereinafter 'ILOAT Workload and Effectiveness Report').

²³³ ILOAT Workload and Effectiveness Report, para. 14.

²³⁴ See General Comment No. 32, para. 27 where the UN Human Rights Committee states that '[a]n important aspect of the fairness of a hearing is its expeditiousness ... [delays] that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in [Art. 14 (1) of the ICCPR]'.

²³⁵ A delay of three years in processing of claims in the old UN internal justice system was said to constitute an 'egregious delay': Redesign Panel Report, para. 66.

a decision on an appeal to be taken within a reasonable time.²³⁶ The ILOAT has found delays of even a few months that cannot be objectively justified due to the complexity of the case or the behaviour of the complainant to be unreasonable.²³⁷ Domestic employment tribunals that determine analogous disputes in national systems are required to determine employment disputes within months and not years generally; with harassment claims triggering urgent attention (sometimes within 24 hours of a complaint being raised) particularly.²³⁸ In a comparative study of employment tribunals deciding the kinds of disputes that IATS would usually determine (although applying a different law), a recent study by the ILO observed:

In 2013–14, Australia's [Fair Work Commission] rendered decisions within eight weeks of a hearing in almost 84 per cent of cases, and within 12 weeks in over 93 per cent of cases. In Germany, the importance of speedy procedures at all levels of labour court matters is explicitly referred to in the Labour Court Act. In addition, the Act provides that disputes concerning the existence, non-existence or termination of the employment relationship must be dealt with as a matter of priority. In 2012, more than 85 per cent of all cases lodged were settled within six months. Japan's Labour Tribunal Act requires the tribunal panel to complete its procedures within three hearing sessions. Average disposal time was nearly 75 days in 2013, while under the first-instance civil procedure it was just over 13

236 See *Mr J.A.C.* (2013) ILOAT Judgment No. 3168, para. 13 (and cases cited there). In ILOAT Judgment No. 3688, where there was a three-year delay attributable to the organization for delay in the administration of justice, the ILOAT awarded moral damages as the delay breached the complainant's due process rights (see paras 5–12.) In that case, even a delay in one aspect of the internal appeals process amounting to eight months that could not be explained by the organization was considered unjustified (para. 6). See also ILOAT Judgment No. 3092, para. 15: when the WHO did not process a claim for a service-incurred injury within 42 months, the ILOAT awarded moral damages as the delay was said to be manifestly unfounded; it is also apparent that any delay (of even a few months) that cannot be explained or justified due to the complexity of the case, etc., will be 'undue'. The tribunal has also said that an organization has a positive obligation to ensure that internal appeal procedures move forward with 'reasonable speed': see ILOAT Judgments No. 2197, para. 8 and No. 2904, para. 15.

237 See ILOAT Judgment No. 3092, para. 15: where the WHO did not process a claim for a service-incurred injury within 42 months, the ILOAT awarded moral damages for the delay was said to be manifestly unfounded. In that same case, it is also apparent that any delay (of even a few months) that cannot be objectively justified will be undue; in ILOAT Judgment No. 3168, para. 18, where there was an unjustifiable delay of approximately 9 months, it was found to be undue.

238 See A. Forsyth, 'Australia' in M. Ebisui, S. Cooney and C. Fenwick (eds), *Resolving Individual Labour Disputes: A Comparative Overview* (ILO 2016) 33.

months. In the United Kingdom, the average disposal time for a single claim at the [Employment Tribunal] is 27 weeks In Sweden, cases adjudicated through the labour courts took around 12 months²³⁹

Even a delay of mere months in the determination of an employment claim ought to attract very close scrutiny vis-à-vis compliance with the right to a fair trial. Resource constraints are no excuse for not rendering justice without undue delay. It is the responsibility of the authorities charged with setting up the justice system to ensure that enough resources (in terms of number of judges, registry staff, and budgetary allocations) are made so that the individual right to a fair trial without undue delay can be practically realized. The ILOAT has found so with respect to internal appeal procedures; and there is no rational reason why the same principle should not apply to the delivery of justice at the ILOAT itself.²⁴⁰ There is no doubt that the ILOAT's case-load has exponentially increased.²⁴¹ Such an increase has not been matched with enhanced resources so far.

