

COMMON FOCUS AND AUTONOMY OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS



International colloquy

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

COMMON FOCUS AND AUTONOMY OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS

International colloquy

**50th anniversary
of the establishment
of the Council of Europe
Administrative Tribunal**

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Preface

From 18 to 20 March 2015 the Administrative Tribunal of the Council of Europe held a colloquy to celebrate its 50th anniversary.

The tribunal wished to mark this anniversary by bringing together the largest possible number of members from other similar tribunals and practitioners in this field of law, in order to hold an exchange on the current situation in international administrative justice. Indeed, during the last 50 years the world of such tribunals has not only expanded, but also changed significantly. Consequently, it was deemed appropriate to take stock of future needs, as well as the changes it would be desirable to introduce. This colloquy also followed the one held in April 2014 by the International Monetary Fund Administrative Tribunal, entitled “The Future of International Administrative Law: Harmonisation? Fragmentation? Dialogue?”

The colloquy was conducted in two phases. On 18 March, no fewer than 54 judges and registry members of 19 administrative tribunals of international organisations, located all across the world, came together to exchange ideas. On this occasion, they debated several questions, including how to improve their collaboration.

Even if they did not reach a decision to place their meetings on a formal institutional footing, the participants agreed that it would be a good thing to strengthen relations between tribunals and to increase the exchanges between them. This has already been a success, insofar as such collaboration was virtually non-existent in the past. On this point, I refer to the comments made by my colleague, Judge WALINE, in his conclusions at the close of the colloquy.

On 19 and 20 March, the colloquy itself was attended by just over 200 participants from 33 international organisations. In addition to the participants from 18 March, there were also a significant number of academics, international consultants, lawyers and representatives of parties to proceedings, and delegates representing the staff associations of international organisations. Last but not least, there were also representatives of retired international civil servants’ associations and a number of retirees themselves, who, it must be pointed out, continue under current regulations to benefit from certain rights with regard to their former organisations and/or the bodies which pay their pensions once they have left employment.

Some judges from the highest national courts also participated in the colloquy. At the end of the colloquy, the participants were able to meet with two judges from the European Court of Human Rights, who are also experts on the international civil service and with whom they had a very constructive exchange.

The theme of the colloquy (“Common focus and autonomy of international administrative tribunals”), chosen after consulting experts on the subject, was aimed at taking stock of the way in which the tribunals deal with certain issues.

The proceedings comprised six working sessions focusing on the role and importance of administrative tribunals in international organisations, the enjoyment of fundamental rights in international organisations, factors that can affect the exercise of the right to appeal, the effectiveness of decisions pronounced before and after judgment, the specific nature of international civil service law and the exercise of discretionary power.

The result of this work is presented in full in this publication. I will not go into details, as reading the contributions themselves is more instructive than any comment I could make.

Before concluding, I cannot resist setting out a few considerations on a proposal that was made in 1965, when the Committee of Ministers of the Council of Europe decided to set up a tribunal within the Organisation and which is mentioned in the conclusions of the 140th meeting of the Ministers’ Deputies (meeting of 5-9 April 1965, page 71).

Once the decision had been taken to establish a tribunal and the question of choosing the judges was therefore raised, the then Deputy Secretary General suggested appointing: a) the former President of the Arbitral Tribunal of the Council of Europe – the body which preceded the tribunal that was about to be set up – who was at the time a judge of the European Court of Human Rights, and b) “in order to guarantee a certain level of uniformity in the decisions of different organisations, a member of the European Communities’ tribunal and a member of the OECD Appeals Board” (meeting of 5-9 April 1965, page 71).

Then, the Organisation decided to introduce another method of appointing judges. This proposal, which was groundbreaking in nature, shows the importance attached by the Council of Europe to judicial protection in matters regarding the international civil service.

Even if it was not accepted, I see in this proposal a desire to create a system based on three principles that should inspire the work of an international tribunal and that were mentioned at our colloquy: concern for consistency of the decision to be made with the case law of the tribunal taking the decision; concern for consistency with the case law of other tribunals, while bearing in mind any differences in positive law; and respect for the fundamental principles and values of our society, whether codified or accepted by international case law.

Christos ROZAKIS
Chair of the
Administrative Tribunal
of the Council of Europe

SPEECH BY CHRISTOS ROZAKIS, CHAIR OF THE ADMINISTRATIVE TRIBUNAL OF THE COUNCIL OF EUROPE

Mr Secretary General,

Mr President of the European Court of Human Rights,

Mr presidents of the administrative tribunals,

Professors, and judges of various jurisdictions,

Ladies and gentlemen,

We have gathered today in this room to celebrate the 50th anniversary of the Administrative Tribunal of the Council of Europe, through a scientific conference bearing the title “Common focus and autonomy of international administrative tribunals”.

And I am happy to welcome all of you in the name of the tribunal.

The Administrative Tribunal of the Council of Europe has contributed a lot in the consolidation of its own case law, inspired by the jurisprudence of the European Court of Human Rights, that of administrative courts of various international organisations, of an ecumenical or regional character, and taking account of the specificities of the Council of Europe, an organisation devoted to the protection and promotion of democracy, the rule of law and human rights, individual and social. In the 50 years of its operation, it has dealt with a multiplicity of problems, of differences between, on the one hand, the personnel of the Council of Europe, of its development bank and of the European Court of Human Rights, and on the other hand the head of the administration, the Secretary General of the Organisation, who formally is the recipient of all the complaints of the personnel, with the exclusion of the complaints against the development bank, where the recipient of the complaints is its governor.

With the invaluable assistance of our registry, which is composed of one registrar, Mr Sergio SANSOTTA, and one deputy registrar, Ms Eva HUBALKOVA, who is also a member of the European Court of Human Rights, assisted by a secretary, Ms Anna REGARD and a communication assistant, Ms Flore CHABOISSEAU, the tribunal is able to deal with at least 20 cases a year, most of them having been heard orally in a hearing before the tribunal.

In recent years, and with the rapid proliferation of international organisations, our tribunal is finding it difficult to follow the case law of a number of tribunals, instituted together with the organisations to cope with the need to settle disputes of their personnel, and find solutions to their problems. And, consequently, we decided to hold a conference dealing with the problem of how the large number of tribunals around the globe could streamline their jurisprudence, and avoid double standards in the implementation of their precepts. We hope that this conference, with the presence of eminent practitioners, but also members of academia, will produce fruits for our common goal, which is the alignment of the case law of the administrative tribunals of all, or almost all, of the international organisations around the world.

With these remarks I'll give the floor to the Secretary General, wishing you the best results and success in our endeavour.

Thank you.

SPEECH BY THORBJØRN JAGLAND, SECRETARY GENERAL OF THE COUNCIL OF EUROPE

It gives me a great pleasure to welcome you all...

And, in particular, to welcome the individuals who make the Council of Europe Administrative Tribunal such a success: Christos ROZAKIS, the chair, and Giorgio MALINVERNI, his deputy – I would like to congratulate both on their reappointment at the end of the month.

The tribunal's judges: Jean WALINE and Rocco Antonio CANGELOSI. I should also thank Judge WALINE ahead of his departure, and Judge CANGELOSI who will continue to provide his services to the tribunal as a deputy judge.

I welcome newly appointed judges, Ms Mireille HEERS and Mr Ömer Faruk ATEŞ, as well as Ms Lenia SAMUEL, a deputy judge appointed just yesterday.

I want to praise the contribution of the deputy judges, the registrar Mr Sergio SANSOTTA, and the support staff.

And, finally, I would like to commend the tribunal more broadly for the recent agreement signed with the Central Commission for the Navigation of the Rhine.

Now the tribunal will not only work with Europe's oldest intergovernmental organisation, the Council of Europe, but also the world's oldest international organisation still in existence, founded in the aftermath of the Napoleonic Wars, to protect European trade by guaranteeing safe passage through the Rhine.

It seems the tribunal has reached 50 and decided to branch out – and we wish it every success.

The Committee of Ministers of the Council of Europe had the foresight, 50 years ago, to abolish the arbitration system and establish a new scheme for reviewing administrative decisions.

The tribunal was born.

Nowadays bodies of this kind are the norm for international organisations, and an essential part of the legal landscape.

Administrative tribunals provide justice in disputes between international civil servants and their very special employers.

They are often referred to as “guardians of the rule of law” – which makes this one particularly special.

Because if the Council of Europe is here to defend the rule of law throughout Europe, then you are the watchdog's watchdog!

And rightly so.

The Council of Europe, with our European Court of Human Rights and our European Social Charter protects rights across the continent.

We are the last point of appeal for 800 million citizens.

How can we do that if we do not treat our own staff with the utmost respect?

How can I travel around Europe – around the world – calling on others to behave decently to one another, including in the workplace, if we do not lead by example?

And all at a time of shrinking budgets, as our member states continue to rein in national spending and we are expected to reform our Organisation, to show better value for money, while still being a leading employer.

It is a challenge, but we do our best.

We endeavour to follow fair and clear procedures in all decisions relating to staff while meeting the expectations of our member states and the strategic needs of our Organisation.

I am grateful to the tribunal for keeping these various pressures in mind as it prepares its decisions.

We are not immune to developments in European and global employment; the new realities of career progression; changing contractual situations.

Sometimes we make mistakes, but we set very high standards and we appreciate very much the input of the tribunal in ensuring that the rules and procedures have been fully followed.

We have a highly qualified and highly motivated workforce, supported by an active and vigilant Staff Committee.

Coming from Norway, where robust yet constructive dialogue with trade unions has long been the norm, I welcome this energetic exchange.

Long may it continue – and long may the tribunal conduct its duties with such professionalism and success.

Thank you very much.

SPEECH BY ALI BAHADIR, MEMBER OF THE STAFF COMMITTEE OF THE COUNCIL OF EUROPE

Ladies and gentlemen,

As our chair has just pointed out, it would normally have been Chair of the Staff Committee, Giovanni-Battista CELIENTO, here today to represent the staff, but unfortunately, for reasons beyond his control, he is currently occupied elsewhere on Council of Europe business. However, he has asked me to convey his apologies for not being with you and his warmest greetings, which I have now done.