In sum, the ILOAT does not engage in a fact-finding exercise; does not hold oral hearings; there is no oral testimony given; and the undue delay in the completion of a case is remarkable. Some say that the vast personal jurisdiction of the ILOAT can cause delays: the perception that the extent of the personal jurisdiction of the ILOAT is the cause for delays has been debunked for there are only a small number of organizations that form the majority of the ILOAT's case load, with the European Patent organization (EPO) constituting a significant percentage.²⁴² Indeed, the EPO has been blamed as a main reason for excessive delays by the ILO. Be that as it may, the EPO continues to subscribe to the ILOAT's jurisdiction, creating 30 % of its caseload despite only constituting

239 See 'Resolving Individual Labour Disputes: a General Introduction' in M. Ebisui, S. Cooney and C. Fenwick (eds), *Resolving Individual Labour Disputes: A Comparative Overview* (ILO 2016), 1, 21.

240 It is the organization's responsibility to appropriately staff the internal appeals processes so that justice can be rendered without undue delay: ILOAT, Judgment No. 3168, para. 13. The right to a fair trial also demands that authorities appropriately finance justice mechanisms to ensure that no 'undue delay' is caused in the administration of justice: see General Comment No. 32, para. 27.

241 As the current Registrar of the ILOAT points out: in the whole period of its operation as the L&T Administrative Tribunal, it rendered 37 judgments. Since 2010, the Tribunal has been regularly receiving more than 200 complaints per year: see Petrović, 29.

242 ILOAT Workload and Effectiveness Report, para. 24; at para. 10, it is noted that 'the EPO has been concerned by 761 judgments out of a total of 3,560 judgments delivered by the Tribunal since its creation. By way of comparison, the Tribunal's second oldest member organization – the World Health Organization – with similar staff numbers has been concerned by 447 judgments in 66 years of membership, that is an average of seven judgments per year'.

less than 16 % of the staff; and the existing backlog will no doubt continue to cause delays.²⁴³ That is why it has been concluded that ‘it is difficult to see how the Tribunal could continue under its current configuration and arrangements to cope with both its accumulated backlog and increasing workload’.²⁴⁴

The real reasons behind the delay in the administration of justice are perhaps based in systemic issues with the ILOAT’s approach to certain decision-making; and of course resource-deficits. On the former, the ILOAT does not allow claims from staff associations on behalf of staff members (narrowly interpreting Art. 2 (6) of its Statute), a matter that results in barriers to access to justice as well.²⁴⁵ Challenges to general decisions of the organization impacting on staff rights has attracted inconsistent jurisprudence, with the ILOAT not allowing for such challenges in recent times.²⁴⁶ A vast number of claims that could be determine in one proceeding (or test cases supported by a staff association) then end up being subjected to multiple challenges. A prime example of this is provided by the litigation against the EPO. The EPO Staff Union pointed out that the inability of challenging general decisions may mean that thousands of further claims may be triggered in the coming years.²⁴⁷ If this eventuates, delays would be further entrenched. On the latter, while it is difficult to determine issues of resourcing in the absence of transparency, brief observations may be made. The seven ILOAT judges meet for approximately two months a year, several of whom are still in the service of their respective

243 Ibid., para. 10.

244 Ibid., para. 24.

245 Robertson ‘Opinion for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters’, para. 15; also note that in most jurisdictions/national systems ‘individual workers are often reluctant to voice their claims, fearing retaliation or the inability to proceed alone against their employers. In order to reduce this barrier to access, most adjudication systems provide that a claim can be pursued on a claimant’s behalf by another individual’: see ‘Resolving Individual Labour Disputes: a General Introduction’ 26–7. In another blow to the exercise of collective rights and access by staff associations to a court, in *EPO v. VEOB et al* (20 January 2017) 15/02186 LZ/AS, paras 3.3, 5.2 and 5.7, the Dutch Supreme Court (First Chamber) reversed the decision of the Hague Court of Appeal in *VEOB et al. v. EPO*, Appeal Court of the Hague (17 February 2015) Case No. 200.141.812/01, which breached the immunities of the EPO for it did not provide the staff their collective rights in accordance with the European Convention on Human Rights.

246 SUEPO Report, 3.

247 Ibid. According to the EPO Staff Union: ‘The Tribunal’s insistence on every staff member filing an appeal when he/she is affected as a consequence of a general measure has led to over 3000 internal appeals, most of which are bound to reach the Tribunal ... adding another (potentially) 3000 cases is going to cause an inordinate and undue delay before any of these complainants can obtain justice’.

domestic judiciaries for the remaining time.²⁴⁸ One may thus explain why excessive delays occur despite the judges' best efforts, including holding longer and extra sessions.²⁴⁹

To counter the criticism, the ILOAT has taken some marginal steps to address the delays in the administration of justice. A fast-track procedure was recently introduced providing for a more expeditious procedure in cases where the dispute concerns only a question (or questions) of law, identified by agreement between the parties, and the main facts are uncontested.²⁵⁰ There is a lack of evidence-base to conclude as to how successful the fast-track procedure actually has been. The ILOAT has also increasingly relied on its power to summarily dismiss a complaint,²⁵¹ although this has led to the criticism that such a practice further undermines the right of an official to a determination on the merits of his or her claim.²⁵² Despite the efforts that have been, or can be undertaken to enhance the delivery of justice, it is unlikely that without systemic reform, the deficit can be properly and comprehensively resolved. On the estimates available, the backlog of cases remains significant, and it will take several years for it to be cleared. Given that more and more claims are filed every year, as the ILO has said, it is unlikely that the present situation is sustainable. Unless drastic reforms are introduced, it is suggested that just based on the breach of the component fair trial right to access justice without undue delay, for no fault of the judiciary, the ILOAT is not rendering justice consistently with the right to a fair trial.

(iv) *Equality of Arms*

The principle of equality within the ILOAT regime can arise in two broad situations. First, equality of arms at the level of the internal appeals procedures; where it must be accorded but is often denied. The specifics of that discussion involve considering the legal systems of 58 different distinct international organizations, and is beyond the scope of this paper. The second relates to equality directly before the ILOAT.

248 ILOAT Workload and Effectiveness Report, paras 9 and 14.

249 See Petrović, 29, where it is noted that to deal with the workload, the tribunal recently organized an extra session and extended the duration of its regular sessions from three to four weeks. This enabled the ILOAT to increase its workload from 50 to 80 judgments per session.

250 Art. 7bis of the ILOAT Rules of Procedure.

251 SUEPO Report, 1, fn 3. The Report points out that: 'The summary procedure provided for in Art. 7 of the ILOAT Statute was used 18 times between 1945 and 2014; since July 2014 (as of 2015) it has been used in at least 58 cases'.

252 Ibid..

In so far as equality before the ILOAT itself is concerned, perhaps the most significant deficiency arises due to the routine denial of oral hearings. While some may argue that where both parties are denied an oral hearing, the equality principle is not breached. It is important to however take into account that whereas the organization is in possession of all the documents and information relevant to the determination of a case, the complainant may be denied access to such documents. In such circumstances, without access to oral hearings; and the chance to test the evidence: it can hardly be said that the principle of equality is being practically realized.²⁵³ The equality deficit is further exasperated due to the absence of any provision in the ILOAT's Statute or Rules of procedure allowing a complainant to seek discovery of documents;²⁵⁴ meaning that the complainant is at the mercy of the Respondent to a case; or the ILOAT; for full disclosure. Given how the ILOAT procedurally functions, with no case management hearings facilitated where interlocutory issues critical to the just determination of a dispute may be ventilated, the principle of equality is seriously compromised.

Moreover, the Respondent institution will invariably be represented by counsel. There is little information available about the possibility for staff members of the different organizations subscribing to the ILOAT's jurisdiction to secure legal representation.²⁵⁵ Leaving to one side the complexity of international administrative law, a relatively obscure body of law requiring legal expertise in the preparation of cases; with the ILOAT's onerous processes requiring significant expense just to file and dispatch a claim to its Geneva Registry, the equality deficit is in fact starker than what may appear to be the case at first glance. Of course, the Respondent will almost always be in possession of superior financial and human resources.²⁵⁶ When the existing factual inequalities are considered in light of the deficient legal infrastructure in place, the demands placed on aggrieved officials to undertake international litigation without structurally enshrined access to legal representation must not be underestimated.

Until recently, The ILOAT regime went on to entrench inequality to bizarre limits. Not only an aggrieved official is unable to seek the protection of

253 The ILOAT itself has stressed the central role of the principle of equality of arms in international administrative procedural law: see for example, ILOAT Judgment No. 3688, para. 29; see generally Fauth.