Today we are celebrating the 50th anniversary of the Administrative Tribunal of the Council of Europe. Some of you may not know this but this event might not have taken place at all because, for a short period in 2002, the Secretary General of the time considered the possibility – for purely budgetary reasons – of doing away with the tribunal and assigning jurisdiction over public-service disputes to the ILO Administrative Tribunal. Fortunately, he did not follow up on this idea.

I must emphasise that the staff of the Council of Europe set great store by their Administrative Tribunal as they believe that it is always preferable to deal with a judge

who is used to applying the Organisation's internal regulations and is conversant with its practices and functioning.

However, this is not the only reason for their attachment to the Administrative Tribunal. Another is that this body, which is the only judicial protection available to staff, offers very strong procedural guarantees. I do not wish to go into all the aspects of the right to a fair trial here of course but I would like to mention those which seem most important to the staff in relation to the Administrative Tribunal.

I will begin with the question of the tribunal's independence and I shall start of course with its chair. As you know, the chair is appointed by the European Court of Human Rights. On the whole this is a somewhat unusual practice in this field, especially as the current approach of the Court is to appoint one of its former members to the post, and everyone will agree that it would be difficult to think of a greater guarantee of the chair's independence.

As to the other members of the Administrative Tribunal, they are all appointed by the Organisation's governing body, the Committee of Ministers. Yet, the tribunal is sometimes called on to rule on measures which, although officially taken by the Secretary General, are in fact the implementation of decisions taken by the governing body. In the past this situation has given rise to some objections of principle by certain staff representatives, not just at the Council of Europe but also elsewhere.

I must tell you very sincerely that these objections, which are objections of principle, have largely been theoretical up to now. In practice, everything suggests that the judges of the Administrative Tribunal demonstrate complete independence when they adopt their decisions and it can be seen from the tribunal's recent judgments that the judges are entirely fulfilling what Robert Badinter called "the judge's duty to be ungrateful towards the authority by which he or she was appointed".

The second point I would like to mention is the length of proceedings. "Justice delayed is justice denied" says the old maxim. I do not have statistics on the length of proceedings before the Administrative Tribunal. In fact, I do not even know if there are any, but, although the proceedings may always seem a little long to the appellants, my experience of them and the points of comparison I can refer to, which relate mainly to national courts, allow me to say that the Administrative Tribunal of the Council of Europe delivers its judgments within an entirely reasonable time frame, at least in relation to the criteria identified in this connection by the European Court of Human Rights. To paint the full picture, I should also say that when the circumstances call for it, the Administrative Tribunal has no hesitation in suspending the administrative act referred to it and this undoubtedly limits the detrimental consequences for the appellant of the length of the proceedings.

It should also be stressed that applications for stays of execution can be made at the pre-litigation stage, in other words even before the tribunal begins examining the merits.

The third point to be mentioned is that of the equality of arms, or at least a particular aspect of this principle. The main inequality for parties to proceedings before the Administrative Tribunal of the Council of Europe stems from the problem for appellants in gaining access to the evidence they need to establish their claims. In the words of

Jean WALINE, who is a judge at the Administrative Tribunal – and I was fortunate to be one of his students when he was still teaching administrative law – “the evidence for the appellant’s statements is often to be found in the administration’s files, to which the appellant rarely has access”. In the face of this inequality, the tribunal does have the possibility of redressing the balance as it may order the administration to produce any evidence it considers necessary to settle the dispute. It has moreover just recently taken advantage of this possibility which is provided for by the statute, specifically in the Bilge Kurt Torun case, in which it asked the administration to provide it with confidential documents. Although the tribunal did not forward these documents to the appellant – which is what we would of course have wished – it did rely heavily on them when upholding the appellant’s claim.

These procedural guarantees and the high quality of its judgments account largely for the Council of Europe staff’s attachment to the Administrative Tribunal. These features probably also explain the interest that the tribunal arouses outside the Organisation. Following the amendment of Article 15 of the Staff Regulations, for which the Staff Committee expressed its wholehearted support, the Central Commission for the Navigation of the Rhine very recently granted the Administrative Tribunal jurisdiction over disputes between it and its staff. The geographical proximity of this organisation, whose headquarters are in Strasbourg, no doubt played some part in this decision but it is probably not the only explanation.

However, this blue sky which I have just painted is not totally free of dark clouds. Bearing in mind the changes that have occurred recently in administrative disputes at both national and international level, particularly at EU level, there are some improvements that could be made to the functioning of the Administrative Tribunal and this colloquy is most certainly an opportunity to talk about the potential changes that could be made in the near or not so near future. Looking at the programme, I do not think I would be wrong in thinking that we will have plenty of time to debate this. After all, anniversaries should not just focus on the past; they should also be an occasion to look to the future.

In this connection, I would like to thank the tribunal for inviting the staff representatives to this event and involving them in the discussions of the judges and representatives of the administration. I would also like to take this opportunity to thank those who were most certainly the key players in organising this colloquy. I am thinking of course of Sergio SANSOTTA, Eva HUBALKOVA, Anna Maria REGARD and Flore CHABOISSEAU, all of whom work for the Registry of the Administrative Tribunal.

Ladies and gentlemen, I wish you all a very good colloquy. Bearing in mind the programme and the high level of the participants, all of whom are eminent legal experts, I am convinced that this will be a very productive and extremely rewarding event. Thank you.

Session 1

The role and importance of administrative tribunals in international organisations

THOMAS LAKER, JUDGE AND FORMER PRESIDENT OF THE UNITED NATIONS DISPUTE TRIBUNAL (GENEVA)

It is my desire to first of all thank our host from the Administrative Tribunal of the Council of Europe and especially thank Sergio SANSOTTA and his staff for having organised this wonderful event and I think they even might have deserved a little applause. Thank you very much.

It is my pleasure to moderate the very first session of this colloquy named “The role and importance of administrative tribunals in international organisations”. This is of course the most important issue of all of those scheduled and it is my pleasure to tell you how we are going to try to run this first working session.

We have three speakers with us and I will introduce them briefly in a few minutes. All of them have some 10 minutes for their initial statements. Those statements will be given in sequence, one by one, and after about 30 minutes we will have time for a discussion, questions and answers, whatever you want to call it. After that discussion the panellists will have the opportunity to give some closing statements, maybe reflecting the discussion, and at the very end I will also take the floor to give some closing remarks. We have some 90 minutes for this exercise so I suggest that we shouldn't lose any more time.

Let me introduce my first speaker on this panel, Justice Kate O'REGAN, well known in the business of international administrative law. Justice O'REGAN was one of the first judges of the new post-apartheid Constitutional Court of South Africa. She did that between 1994 and 2009, when her 15-year term ended. Since then she has been an ad hoc Judge of the Supreme Court of Namibia. She was most importantly the Chairperson of the United Nations Internal Justice Council between 2008 and 2012. She is now President of the International Monetary Fund Administrative Tribunal as well as a member of the World Bank Sanctions Board. In addition, with respect to her academic records, she's a visiting professor at the University of Oxford and an honorary professor at the University of Cape Town. In addition, she's working for quite a lot of NGOs. So this is Justice Kate O'REGAN.

On my left we have Mr Andrzej ANTOSZKIEWICZ who is the Deputy Director of the Human Resources of the OSCE and also its Ethics Co-ordinator. As the Deputy Director, he oversees the Human Resources (HR) strategy policy and plans as well as the delivery of HR services across this unique 57-nation organisation. As the Ethics Co-ordinator he is the Secretary-General's representative and adviser on organisational ethics. Before joining the OSCE, Andrzej worked with NATO where he developed among others an award-winning HR strategy for the organisation while also leading a number of transformation initiatives.

And finally we have Ali BAHADIR with us. You have already been introduced to Ali. Ali has undertaken legal studies at the universities of Strasbourg, Louvain and Izmir. He has been a project officer for the Council of Europe on judicial reforms in Turkey for about four years and he has also been a lawyer at the Registry of the European Court of Human Rights for seven years. He is with us especially in his function as member of the Council of Europe Staff Committee and head of its working group on staff regulations and legal issues.

CATHERINE O'REGAN, PRESIDENT OF THE IMF ADMINISTRATIVE TRIBUNAL

Some reflections on the role and importance of international administrative tribunals

Introduction

Our panel has been asked to discuss the role and importance of international administrative tribunals so as to introduce the key themes of our discussion over the next two days. In the course of my remarks, I shall identify three related and important functions of international administrative tribunals, as well as speaking briefly about the role of international administrative tribunals in developing general principles of international administrative law. Both these aspects of the role of international tribunals will, I am sure, be questions that we will discuss more fully over the next two days.

The three-fold role of international administrative tribunals

Robert McNamara (then President of the World Bank) identified one of the most important functions of international administrative tribunals 35 years ago. He told Robert Goldman, the distinguished American labour lawyer, who was to become a member and President of the World Bank Administrative Tribunal, that it was important to establish an administrative tribunal at the World Bank because "a system of due process and fair treatment [will] enhance the morale of the staff and improve the quality and efficiency of their work".¹ He thus identified a key role of administrative tribunals: that they have a benevolent effect on the functioning of international

1. Cited in Robert Gorman (2012), "The *De Merode* Decision, and its influence upon international administrative law", in Olufemi Elias *The development and effectiveness of international administrative law: on the occasion of the thirtieth anniversary of the World Bank Administrative Tribunal*.

institutions, as they foster morale and efficient work. But this is not the only role of international administrative tribunals.

A second and related role that should spring to mind as we sit here at the home of the European Court of Human Rights (the Court), is rooted in the human rights of those who work in international organisations. Human rights principles require that staff members of international organisations (as well as employees everywhere) be treated fairly and without discrimination. So this is a second important role of international administrative tribunals.

And there is a third role as well. It is linked to the principles of international law. The International Court of Justice (the ICJ) in the 1950s, when faced with questions about the legal status of the United Nations Administrative Tribunal (the UNAT), reasoned that the UNAT was necessary. The ICJ recognised that it was not just a good idea to have international administrative tribunals within international organisations, it was “essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity.”² The reasoning of the ICJ here is very similar to the reason given by Mr McNamara that I mentioned above. But there is another principle of international law that is relevant, and that relates to the immunities of international organisations from judicial proceedings. Emerging jurisprudence that I shall discuss in a moment suggests that the immunities of international organisations from suits brought by their staff members will be recognised so long as the international organisations provide a fair procedure to protect the rights of staff members.

International administrative tribunals have three important roles or functions. The first is to provide for a fair system for the resolution of disputes to enhance morale within the international organisation; the second is to ensure that international organisations are seen to respect the human rights of their staff members, so as they may be seen as role models in relation to the manner in which they treat staff members; and the third is to provide fair procedures for the resolution of disputes with staff members so as to protect the immunities of international organisations.

I wish to say a little more about this third role. You will all probably be aware of the jurisprudence on the immunities that has emerged. In 1949, the ICJ recognised that international organisations are themselves subjects of international law.³ International organisations are capable of suing and being sued, as well as being both bearers of rights and obligations in international law.

Initially, of course, the immunity of international organisations was broad in scope. The purpose of the immunities is to enable international organisations to function effectively without interference from states. But in recent decades, the immunity of international organisations has come under scrutiny and has sometimes been limited. In this regard, some of the leading decisions have been decisions of the Court, our

2. See “Effect of awards of compensation made by the United Nations Administrative Tribunal”, Advisory Opinion of 13 July 1954, at p. 14. See also ICJ Reports, 1954, p. 47.

3. See “Reparation for Injuries suffered in the service of the United Nations”, Advisory Opinion, at p. 9, ICJ Reports, 1949, p 174. This case was concerned with the status of the United Nations.

host for this colloquium. In the related decisions of *Waite and Kennedy v. Germany*⁴ and *Beer and Regan v. Germany*⁵ the Court had to consider the question whether temporary workers of the European Space Agency who had been denied relief in German courts on the grounds of the immunity of the agency had a case under the convention. Their applications were dismissed on the grounds that reasonable alternative means had been available to provide effective protection of their rights.⁶ It is clear from the decisions that the Court did not require the mechanisms set up by international agencies to apply the domestic law of the jurisdiction in which the particular staff members were working, but it did require that the mechanism would provide recourse to an independent tribunal to hear and determine disputes between staff members and the organisations.

Domestic courts, particularly in Europe, have also been scrutinising the scope of immunities. A full discussion of these developments is beyond the scope of my remarks this morning but I should like to refer to just one of the most well known: *Siedler v. Western European Union*,⁷ in which the Belgian Labour Appeals Court refused to confer immunity upon the Western European Union in relation to a dispute with a staff member on the ground that the internal procedure was not adequate to protect the staff member's rights under Article 6(1) of the European Convention on Human Rights. In the last five years we have also seen scrutiny of the imposition of sanctions by the United Nations Security Council as implemented by the European Union in the two European Court of Justice decisions in *Kadi I*⁸ and *Kadi II*.⁹

My main argument this morning is that although international administrative tribunals should be aware of the increasing scrutiny of the immunities of international organisations, international administrative tribunals should focus in the first place on adjudicating disputes fairly. If administrative tribunals perform that role well, the question of the restriction of immunities will fall away – as long as the design of the administrative tribunal system is adequate – a question that is generally beyond the role of judges.

A fair system of dispute resolution

So our focus should remain on ensuring a fair system for the resolution of employment disputes. How should we decide what constitutes a fair system for resolving disputes? Guidance can be found in Article 14 of the International Covenant on Civil and Political Rights, which provides that “everyone is entitled to a fair ... hearing before a competent, independent and impartial tribunal”. It also provides that ordinarily a hearing should be in public, save where special circumstances exist, and that judgments must be published. Article 14 is a good basis for determining what a fair system for the resolution of disputes might look like.

4. ECHR App. No. 26083/94, 18 February 1999.

5. ECHR App. No. 28934/95, 18 February 1999.

6. See *Waite and Kennedy*, cited in note 4 above, at para. 68, and *Beer and Regan*, cited above note 5, at para. 58.

7. Appeal judgment, Cass. No. S 04 0129 F, 21 December 2009.

8. *Kadi and Al Barakaat International Foundation v. Council and Commission* (2008) ECR I-6351.

9. *Commission and Others v. Kadi*, 18 July 2013, (2014) All ER (EC) 123.

The development of general principles of international law

In considering the role and importance of international tribunals, one further issue should draw our attention and that is the development of general principles of international administrative law by international administrative tribunals. Of course, there are limits on the general applicability of such principles, because each tribunal has its own governing statute, and must apply the internal law of its own organisation. Yet the development of such principles is of great value to the administration of all international organisations as the principles provide guidance for managers and staff members alike.

How should international tribunals approach the development of general principles of international administrative law? Here, the principle of equality before the law would suggest that we should seek to ensure reasonable consistency and coherence in principles of international law without undermining the authority of international organisations to regulate their internal law differently. If we rely on consistency and coherence in international administrative law principles, the legitimacy of the system of international administrative law will be enhanced, and confidence in it will be fostered.

A famous example of the development of such principles, of course, particularly in the Bretton Woods institutions, is the *de Merode* principles developed by the World Bank Administrative Tribunal in its first case, which identified key grounds for the abuse of discretion: arbitrariness, caprice, discrimination, improper motive, errors of law and fact, and violation of fair and reasonable procedures.¹⁰ And certainly at the IMF Administrative Tribunal we have found those principles to be really helpful guiding principles in cases dealing with the abuse of discretion.

Conclusion

In conclusion, I would suggest that there is a clear convergence between the human rights principles that require staff members to be treated fairly, the functional value that administrative tribunals have in ensuring good morale and trust among international civil servants, and the need to protect immunities by ensuring that international civil servants have reasonable means to provide effective protection of their rights in relation to their employers. All three suggest that the primary task of international administrative tribunals is to provide a system for the fair resolution of disputes. For if international administrative tribunals do adjudicate disputes fairly then the human rights of staff members will be protected, the morale within international organisations will be enhanced and there will be no reason to attenuate the immunities of international organisations.

10. *de Merode and Others v. World Bank*, Decision 1, WBAT, 5 June 1981.

**ANDRZEJ ANTOSZKIEWICZ, DEPUTY DIRECTOR
AND OSCE ETHICS CO-ORDINATOR, DEPARTMENT
OF HUMAN RESOURCES, ORGANIZATION
FOR SECURITY AND CO-OPERATION IN EUROPE**

Thank you very much.

I would like to open up by first joining with the remarks of my colleagues and thanking the Council of Europe for organising this particular event and for affording me the opportunity to speak to you today.

The administrative tribunals... Maybe I should precede this by mentioning that I'm not actually a lawyer so just be gentle with me. By training I'm originally an engineer, which I consider to be roughly analogous, but we have a lot to learn.

I look at administrative tribunals both in my role as the Ethics Co-ordinator for the Organization for Security and Co-operation in Europe (OSCE) and as the Deputy Director of Human Resources (HR) and for me they play a vital and extremely important role.

What I would like to do is focus my remarks on two core areas. I consider administrative tribunals as very good policy incubators and I consider them as safeguards of privileges and immunities. I think Catherine already mentioned the privileges and immunities but I'll try to give maybe a few examples of where I see particular interest on that particular subject.

So what I will speak about is the concept of human resources policy. I think I'd like to touch upon the classical model that I've seen in my career in international organisations and how it's developed. How do we build learning processes and how do we involve the administrative tribunals and their findings in that process. And then I'd like to use a case study which is actually not an international organisation but the Canadian public service because I think there they create this feedback learning process really well. It's something that's quite interesting and perhaps something worth considering at the international organisation level.

On organisational privileges and immunities, I'd like to briefly speak about the logic model and the argument that Catherine has already introduced and then present the case study for the OSCE.

If I look at the classical way that policies are developed in the human resources domain what I notice is that we often either adapt national administrations' or other international organisations' codes. So with my colleagues, when we work on a day-to-day basis in HR departments, what we ask is how do other people do what we need to do? New elements in HR frameworks are often introduced to solve a business need. Something happens which I'm not quite sure how to handle, and the solution is a policy, a staff instruction or guideline. I've observed that this often leads to very little consideration for duplication and overlaps, and very little consideration for how it all looks when I step back: does it still make sense? Is the integrity of the policy framework still maintained? And as a result, we end up with inconsistencies, inefficiencies and, I would dare say, a lot of business for you.

If I look at how we can improve human resources policies and organisational policies through rulings and findings of administrative tribunals, we first need to look at adaptive and predictive processes, so how do we as administrators in our organisations take this information and improve on it?

The first step is very clear (my background is actually in business so I always look at the business need): what we are trying to accomplish and the process architecture; so standing back and looking. I compare this to a Monet: a Monet doesn't really look very good when you're two feet away from it; but if you step back you see the picture, it all comes together. And this is essentially how you have to view policy: you have to take that step back and understand how these frameworks work.

Regular policy reviews are an element that doesn't necessarily exist in most international organisations, especially when it comes to the human resources policies. I think we can do better on that. What I'm trying to introduce at the OSCE is a five-year policy review cycle, which includes a regular consultation with staff members and with other organisations. What we are trying to get to is a model where policy reform is driven by a measured review cycle rather than in response to errors and miscalculations.

And for me the most important bit here is the last one: learning from mistakes. And there, that's where I see the administrative tribunals' value proposition with regard to policy review. It's the final test that tells us whether what we've done is correct, whether we're administering these policies correctly, and how we can improve.