254 See Robertson, 'Opinion for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters', noting a lack of discovery procedures at the ILOAT.

255 Art. 5 of the ILOAT Statute entitles a complainant to appoint privately retained counsel; but no right to guaranteed legal representation is enshrined.

256 *IFAD Advisory Opinion* (Separate Opinion of Judge Greenwood) para. 6.

a national court due to jurisdictional immunities, where the organization is able to do so; the Art. XII regime constituted yet another layer of a one-sided review possibility only open to Respondent organizations. As the ICJ itself observed on numerous occasions, the inability of the very individual who initiated the litigation at the level of the tribunal to approach the ICJ, and put his or her case forward in his or her own right, where the organization could do so, raises grave issues of equality in proceedings (howsoever named) that in reality constituted a contentious dispute,²⁵⁷ that resulted in a binding judgment affecting the interests of the aggrieved official.²⁵⁸ It is only because the ICJ was unwilling to refuse requests for determining Advisory Opinions pursuant to the Art. XII regime when asked to do so: that saved it from a judicially imposed death.²⁵⁹ The ills of the Art. XII regime have neatly been summed up by Judge Greenwood in his declaration in the IFAD Advisory Opinion as follows:

[T]here is a marked inequality of access to justice in that the employer, but not the employee, may challenge a decision of the Tribunal. While that inequality might have been acceptable fifty years ago (although for some judges it aroused concerns even then), I do not believe that it is acceptable today ... The Court should not be asked to participate in a procedure whose inequality is at odds with contemporary concepts of due process and the integrity of the judicial function.²⁶⁰

The ILOAT itself also said that the Art. XII regime is ‘fundamentally imbalanced to the detriment of staff members’.²⁶¹ The concerned employee was largely at the mercy of the organization as to how the right to present his or

257 Ibid., para. 5, Judge Greenwood spoke of ‘the reality of such proceedings as a confrontation between a staff member and the organization’.

258 Ibid., para. 4, Judge Greenwood said: ‘Under Art. XII, a staff member, such as Ms Saez Garcia, who has been successful in a case before ILOAT can find that the judgment in her favour is challenged before this Court, whose opinion, though ‘advisory’ under the Court’s Statute, is binding under the terms of Art. XII (2) of the ILOAT Statute. If the Court concludes that the ILOAT has exceeded its jurisdiction, or that there has been a fundamental flaw in procedure, the staff member will – lose the compensation awarded to her. In substance, therefore, if not in form, the proceedings before the Court are proceedings between the Organization requesting the Opinion and the staff member, and the Court’s opinion will determine whether or not the staff member continues to be entitled to the compensation awarded to her’. See also the Separate Opinion of Judge Cançado Trindade in the *IFAD Advisory Opinion*, paras 28, 92, and 101.

259 Ibid., para. 3 (Judge Greenwood).

260 Ibid., paras 3–6.

261 See *IFAD* (2011) ILOAT Judgment No. 3003, paras 40–43.

her case is actually exercised. The Art. XII regime was nothing but a disguised appeal, which only the Respondent organization could pursue. It breached the principle of the equality of arms; and caused even more delays in the realization of justice, in an already excessively slow justice regime.²⁶²

The ICJ's attempt to bring about so called 'actual equality' in a roundabout way only addressed the equality deficit marginally and that to on a case-by-case basis; in any event that approach did not remedy the structural deficits in the Art. XII regime. The fact remains that the original complainant at the level of the tribunal could not approach the ICJ on an equal basis with the organization, infringing on the right to equal treatment. The totality of the breach of the right to a fair trial resultant from the application of the Art. XII regime in the view of this author is a sufficiently compelling reason justifying the demise of the regime.²⁶³

2 *Individual Independence*

a Method of Appointment and Judicial Qualifications

The deficits in the ILOAT's regime when it comes to the method of judicial appointments; and requirement for qualifications are significant and well-rehearsed. As to who appoints ILOAT judges, the statutory provisions are silent. However, in 2007, it was noted in the Amsterdam report that the selection process involves 'the ILO Director-General first consult[ing] with the ILO Governing Body and then select[ing] candidates on the following criteria: (1) experience in a court of high national jurisdiction or equivalent status at the international level; (2) nationality; and (3) balance in linguistic ability'.²⁶⁴ More recently, the process was contextualized as follows:

While the original text of the Statute adopted in 1927 provided that three judges and three deputy judges would be appointed by the Council of the League of Nations, which would be equivalent to the ILO Governing Body, the ILO decided that judges should be appointed by the International Labour Conference. By entrusting the task of appointing judges to the Conference, which is not only the highest body of the Organization but, more importantly, is a tripartite body entrusted with the mandate of dealing with international labour issues, the ILO pre-empted any serious

262 The delay in the delivery of justice was one of the reasons why Judge Greenwood was even willing to make an order for costs had such costs been sought: *IFAD Advisory Opinion*, para. 6.

263 The International Labour Office had suggested abolishing the Art. XII regime: ILOAT Workload and Effectiveness Report, para. 30.

264 Amsterdam Report, 38.

challenge to the judges' legitimacy. Who else would be better placed than the 'World Parliament of Labour' to choose judges for this type of jurisdiction?²⁶⁵

The ILO's executive organ continues to exercise a degree of control on appointments given their consultative role. The apparent move from what are effectively executive to partially legislative appointments may or may not have constitute an advancement at the time when the LNAT was renamed the ILOAT. According to modern human rights standards, judicial appointments ought to be made by an independent body and in a transparent manner. Moreover, the so called 'political accountability' of ILOAT judges also must be now understood narrowly, where a judge may only be removed in exceptional situations, and that too following a fair hearing. The absence of an independent commission or mechanism; as well as any transparency in the appointment process (including the lack of any prescription on qualifications) seriously undermines the perception of the individual independence of ILOAT judges.

The lack of *de iure* standards does not mean that ILOAT judges are not selected from amongst the brightest judicial minds. As the current Registrar of the ILOAT points out 'the ILO opted for the selection of judges who already hold the highest judicial functions in their respective countries'.²⁶⁶ So far, 56 judges and deputy judges of 29 different nationalities have sat on the ILOAT since 1946.²⁶⁷ The practice whereby only existing judges of superior courts are appointed to the ILOAT tempers to a significant degree the opaque nature of the selection process. Be that as it may, without *de iure* guarantees, regardless of the prevailing practice, the perception of an independence deficit remains.

b Security of Tenure: Length of Tenure; Financial Security; Judicial Accountability

One of the most significant deficits in the independence of the ILOAT is the short renewable terms of appointment. Robertson commented:

[T]he Tribunal members are 'contract judges', whose well-remunerated employment is contingent upon the regular approval of the very body which is a defending party to their proceedings. This position is

265 See Petrović, 29.

266 Ibid., 24.

267 Ibid., 27. It is also noted that several former Presidents of the Tribunal – Judges Gentot, Ba, Gaudron and Rouiller, for instance – stayed with the Tribunal for between 10 and 15 years each.

plainly incompatible with the rule that requires the judiciary to be independent ...²⁶⁸

Not only there is a complete lack of transparency on how the renewal process works; how many terms a judge can be appointed for (this could be potentially unlimited); but there are no provisions guaranteeing financial security of the judges; or the process of the removal of judges. Given these deficits, the ILOAT cannot said to constitute a body whose judges can be considered to be individually independent. Given the *de iure* deficits, the Amsterdam Report concluded that 'it is clear that the ILOAT must take substantial steps in order to meet judicial independence standards.'²⁶⁹

Overall, for no fault of the judiciary; but due to the institutional laxity, the assessment of the ILOAT with standards of individual independence can only be rated as poor.

3 *Impartiality*

Following a similar pattern to the lack of *de iure* protections regarding independence, there exist no rules concerning the possibility of recusal either by application of a party, or by the judge him or herself when issues of subjective or apprehended bias are engaged. In fact, the party to the proceedings do not even know the identity of the judge determining the case. Until judgment is rendered, for all intents and purposes, the trial is before a faceless court. Given these significant deficiencies, the Amsterdam Report concluded:

The absence of any statutory safeguards and the lack of transparency with regard to the practices and procedures addressing impartiality could create the appearance of a lack of independence safeguards. Further, the fact that parties before the ILOAT do not know the identity of the judges until after the judgment is rendered may be seen as problematic especially in light of Human Rights Committee jurisprudence addressing the issue of the faceless judge.²⁷⁰

To conclude, the fact that there exists no equality of arms; oral hearings are not provided; there exists no right of appeal; and the parties to proceeding have no possibility in law or fact to make an application for recusal means that no protection is provided to a party to address impartiality before the court or

²⁶⁸ Robertson, 'Opinion for the Information Meeting on the ILO Administrative Tribunal Reform and Related Matters', para. 6.