Now if I look at the Canadian case study on this: the Canadian public service is a huge organisation; it's 260 000 people – I'm Canadian originally, so for me 260 000 is a big number. So 260 000 staff; 1 600 locations and what they employ is one board: the Public Service Labour Relations Board and it administers a number of acts including the Public Service Labour Relations Act and the Public Service Employment Act. And the really interesting thing with this particular board is when it issues findings, (of course they are publicly available) they make an extra effort and they send these findings on a bi-monthly basis to HR practitioners in the field. What they then do is a sort of expanded registrar function: they translate those findings into something that lay people can effectively read and make use of. They recommend changes to the Treasury Board Policy Suite, which is a legislative framework, but they also recommend changes to the management of policies and standards, so the much more informal documents that departments have control over. And they also recommend changes to management behaviours, which is particularly interesting because it gives us in the government departments an understanding of how those particular recommendations can translate into annual HR plans, into performance improvement activities for staff, and into better practices. This is a really good evolving process where individual findings translate into their sub-elements and then those sub-elements are broken down and communicated as actionable activities. And that's again something that we'll be looking for within the OSCE legal framework as we move forward.

Now if I look at organisational privileges and immunities, these are for me a bedrock element of the international organisation landscape. And so you've got this principle of independence of staff which Catherine spoke of and there is also the element of protecting the organisation. In the HR administration context, the most important element for us is the ability to maintain immunity from national labour laws and

regulations; and in order to do that of course we have to have a sufficient internal justice system (which we spoke of just a few minutes ago).

And so there's a direct linkage between effectiveness of an internal justice system and the health of the privileges and immunities of an organisation. And the case study I wanted to use here very quickly is the OSCE. The OSCE is right now composed of 57 participating states with 4 000 staff in Vienna and about 17 field offices. The values and ethics of the organisation are diverse. We have the United States, we have Russia, we have Kazakhstan and we have the Holy See. So finding a common framework is quite complicated; but what we have is a document called the Staff Regulations and Staff Rules and it's supported through a Panel of Adjudicators which oversees the justice element.

The challenging thing about the OSCE is that it lacks a chartering document which means that it has a deemed or customary legal personality. There are no specific conventions on privileges and immunities for the OSCE as a whole, and as a result the Vienna Convention is the one document that ubiquitously applies. (Addendum: the OSCE does however have a number of localised agreements on privileges and immunities in a number of specific locations such as Austria, Denmark and Poland.) This has some real practical consequences for the OSCE as an organisation: local staff income taxation exists in some of the missions and it doesn't exist in others. So there's a fundamental unfairness there. Certain missions have a requirement from the host nation for payment of local social security for some of the staff; others do not. So again, we see disparities in compensation. So the idea of equal work for equal pay doesn't necessarily translate.

But what we have, however, noticed is that administrative appeals are all handled through the existing and functional internal processes and we haven't had any cases or appeals brought to international courts. And the observation that I have there is you can kind of flip it around the other way and say that the presence of a very effective and responsible internal justice system in fact strengthens the privileges and immunities claims of an organisation like the OSCE as we follow our path and move forward towards essentially having full status.

I think this concludes my remarks so I pass the floor back to the chair. Thank you.

ALI BAHADIR, LAWYER AT THE REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS, HEAD OF THE STAFF COMMITTEE'S WORKING GROUP ON "STAFF REGULATIONS AND LEGAL ISSUES" OF THE COUNCIL OF EUROPE

President O'REGAN talked of the role and the importance of administrative tribunals from the judge's viewpoint while Mr ANTOSZKIEWICZ looked at the issue from the angle of the administration. I myself will attempt to outline the views of staff and as you will see, these three viewpoints overlap in most respects.

In its judgment in the case of West (No. 10),¹¹ the ILO Administrative Tribunal stated as follows: "The existence of the right [to appeal to the tribunal] is in the interests of

11. Judgment 885, 30 June 1988, Consideration 2 *in fine*.

both sides since it serves to maintain harmony, general efficiency and good morale in the Organisation," and I believe that this statement sums up the matter rather well.

Of course, the main value of an administrative tribunal lies in its role as a guardian of the rule of law. Clearly, it is of benefit to all staff members to be able to appeal to the tribunal if they consider that one of their rights has been infringed. Moreover, this benefit is not specific to the administrative tribunals of international organisations; it is an inherent feature of any administrative tribunal and even, more broadly speaking, of any other tribunal or court.

However, over and above this more traditional role, administrative tribunals also have the merit of contributing to social dialogue. It may seem paradoxical to say that litigation contributes to dialogue, as bringing a matter before the tribunal generally signals the end of dialogue.

At the Council of Europe, we have what I would term a fairly highly developed tradition of social dialogue. What is more, the Secretary General of our Organisation emphasised a few moments ago just how much store he sets by this dialogue. On a regular basis (about every two to three weeks) staff representatives meet representatives of the administration to talk with them about problems which staff have asked them to raise, and attempt to reach satisfactory solutions. During our discussions not everyone always shares the same point of view and we often run out of arguments to convince our colleagues that what we are saying is right. I must admit that very often the most convincing arguments are those based on law. The administration is generally quite receptive to legal arguments, particularly if they are supported by case law, especially by judgments of the Administrative Tribunal.

In other words, one of the advantages of the tribunal for us is that its judgments provide us with substantial arguments during our negotiations, and this is a definite asset given the very limited number of negotiating tools at our disposal.

The main problem we face in this context is that in many areas, there are gaps in the Administrative Tribunal's case law. There are many aspects of the Organisation's functioning, including certain aspects of the new contractual policy, which have not yet been the subject of a judgment. This is also one of the reasons why the staff representatives (whether the staff committee or certain trade unions) bring proceedings before the tribunal whenever an opportunity arises to give it a chance to interpret the internal regulations.

It is in this regard that the role of the tribunal reaches an initial limit. Bringing a case before the Administrative Tribunal is not without its difficulties. As you most certainly know, the Staff Committee has a relatively limited power to appeal to the Administrative Tribunal itself. It can only do so if it is directly affected by the act it wishes to contest or if the act undermines its prerogatives.

The Staff Committee can also intervene in proceedings before the Administrative Tribunal to uphold the submissions of one of the parties, but the proceedings still have to have been initiated by a member of staff.

The organisations representing staff have a policy of supporting appeals with the aim of providing the tribunal with an opportunity to interpret the law and clarify

certain texts. This support can take various forms. In the case of the SACE (the Council of Europe Staff Trade Union), it takes the form of financial assistance, in other words covering the costs of a lawyer. In the case of the other trade unions (such as One Staff), the trade union representatives themselves have legal training and act as legal representatives, pleading before the tribunal.

I should make it clear that we are determined to ensure that this support will not be transformed into an abuse of the right to appeal. We assess each appeal in some detail and check that it is not manifestly unfounded and is of relevance to all staff or a sufficiently large number of them. We scrupulously avoid all appeals which would needlessly overload the tribunal's work.

Despite the support that we offer, it is difficult to find staff who are prepared to go so far as to initiate proceedings. Some of our colleagues are reluctant to appeal, probably out of a fear of reprisals. Generally speaking, I do not believe that their fears are legitimate. I for one have never heard reports of any reprisals or harassment targeting staff who have appealed to the tribunal. The phenomenon may exist but I must say that I have never witnessed it.

Unfortunately, this reluctance is fairly commonplace among staff in vulnerable situations, that is to say those who are on fixed-term contracts.

In sum, the difficulty of referring a case to the tribunal and allowing it to give judgment on a number of questions limits the tribunal's role and its case law on negotiation.

One solution to the problem would no doubt lie in extending the possibility of collective appeals, particularly that of appeals by the Staff Committee. In this connection, some have talked of the possibility of allowing the Staff Committee to ask the Administrative Tribunal for an advisory opinion. Advisory opinions are very much in vogue at the moment as Protocol No. 16 to the Convention is setting up a procedure of this sort, enabling some national courts to refer questions to the European Court of Human Rights for preliminary rulings. Of course, some thought would have to be put into the specific arrangements for this consultation so that the Staff Committee would not be tempted in certain cases to abuse the procedure.

There is also a second limit to the tribunal's role, which lies in the way in which its decisions are enforced.

When the Administrative Tribunal gives a decision in which it finds against the administration, there are, put simply, two sets of measures which may be considered. Firstly, there are individual measures, namely those which relate solely and directly to the appellant, and secondly, more general measures, whose purpose is to bring the Organisation's practice into line with the Administrative Tribunal's interpretation of the law.

In the context of these general measures – and it is these, as you would suspect, that the Staff Committee takes most interest in – the administration has relatively extended powers, to the point that it can sometimes empty a decision of all its impact.

I am thinking here of a quite specific instance, namely the tribunal's decision in the Libs case.¹² In this decision, which related to internal recruitment procedures, the

12. Appeal No. 463/2010, decision of 4 November 2010.

appellant was a grade B4 staff member who had been placed on a position, in other words in a fixed-term job. He had decided to apply for a “post”, that is to say a job meeting a structural requirement and hence not affected by any time limit. However, this post for which he was hoping to apply was at a lower grade than the one he already had. Like many other members of staff on insecure work contracts, he was prepared to accept a lower grade on a permanent contract instead of a higher grade in a fixed-term position, which exposed him to the risk of losing his job.

However, the administration refused to consider his application precisely because he had a higher grade than that of the desired post. This refusal was ultimately censured by the Administrative Tribunal for two reasons. The first was a procedural one: the Appointments Board had not been consulted. The second was linked to the lack of any legal basis, as the tribunal found that there was nothing in the regulations which prohibited staff members from applying for posts at a lower grade.

When this decision was made, we naturally expected the administration to halt the practice of accepting applications only from staff with a grade lower than or equal to that of a post advertised internally, which would have enabled some colleagues to bring an end to the uncertainty of their contractual situation.

However, this is most certainly not what happened, as the administration quite simply decided to amend the regulations to insert a provision which now quite expressly provides that, in the context of internal vacancy procedures, staff may only apply for jobs at the same or a higher grade than their current one. In other words, instead of bringing its practice into line with the law, the administration has brought the law into line with its practice.

This example shows the limits of what the Administrative Tribunal can do.