²⁶⁹ Amsterdam Report, 61.

²⁷⁰ *Ibid.*, 49 and 55.

through a higher appellant tribunal. The ILOAT demonstrably does not provide for an objectively impartial dispute resolution mechanism.

4 *A Concluding Comment on the ILOAT Regime*

The ILOAT is the earliest IAT: remarkably, its need became immediately apparent when the very first Director-General of the International Labour Office (as it was then known), Edward Phelan, the first official employed by the ILO, also happened to be the very first official to bring a complaint to the Tribunal in 1929.²⁷¹ Since then, the ILOAT has no doubt played a significant role in the development of IAL. However, its laws and practices have changed little since its inception.²⁷² It does not comply with modern standards of human rights law when it comes to the administration of justice. It is largely structural reasons that prevent the ILOAT from delivering justice independently, impartially and fairly. Moreover, the ILOAT still relies on antiquated procedures. With no e-filing in place, and the absence of the use of technology to conduct proceedings, the delivery of justice is cumbersome and slow. In sum, without significant reforms to its regulatory regime, and how justice is actually delivered, it is unlikely that the ILOAT can deliver justice in compliance with human rights standards generally, and the international administrative procedural law of fair trial specifically.

VIII General Conclusion

The development of an international administrative procedural law of fair trial is to be welcomed. Whether that law is being applied in practice is the real question. Primarily due to the exceptional candour shown by the UNDT judges in and out of court, by and large, officials having access to those tribunals can said to access a court that can said to be independent and impartial. However, given the deficits identified in this paper, should national or regional human rights courts be confronted with challenges impugning the UN internal justice system, very close scrutiny of the impact of the independence and impartiality deficits ought to be given to ensure that in particular cases fair trial guarantees have not been contravened. If the UN's internal justice system is to avoid the risk of being impugned before national and human rights courts,

²⁷¹ G. Ryder, 'Introduction', in D. Petrović (ed.), *90 Years of Contribution of the Administrative Tribunal of the International Labour Organization to the Creation of International Civil Service Law* (ILO 2017) 15, 16.

²⁷² The ILOAT's Statute has been amended only seven times but its competences *ratione materiae* and *ratione personae* have not been modified; the three-year length of term in Art. 3 has never been amended; see Petrović, 21–22.

immediate steps to counter the independence and impartiality deficit must be undertaken.

The ILOAT however is not rendering justice consistently with the right to a fair trial. Leaving alone the significant structural independence and impartiality deficits, the excessive delays in the delivery of justice on their own are egregious contraventions. The idiom 'justice delayed is justice denied' rings true for the ILOAT. Remarkable though it may be, unless significant changes to the ILOAT's law and practice are made, the individuals having access to the ILOAT cannot receive justice in compliance with fair trial standards. Blame for this lowly state is largely attributable to the ILO and the international organizations responsible to set up the justice machinery. So far, the broader regime provided by the ILOAT is being spared the ignominy of rejection at the international level not because it is compliant with the right to a fair trial, but because national and regional human rights courts have failed to examine it with the proper scrutiny that is warranted.

In sum, the right to access an independent court or tribunal for a vast number of international civil servants is being undermined. Despite the development of an international administrative procedural law of fair trial, its implementation remains a challenge. A move from rhetoric to reality is greatly needed. To make matters worse, increasingly, international organizations, including the UN and the ones subscribing to the ILOAT's jurisdiction, rely on temporary workers, such as consultants or contractors, to perform roles traditionally performed by fixed or permanent staff members. This category of worker does not have access to the UNDT and the UNAT; or the ILOAT, as the case may be. As a result, an even larger number of officials are being denied access to justice. How to enhance access to justice for this latter category of individuals, and how such mechanisms may be integrated into what I have called an international administrative procedural law of fair trial is a significant issue the discussion of which is left for another day.

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