I would like to give you another example, or rather a counter-example, in the form of the Kurt Torun decision,¹³ which was delivered less than a month ago and related to an internal procedure for the upgrading of staff from B to A category. The appeal concerned an internal competition which enables category B staff with a number of years’ experience to transfer to category A. The competition is divided into three stages: firstly, a series of psychometric tests (verbal reasoning, numerical reasoning and logical reasoning tests). Staff who pass these tests then sit written examinations and those with the best marks in these are admitted to an oral examination. A large number of staff – about 200 – were eliminated following the psychometric tests. Only one decided to bring her case before the Administrative Tribunal and she was supported by the SACE, who agreed to finance the appeal.

In its decision, the Administrative Tribunal upheld the appellant’s claims, setting aside the impugned act on the ground that the Secretary General had exceeded the limits of his discretionary power. It considered that in the context of an internal procedure relating to staff who already had some experience and were well graded in appraisals, holding aptitude tests of this type was pointless and did not bring any extra benefit compared to the written tests which were to follow to ascertain the actual ability of candidates to perform category A functions.

13. Appeal No. 543/2014, decision of 30 January 2015.

To implement the tribunal's decision, the administration decided to hold written tests for the appellant.

We learnt yesterday evening to our great satisfaction that the administration has not confined itself to this individual measure and has decided to go further in adopting a series of other measures:

- ▶ firstly, it has decided to conduct a more general investigation on the nature of the tests which are proposed during these competitions – I hope that the Staff Committee will be involved in this process and have no doubt that it will;
- ▶ secondly, the administration has decided to suspend the use of these tests in future competitions for the time being. This suspension does not relate solely to the type of competition which was the subject of the appeal – that is to say competitions to pass from category B to category A;
- ▶ thirdly, the administration has decided, for competitions which are already under way and for which there have not yet been any written tests, to invite all staff members who failed the aptitude tests to these written tests.

Here is an example of the enforcement of a decision which shows that when it wants to be, the administration is capable of the best.

I promised the session chair that I would be brief and he has just reminded me of that promise so I shall stop speaking now. Thank you.

DISCUSSION AND CONCLUSIONS: SESSION 1

Thomas LAKER

I am glad to see that we still have plenty of time for discussion. We have heard two very different perspectives: that of the employer and that of staff members. The last example which we just heard about from Ali is particularly impressive and provided some kind of hope that administrative tribunal awards might in fact be taken seriously, a hope that not everyone shares. Each of us has had different experiences in this area and, in addition, the first example cited by Ali is very much at the front of our minds.

I have no clear plans as to how we should set about conducting this discussion. As I said, we have heard three very different contributions. I think the simplest solution is to give the floor to the audience. I declare the floor open. Do you have any comments or questions?

Virginia MELGAR

Hello. My name is Virginia MELGAR. I am President of the Administrative Tribunal of the European Stability Mechanism. I wish to thank Catherine for her very interesting statement, and for introducing the topic that we will be discussing today.

She mentioned two very important things: human rights and the privileges and immunities enjoyed by international organisations. I for one would like to tell you about a ruling handed down by The Hague Court of Appeal in the Netherlands. An appeal was lodged by representatives of the staff at the European Patent Office. Firstly, it was found that the rules on privileges and immunities did not apply to

the European Patent Office and secondly, the Court held that certain decisions and even some pieces of legislation adopted by the Patent Office were contrary to the European Convention on Human Rights. More specifically, reference was made to the fact that the staff association could not communicate with staff members, that the staff's freedom of association was under attack and lastly, that the organisation's rules governing strikes were contrary to the European Convention on Human Rights and in particular Article 11 thereof.

Catherine, do you wish to respond to what I have just said?

Catherine O'REGAN

If one looks at the great trajectory of international law, it will be observed that this is an area in which we are going to see a lot of jurisprudence of this kind. I am not familiar with the particular decision handed down by The Hague court, but thank you for drawing it to my attention. I think we are going to see more such decisions in the future, particularly in the area of human rights.

It is interesting that you should mention freedom of association because up until now, a lot of the cases, especially in Europe, have focused on Article 6 of the Convention (access to courts and fair process). Freedom of association, particularly in the context of employment, does seem to me to be an issue that may well find its way into national jurisdiction and indeed into regional human rights bodies.

Speaking as a judge, I tend to think that the design of the system is a matter for each individual organisation. They need to look at international human rights norms and they need to think about what the implications are for the design of the system to be put in place in their own organisation. And certainly, as regards my own involvement a few years ago in the United Nations design process, that was something the Internal Justice Council repeatedly said to the General Council and the Office for Legal Affairs, i.e. that it was their job to look at and to think about these issues in relation to the design of the system. Because I do think we are going to see increasing scrutiny and, speaking myself as a human rights defender, I think it is only right that international organisations should serve as role models in this area. Indeed, the Secretary General this morning said exactly the right thing. As the Secretary General of the Council of Europe, he travels around Europe, encouraging people to comply with the rulings of the Court and to comply with the Convention. It is very important to have your own house in order. In other words, this notion that human rights should apply to international organisations seems to me quite fit and proper. But of course, each organisation has its own circumstances and those need to be taken into account by both domestic courts and regional courts in assessing whether there have been infringements in particular cases.

Andrés RIGO

Andrés RIGO, judge, International Monetary Fund. I would like to respond to what my colleague, Judge O'REGAN, said. I have also served on a number of other administrative tribunals. I just want to mention that I chaired the Sanctions Committee of the Inter-American Development Bank. These are boards or committees in various international institutions that normally sanction individuals or companies in the private sector that commit fraud or corruption, e.g. in connection with public procurement contracts.

In the case of the Inter-American Development Bank, the institution is currently being sued for a decision that we took regarding an individual from Costa Rica. The bank is being sued by the local tribunals but Costa Rica already has a very strong tradition in terms of respecting and upholding human rights under the Latin American Convention on Human Rights. So this is something that is in progress but I just wanted to mention it as a contribution to the discussion.

Hessel RUTTEN

Thank you. My name is Hessel RUTTEN. I represent NATO pensioners and it is for that reason that I wished to ask a question.

It is my impression – and not only my impression because Gianni PALMIERI wrote an excellent piece on the subject recently – that various international organisations, appeals boards and administrative tribunals often reach different decisions. So if there is one internal justice system that does not live up to human rights principles or otherwise makes decisions which are not in accordance with the generally recognised principles of international law, the fact that there is no second instance poses a real problem. In the paper that Gianni PALMIERI has written, he elaborates on how a number of diametrically opposed decisions were reached in the past on exactly the same problems. There is really a need, therefore, for a second instance. As you may know, the Chair of AAPOCAD wrote a letter to the co-ordinated organisations, asking whether it would not be better to have a second instance and the response of the co-ordinated organisations was either non-existent or fairly negative.

I now come to the question that I wished to put to the panel on behalf of the pensioners: do you agree with me that there is a need for tribunals to also act in cases involving pensioners or do you believe that, since the pensioners are no longer serving members of staff and have lost a number of their privileges and immunities, they should turn to their local jurisdiction?

Inés WEINBERG de ROCA

Just to answer the concerns expressed by the previous speaker, the United Nations has a two-tier system, with a first and second instance, and the Appeals Tribunal can also review decisions taken by the United Nations Pension Board.

Fabrice ANDREONE

I would like to put a question to Judge O'REGAN. My name is Fabrice ANDREONE and I am Vice-Chair of the Staff Committee of the European Commission in Brussels.

At present we have a court system in European civil service law where we have a European Union Civil Service Tribunal which acts as a court of first instance in cases brought by staff. The European Court of Justice has suggested abolishing the European Civil Service Tribunal and referring cases instead to the general tribunal, i.e. the Court of First Instance of the European Union. I would like to know how you view these plans at European level to do away with the specialised tribunal and chamber, and to redirect cases to the general court. There was a move in the opposite direction in 2004, under the Nice Treaty, which provided for the setting up of specialised chambers. As a result, 2004 saw the creation of the European Civil Service Tribunal. In 2014, the Council of Ministers was asked to make a decision on

whether to abolish this tribunal and return cases to the general court. In relation to your speech, therefore, I would like to know how you feel about these changes and the manner in which cases can be dealt with either in a general court or in a specialised tribunal. Thank you very much.

Gregor SCHNEIDER

Thank you very much. I am the President of the Staff Committee of a European agency. We have talked a lot about the administrative tribunal being a precondition for the privileges and immunities enjoyed by an international organisation. Being in the European context, where the national administration is replaced by the European administration, we are an international trademark agency which replaces the national trademark agencies, but the point I wished to make is a different one. Democratic legitimacy depends on the possibility of going to international tribunals. The independence of administrations and the way administrations are chosen needs to be controlled. So I think it is not just a matter of privileges and immunities but also a matter of democratic legitimacy to have a body that controls the way the administration operates. I think this is very important.

Tobias JAAG

My name is Tobias JAAG. I am Vice-President of the Administrative Tribunal of the Bank for International Settlements in Basel. With regard to human rights, I would like to raise the question as to whether, in order to guarantee or enforce human rights in international organisations, it would not make sense to open the European Convention on Human Rights to regional organisations and tribunals? For the European Union, we already have a basis for this in the Convention but that is not the case for other regional organisations. Such a move would help to improve the way human rights are implemented in international organisations.

Thomas LAKER

Thank you very much. In view of the time constraints, I would like to know whether you have any further questions or comments. If not, I will ask our panellists to respond.

Ali BAHADIR

I must confess I do not have a great deal to add to everything that has just been said, or said in the past five minutes at any rate. I would simply like to go back to one of the observations made in response to one of the questions and which concerns appeal courts and the possibility of appealing against administrative tribunal decisions. In my opening speech, I mentioned the fact that generally speaking, international administrative tribunals are somewhat behind in relation to the rights guaranteed by their national counterparts. It is true that in virtually all systems where there are administrative tribunals – in national law, at any rate – there are also appeal courts. The same is true for the European level. I have just found out that the European Union was planning to abolish the Civil Service Tribunal but the fact remains that in Luxembourg, there are several tiers because although the Court of First Instance has jurisdiction in this area, there is always the possibility of appealing to the Court of Justice and that, in my view, is one of the problems facing international administrative justice: the fact that there is no court of appeal. Some have suggested introducing a

sort of international administrative appeal court, i.e. an appeal court common to all jurisdictions that would help to avoid the very thing one of the speakers was talking about, i.e. conflicts of case law between different tribunals.

Thomas LAKER

Your last suggestion is something which, to my mind, would be very difficult to achieve although, on a more general level, it is one that many might find interesting. There is something I would like to say as regards having a second instance. That is a good thing in itself and I myself come from a system where we have two instances. But it is important to take into account the fact that often at the administrative level itself, there is already some kind of review as an initial form of control of the administrative decision and that there might be some reluctance to overdo it, as it were. Coming from Germany where there are three or four different instances of judicial review, I can tell you that this is something that has attracted criticism at national level. We have been accused of overdoing it.

I understand the problem which was raised by our colleague from NATO, coming from a court where we have ourselves experienced this problem from time to time. Individual judges of the same tribunal may have different views. At present, we live in a system where the decision given at second instance does provide some guidance and goes some way towards harmonising the approaches taken by the first-instance judges.

Andrzej ANTOSZKIEWICZ

On the question of applicability to pensioners: as I see it, if we have an official administrative policy in place that applies to an individual, clearly decisions relating to that policy should be able to be reconsidered. It is essential at the very least that decisions which have the potential to affect pensioners can be appealed by those same pensioners.

On the question of a second level, clearly this is a very interesting idea. I imagine the biggest issue is that of the composition of the participating states. This is something that would also require consideration. At my own institution, we have several levels of review but it is always good to have this additional, external element.

In my closing remarks, what I would say is this: the role that you perform is an extremely important one. The administrative tribunals provide the checks and balances that administrations need, so as to ensure that the decisions administrations make are guided by the right principles and behaviours. The relationship between employees and employers is often a challenging one but from an administrative perspective, we need these rulings as they allow us to reflect on how we conduct ourselves and how we manage the greatest resource that international organisations have, namely our human resources. It is vital that we get that right. So I would like to thank the administrative tribunals for what they are doing and for providing us with information.

Thomas LAKER

I'm sorry but I have a question for Andrzej. It concerns these two examples that were given by Ali. On the one hand, you have an award made by an administrative

tribunal, and a situation of non-compliance or partial compliance, in that the rules were changed to prevent such a situation from arising again. And on the other hand, you have a sort of learning curve, not only in terms of the implementation of this particular decision but also in terms of a change to the rules, so that they operate more in favour of the staff. What would be your view in relation to these different reactions? What do you consider to be the proper way of dealing with administrative tribunal decisions?

Andrzej ANTOSZKIEWICZ

We have to accept them for what they are, namely an attempt to provide guidance or feedback on situations that may have gone awry or may have gone off the rails. What we are very fortunate to have at the OSCE is an Office of Internal Oversight. And so, when decisions come down, one of the things I am able to do is sit down with members of that particular office and consider the ramifications of those particular decisions. And I think you have to come at it from the perspective not of someone who has been personally affected by the ruling, but from the perspective of somebody who has something to learn from it. And the question you have to ask is how can we learn, how can we make the system better and more efficient. Ultimately, it is a question of faith: do you approach this process in good faith or in bad faith? And from the administration's perspective, often, we are guided by very practical outcomes. There is an individual, we consider that person to be a problem case and therefore you seek a particular outcome. But the way we go through that particular process has to be just, because if it is not, then what are we doing? And so that would be my short answer to your question. I think you have to go into the process in good faith. Sometimes these rulings deliver bad news but they can also provide insights and opportunities.

Thomas LAKER

I'm sorry to insist but what we have seen in the examples given is an attempt to evade the results of the tribunal's decision. That has nothing to do with good faith. I think it is remarkable that the organisations, from time to time, deal with unwelcome decisions in a way that raises questions about the competence and authority of the administrative tribunals.

Catherine O'REGAN

I thought I would start with the question of the second-instance or second-tier appeal. It seems to me that we need to recognise that there will be differences between international organisations. Comparative labour law happened to be my academic field before I became a judge and the way in which relationships between staff members and employers and between staff associations and employers work in different jurisdictions across the world varies quite remarkably. And if you are familiar with International Labour Organization conventions and recommendations, you realise that in many cases, there is what you in Europe call a margin of appreciation, a significant amount given to signatories to conventions and recommendations produced by the ILO and I would expect the same thing between international conventions. So although I would not be opposed to the idea of a second tier, one thing I would be sure of is that a margin of appreciation would be built into that and, in my view,

quite legitimately because context, in the area of labour law, is very important. Some conversation about these things is often good and it is always interesting to hear an external viewpoint. I think the UN experience is an important one because there what you have is three tribunals at first-tier level, with the dispute tribunals in New York, Geneva and Nairobi issuing decisions, and at times of course, inevitably, with different panels and different geographies, it can produce very different decisions. And having an appeals tribunal whose function is to provide coherence and consistency across the three tiers seems to be very important. But that is a slightly different phenomenon, I think, from having a supranational administrative appeals tribunal where I think you might find that quite often the appeals tribunal – as does the European Court of Human Rights at times – gives a large amount of appreciation to a particular organisation or tribunal.

On the question of pensioners, there is no doubt that pensioners should have a mechanism for determining disputes related to pensions and how exactly that works will vary from system to system. In the IMF system, for example, pensioners in relation to their disputes over pensions are defined as staff members within the statute. That will vary from tribunal to tribunal but it does seem to me that pensioners' ability to resolve disputes in a fair process in relation to their pensions is something that needs to be provided for.

On the issue of the general court versus the specialist court, this is something labour law has spent a lot of time talking about. In South Africa we have actually had that shift several times, in various directions. There are a range of considerations that inform it. I do think that there is something about experience and a background in labour and employment law which gives judges an advantage when they are dealing with employment matters. It is not an unusual phenomenon, however, to have this shifting back and forth. Sometimes it is a cost issue.

On the question of preconditions and the situation in Europe, of course you are quite right. In some ways, Europe is not a purely international organisation, it is sort of halfway between a federation and an international organisation. So there are some notions that the organisation is now playing a role for a range of nation states, in some ways as a nation state itself or supranational body, which is slightly different from other international organisations. And I think you are right to say that there is an added impetus beyond privileges and immunities to want fair processes to resolve disputes in those circumstances.

Finally, I think the last interesting question was this question of international organisations becoming signatories to international human rights conventions. Since 1949, the United Nations and, with it, other international organisations have been recognised as subjects of international law, and there is no legal barrier to international organisations signing up to international human rights conventions. And maybe it is something we should be looking at more closely.

Thomas LAKER

My own closing remarks will relate to three issues. The first concerns the implementation of administrative tribunal decisions. To a certain extent, the answer to this question is rather simple. Naturally, the administrative tribunals have to apply the

law, as it is. And if a law is changed by an organisation as the result of an administrative tribunal decision, in the proper way, then the next time, the new law has to be applied. It is as simple as that. We should not expect the tribunals to do more than they are entitled to. They are bound by the law and that is very important. They are not the policy makers of the organisation. That is something we need to bear in mind when looking at the role of administrative tribunals in the international system. On the other hand, as we learnt from our panellists, the idea of immunities and preventing employees from going to the national courts is based on the expectation that international organisations will themselves provide for an effective system of justice. The question is what elements are needed for such a system to be recognised as an effective mechanism. This is something that is still developing, taking into account recent decisions handed down by the European Court of Human Rights. International organisations should be aware, therefore, that there is no guarantee to be exempted from national jurisdiction and that any such derogation will only be upheld as long as effective remedies are provided by the organisation. Whether each and every system of justice in each and every international organisation meets that criterion, I do not know. That is something that could be looked at more closely.

Finally, with respect to the second instance, I have my reservations as to whether there might be some kind of agreement among all the international organisations in order to establish a higher court. To some extent, it has to be recognised that the ILOAT does serve the purposes of many international organisations but they also have their problems so whether the question of having an international second-instance tribunal is really worth discussing further, I personally have my doubts.

On behalf of the audience, allow me to thank my three panellists for their interesting contributions. Thank you very much.

Session 2

Fundamental rights and international organisations: subjective rights and procedural safeguards

GIORGIO MALINVERNI, DEPUTY CHAIR OF THE ADMINISTRATIVE TRIBUNAL OF THE COUNCIL OF EUROPE, FORMER JUDGE OF THE EUROPEAN COURT OF HUMAN RIGHTS

I am delighted and honoured to chair this second session on fundamental rights and international organisations: subjective rights and procedural safeguards.

Like the chair of the previous session, I should like to begin by presenting the speakers, who are leading figures and leading experts.

The first speaker on the list is my very dear friend, Dean SPIELMANN, the current President of the European Court of Human Rights. Mr SPIELMANN studied law at Louvain and Cambridge and then practised as a barrister in Luxembourg, during which time he also lectured at the universities of Louvain and Nancy. He is the author of very many publications – indeed, many more than some university professors – and became a judge at the European Court of Human Rights in 2004 and then its president in 2012.

The second speaker is an Italian, Mr Giuseppe PALMISANO, who is an internationalist, a professor of international and European law and Director of the Institute for International Legal Studies at the National Research Council in Rome and has been a member, and is currently President, of the European Committee of Social Rights, which is the committee in charge of ensuring compliance with the European Social Charter.

The third speaker is Ms Memooda EBRAHIM-CARSTENS, who is Botswanan. She is President of the United Nations Dispute Tribunal, before which she was President of the Botswanan Supreme Court. She is an expert in labour law, who previously practised as a barrister in her own country.

I will give the floor first to Mr SPIELMANN and point out that contributions should not last longer than 15 to 20 minutes. As during the previous session, they will be followed by questions to be answered by the panel members.

DEAN SPIELMANN, PRESIDENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

Chairman, dear Giorgio,

Ladies and gentlemen,

I should like, first of all, to say how delighted I am to be taking part in this international colloquy on international administrative tribunals being held on the occasion of the 50th anniversary of the Administrative Tribunal of the Council of Europe.

The Court over which I have the honour of presiding has a dual link with this Administrative Tribunal. Firstly, because it appoints its chair and deputy chair; which explains that our moderator this morning is my friend and former colleague, Giorgio MALINVERNI, Deputy Chair of the Administrative Tribunal. Secondly, because disputes concerning our Court's staff are, of course, brought before this tribunal.

With your permission, I will say a few words about our Court's case law in the area of international administrative tribunals. It is not very extensive. Some principles do emerge from it, however. Firstly, I believe it is important to point out that, according to well-established case law, we do not hear applications against international organisations, as they are not parties to the European Convention on Human Rights. Applications against international organisations are therefore declared inadmissible *ratione personae*.

Moreover, international organisations enjoy immunity from jurisdiction, usually under their General Agreement on Privileges and Immunities. This immunity has the effect of preventing complaints against the decisions of these bodies being brought before our Court. For instance in the cases of *Waite and Kennedy* and *Beer and Regan v. Germany*, which involved proceedings by applicants complaining about the European Space Agency's immunity from jurisdiction, the Court held that the immunity of an international organisation was essential, provided, however, that the restriction it generated was not disproportionate. In the cases which I have just cited, we were able to ascertain that alternative means were available to the applicants for protecting their rights. Let me explain. We willingly accept an international organisation's immunity from jurisdiction, provided, however, that accessible alternative internal means are available to the applicant. Very recently, in a case in which the decision was delivered at the beginning of this year,¹⁴ the applicant complained that the European Patent Office's immunity from jurisdiction had denied him access to a tribunal, specifically the German courts. The Court considered the fact that the European Patent Office had proposed that the dispute be resolved by an arbitration tribunal, which the applicant had refused. It concluded therefrom that the European Patent Office had provided the applicant with a reasonable alternative means of having his complaint examined and that, consequently, the protection of fundamental rights within the organisation had not been deficient. In another case,¹⁵ on which it ruled on the same day, the Court held that the applicant, who had complained of

14. Judgments of 18 February 1999 in *Waite and Kennedy* and *Beer and Regan v. Germany*. Decision of 6 January 2015 in *Klausecker v. Germany*.

15. Decision in *Perez v. Germany*.

deficiencies in UN internal appeal proceedings, had failed to exhaust the domestic remedies because she had not appealed to the Constitutional Court. Her application was therefore declared inadmissible. However, and this is the interesting point here, the Court noted the fact that in spite of international organisations' immunity from the jurisdiction of the German courts, the Constitutional Court in Karlsruhe still had jurisdiction to examine whether the level of fundamental rights protection in disputes within international organisations complied with the constitution. Admittedly, this jurisdiction of the Constitutional Court is exercised only under restrictive conditions, but it does exist and is an interesting point to underline today. In plain language, the level of fundamental rights protection afforded by the international organisation must not be lower than that required by the constitution.

I would, however, point out that our case law is nuanced and adapts to the circumstances, as we demonstrated in the case of *Stichting Mothers of Srebrenica v. the Netherlands*.¹⁶ In that case, we accepted the UN's immunity from jurisdiction, in spite of there being no internal remedies. In this specific case, we felt it was inappropriate to bring UN military operations within the scope of national jurisdiction, as that would have allowed states to interfere with the performance of the organisation's mission.

With regard to decisions by the administrative tribunals of international organisations, the Boivin decision of 9 December 2008 was the first time that the Court ruled on its competence *ratione personae* concerning a labour dispute. The case involved an application against 34 Council of Europe member states complaining of a judgment by the ILO Administrative Tribunal regarding the refusal of a staff appointment; in other words, it was a very ordinary dispute. The application was examined solely in respect of France and Belgium, as it was declared inadmissible in the case of the 32 other member states because of failure to comply with the six-month time limit.

In the case of France and Belgium, the Court held that the applicant did not fall within their jurisdiction and concluded that the application was incompatible *ratione personae*. We have confirmed this case law since then in cases involving labour disputes in other international organisations, be they the European Union¹⁷ or the Council of Europe. The latter involved your tribunal, chairman, and I refer to the decision of 16 June 2009 in *Beygo v. 46 Member States of the Council of Europe*. In all these cases, regardless of whether the applications were brought against several member states of an international organisation such as the Council of Europe or the ILO or against the organisation's host state, we came to a comparable conclusion. It is clear from our point of view that the impugned measures come under the internal legal order of the organisation concerned and that the territorial link does not suffice for the acts of the organisation's administrative tribunal to be attributed to the host state.

We did, however, go further in the case of *Gasparini v. Italy and Belgium*,¹⁸ in which we accepted that the member states of an international organisation could be held liable in an internal labour dispute at the organisation. The organisation in question was NATO and the proceedings concerned its Appeals Board. In the case, the

16. Decision of 11 June 2013.

17. Decision of 9 December 2008, *Connolly v. 15 Member States of the European Union*.

18. Decision of 12 May 2009.

applicant complained of a structural deficiency in the internal mechanism at NATO. We studied the internal dispute resolution mechanism and came to the conclusion that it was not manifestly deficient in that it met the requirements of a fair hearing. Otherwise, and that recalls the method adopted by the European Union in the Bosphorus judgment, the organisation's member states could have been held liable. The appeals system established in the organisation would, however, have to be in clear conflict with the Convention. That did not apply in the instant case, but we did check that the rights safeguarded under the Convention received equivalent protection within NATO.

That is what I wanted to say by way of introduction, and I will now be very interested to hear the other panellists' contributions.

GIUSEPPE PALMISANO, PRESIDENT OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS, COUNCIL OF EUROPE

The European Social Charter as an instrument for the protection of fundamental rights within an international organisation

It is an honour and a privilege for me to be here today, in this "colloquy international", organised by the Administrative Tribunal of the Council of Europe. And the privilege is even greater since this is a very special time for the tribunal: we are celebrating the 50th Anniversary of the tribunal, and this is clearly a very significant and successful anniversary.

In my intervention, concerning the relevance of fundamental rights within an international organisation, I will endeavour to focus on the specific issue of social rights, and in particular fundamental social rights established by the European Social Charter (ESC).

But before coming to my specific subject, let me share with you a preliminary general consideration, made as an international lawyer rather than as the President of the European Committee of Social Rights (ECSR). This is a general consideration which is important, at least for me, in order to better understand and focus on what can be the impact of an international legal instrument, like the ESC, on the domain of the relationship of the agents, the staff of an international organisation and the international organisation itself, and therefore what can be the impact of an instrument such as the Social Charter on decisions of international administrative tribunals on questions concerning the treatment of such staff and the recognition and protection of their rights in their labour and other relations with the organisation.

The preliminary consideration, on which more could be said (much better than me) by Madam EBRAHIM-CARSTENS, concerns the distinct existence and different legal nature of the internal legal system of an international organisation, compared to international law, including treaties – and also human rights treaties – concluded by member states of the organisation in the institutional framework of the organisation.

I refer namely to the fact that while created by virtue of a treaty – a source of international law – and in this sense deriving from international law, once an international

organisation comes into existence and starts actually functioning, it becomes a distinct – autonomous – organised community and apparatus, with its own, internal, legal order. The realm of such legal order is clearly different from (and not homogeneous with respect to) the realm of international law, properly understood as the domain of interstate relations.

In fact, differently from the realm of international law, the organic element is present in international institutions, I mean within the inner structures of such institutions and in the inner functioning of those structures. We refer to the organisations of individuals operating as the instrumentalities of interstate charters and statutes (assemblies, conferences, commissions, councils, and mainly secretariats, bureaux and offices), and to the rules governing the inner functioning of such bodies, and the treatment of the staff of international institutions. Here, we find the organisation in a proper sense, hierarchy. We find to a degree the law-making function, the judicial function and the executive function. And the main addressees of these organised functions and internal legal rules of each international organisation are precisely the members of the staff and assemblies and councils.

Within the autonomous internal legal system of an international organisation (which is essentially composed of statutory provisions, administrative rules, staff regulations and labour contracts), international rules and principles on the protection of fundamental rights, including those established by treaties concluded in the framework of the organisation, are not *per se* legal sources. They can rather be considered legal sources, having legal value, if and to the extent that the legal sources of the internal order of the organisation make an explicit reference – a *renvoi* – to them; or also as general principles of law, which judges in international administrative tribunals can legitimately and usefully consider and apply to assess and decide cases brought before them.

Even with this kind of caveat in mind, if one considers the kind of relationship existing between civil servants and staff of an international organisation, on the one hand, and the organisation itself, on the other – which is essentially an employment relationship – it is quite evident that an instrument like the European Social Charter can be extremely useful as a point of reference to determine what fundamental rights can be claimed by members of the staff against their organisation and what rights have to be recognised and guaranteed by international administrative tribunals. I would say that it is even more useful than the Court, which relates essentially and primarily to the civil and political dimension of the relationship of individuals with the state under the jurisdiction of which they live. And this is not less true even if one considers that the issue in question is not the management and treatment of ordinary staff engaged in ordinary-law activities, but the management and treatment of staff engaged in what, in a national setting, would be described as a public-service or public-interest activity.

But in order to better explain what I am saying, that is, why the European Social Charter can be so important in the context of the employment relationship of international staff with the organisation for which they work, I think it is necessary to briefly recall what the system of the Social Charter actually is. And this will be the first substantial part of my intervention.

The European Social Charter was signed 54 years ago, in 1961, in Turin, and it is the second-born daughter, so to say, in the family of human rights treaties adopted within the Council of Europe, after its elder sister, the European Convention on Human Rights. Though being in force since the beginning of the 1960s, the Charter remained for years a somewhat obscure and virtually ineffective instrument. It was only in the 1990s, at the end of the Cold War that the Council of Europe and European states decided to relaunch the Social Charter. The idea was to make the Charter more effective, by aligning it as closely as possible with the European Convention on Human Rights, and also to modernise it, by adding new rights, in order to properly take into consideration the individual and collective social needs which were emerging in a changed world. One could say that, by virtue of the process of institutional reforms started in those years, the Council of Europe intended to give a substantial and effective meaning to the principle that human rights are indivisible, and that social rights are human rights on an equal footing with civil and political rights. The institutional reforms that I have just mentioned first took the form of three protocols, and then of the adoption of the revised Social Charter in 1996, which added a number of new rights, while at the same time incorporating the basic content of the 1961 Charter and its protocols.

To date, 43 out of the 47 member states of the Council of Europe have ratified either the 1961 Charter or the revised Charter. Eleven states have ratified only the 1961 European Social Charter, and 32 states are parties to the revised Charter.

Today, the European Social Charter is probably, at the international level, the most wide-ranging and comprehensive legal instrument for the protection of social rights. The 31 substantive articles of the revised Charter (1996) indeed cover a broad range of individual and collective rights, spanning across many social areas. Among such rights, employment rights – including the right to work and to employment, the rights at work and the right to decent working conditions with respect to pay, working hours, holidays and dismissal protections, as well as the collective rights of workers to organise, to bargain collectively and to form and join trade unions – represent certainly one of the main pillars of the Charter, probably the most traditional one. Social protection is another pillar of the Charter. The Charter addresses all aspects of social protection. It provides for the right to social security in its various branches, such as pensions, sickness cover, unemployment benefits, occupational accident insurance and family benefits; and it guarantees an enforceable right to social and medical assistance for persons in need.

But the revised Charter goes far beyond employment rights, labour law and social protection, in providing an overarching approach to what are known today as “societal” issues. I refer, for example, to the right to protection of health, the right to housing, the protection of the family, the protection and education of children and young persons, the right of disabled persons to social integration and participation in the life of the community, the right to protection against poverty and social exclusion (which requires states to adopt a global and co-ordinated approach to fighting poverty and social exclusion). And it is worth stressing that the Charter guarantees all the above rights in a non-discriminatory way. Non-discrimination is not only guaranteed in matters of employment and between men and women, but it is a fundamental principle which indeed applies to all the rights of the European Social Charter. In particular, according to Article E, the Charter applies regardless of race,

sex, age, colour, language, religion, opinions, national origin, social background, state of health or association with a national minority. And it is clear from Article E that this list of grounds was not to be intended as exhaustive.

Therefore, from the standpoint of persons protected, it is correct to say that the Charter, more than any other international (and European) normative instrument, takes care of the essential social needs of individuals in their daily lives, and that the common rationale of all its provisions is the assumption that human beings must have the right to enjoy decent living conditions as members of the organised community in which they live: conditions such as to allow them to live in dignity, rather than merely survive. At the same time, from the standpoint of the political and legal commitment required by states parties, it can be said that the European Social Charter, more than any other international instrument, pushes states to provide themselves with an advanced and efficient public welfare system.

Furthermore, the Charter is not a mere “bill of rights”, that is, a simple catalogue of rights that states declare to uphold, or which they try to promote. It also provides for a specific monitoring mechanism aimed at guaranteeing the implementation of the obligations assumed by states parties, which – albeit not overcoming the well-known limits of almost all international mechanisms of control and monitoring – has some impact on national laws and practices (and in consequence, on the effective enjoyment of the rights by the individuals and groups protected by the Charter).

Such a mechanism, which focuses on the role played by the European Committee of Social Rights, envisages two distinct supervision procedures. One is a typical “reporting procedure”, consisting in the evaluation by the ECSR of periodic reports presented by states on the implementation of the Charter in their legislation and actual practice. The other is the so-called “collective complaints procedure”, which concerns only those states parties that have expressly accepted it.

According to this procedure, four categories of organisations may lodge complaints, alleging that a state party is in breach of the Charter: firstly, international organisations of trade unions and employers’ organisations; secondly, non-governmental organisations which have consultative status within the Council of Europe and have been put on a special list; thirdly, the trade unions and employers’ organisations in the country concerned; and fourthly, national non-governmental organisations. Complaints are examined by the ECSR, which, if the complaint is declared admissible, proceeds to decide on the merits of the case, that is whether the situation is in conformity with the Charter or not. Finally, the ECSR transmits its decision to the Committee of Ministers of the Council of Europe, which adopts a resolution and may invite the state concerned to take the necessary measures to bring the situation into conformity with the Charter.

All the above – that is, the substantive and procedural contents of the ESC – clearly explains the importance and potentialities of the Charter with respect to the issue at stake – the protection of fundamental rights within an international organisation – in the relations between the organisation and its staff.

And indeed we find a number of important references to the Charter, first of all, by the Administrative Tribunal of the Council of Europe, since the early 1980s.

Let me refer, as an example, to the decision of 23 February 1983, in *Farcot and others v. Secretary General*, Appeals Nos. 52-75/1981. The appeals were brought against the refusal of the Secretary General to affiliate the appellants to the general French social security scheme.

And the tribunal, at the time its name was still the Appeals Board, considered that the solution to the dispute should be based on the general principle of welfare law enshrined in the European Social Charter, in particular in Article 12, according to which every employer is obliged to ensure that the staff he employs have proper social security cover. The tribunal stated that “this principle is binding on the legal system of the Council of Europe and applies to all the Organisation’s staff”.

Another significant example is the Decision of 28 March 2003, in Appeal No. 308/2002 (*Jean-Marc Levy v. Secretary General*), where the appellant asked the tribunal to annul a decision refusing to renew his contract and afford him protection against unemployment.

Here, it has to be noted that the Secretary General maintained that, as regards application of the European Social Charter in the Organisation, any solutions which the tribunal adopted would have to be based on general principles of European social law, as expressed by the Social Charter, while at the same time observing Council of Europe regulations (paragraph 40).

And the tribunal, making an explicit reference again to Article 12 of the Charter, confirmed that “in performing its function as a judicial body, it is obliged also to take into account the general principles of law which must prevail in international organisations’ legal systems” (see *Artzet v. Secretary General*, Appeal No. 8/1972, decision of 10 April 1973). “General principles of social law include the principle, enshrined in the Social Charter, that every employer is obliged to ensure that the staff it employs have proper social security cover” (paragraph 47).

Furthermore, the importance of the Charter is now confirmed, at the normative level, by the fact that, by virtue of the Resolution Res(2005)5 of 7 September 2005, the preamble of the Staff Regulations makes an explicit reference to it, by stating: “The Council of Europe, in its day-to-day functioning, shall respect all the principles and ideals which the Organisation defends. In particular, in the administration of the Secretariat, the Secretary General shall endeavour to realise the conditions which will ensure the effective application of the rights and principles set out in the revised European Social Charter, in so far as these are applicable to an international organisation”.

And it is worth adding that the General Meeting of Staff of the Council of Europe (*l’Assemblée Générale du Personnel*) repeatedly adopted, and I think will continue to adopt, resolutions invoking full and effective application of the revised Social Charter to Council of Europe staff.

Let me refer, by way of example, to the resolution of 11 April 2013, where the General Meeting requested the Secretary General: “1. to confirm that any policy in the field of human resources, in particular the current reform of the staff policy of the Council of Europe, will be based on the principle of respect by the Organisation of the principles and standards enshrined in the international human rights protection

instruments, in particular the revised European Social Charter"; and "to reword the reference already included in the preamble to the Staff Regulations so that it refers more explicitly to respect for the provisions of the Charter."

But I could also refer to the resolution of the General Meeting of Staff adopted 10 years before, on 11 April 2003, on the accession of the Council of Europe to the European Convention on Human Rights and revised European Social Charter.

Last, but not least, let me recall that at the end of 2003, two members of the ECSR, Jean-Michel Belorgey and Stein Evju, were invited by the Secretary General of the Council of Europe to make a comparative study on the situation of Council of Europe staff in relation to the European Social Charter. This interesting study was presented to the Deputy Secretary General in 2004.

Having said this, I do not want to comment either on the use that has been made of the Charter by the Administrative Tribunal in its decisions, or on the legal value and implications of the reference to the Charter which can be found in the preamble to the Staff Regulations, or on the soundness of requests by the General Meeting of the Staff to apply the Social Charter to Council of Europe staff.

I would rather like to stress that the Charter has actually become, and rightly so, a legal source – even if a subsidiary and supplementary source – in the management and treatment of the Council of Europe staff. And this is clearly not unreasonable. I mean, it is not unreasonable to accept the fact that the organisation that instigated the Charter cannot, for that very reason, avoid observing the rules that the Charter obliges the states parties to introduce and enforce; and that it is primarily up to the Council of Europe to make sure, even though it has no legal obligation to do so, that the standards applied to Council of Europe staff are as similar as possible to those deriving from the Charter.

And there are indeed many issues about which the Charter could usefully be referred to, as expressing general principles of European social law – to use the words of the Administrative Tribunal – in order to determine the treatment and rights to be applied to Council of Europe staff.

Let me just mention a number of examples:

- ▶ temporary and, more generally, precarious contracts, to the assessment of which Article 1 of the Charter, on the right to work, and Article 4 on the right to a fair remuneration, are clearly relevant;
- ▶ working conditions (such as working hours, work at night, or weekly rest period). Here Article 2 of the Charter, on the right to just conditions of work, is of relevance;
- ▶ health and safety at work: Article 3 of the Charter;
- ▶ the right to organise and to bargain collectively: Articles 5 and 6 of the Charter;
- ▶ social protection schemes, also with regard to the old-age contingency: Article 12 on the right to social security;
- ▶ employment policy for people with disabilities, adapting the workplace to allow them access: Article 15 of the Charter, on the rights of persons with disabilities to social integration;

- ▶ family benefits for *de facto* couples or couples linked by contracts that differ from a traditional marriage: here Article 16, on the right of the family to social, legal and economic protection, can be relevant;
- ▶ dismissal, unjustified dismissals, disciplinary measures or deprivation of a benefit: Article 24 of the Charter, on the right to protection in cases of termination of employment;
- ▶ vocational training, which is very important in a society based on mobility and in an unstable labour market: here there is Article 10 of the Charter on the right to vocational training.

Trying to go a bit further in this exercise of identifying issues where a reference to the European Social Charter can be very helpful in order to bring into conformity with fundamental social rights the treatment and management of the Council of Europe staff, I would briefly focus on few specific areas.

One area is that of health and safety. Here, the provisions of the European Social Charter as interpreted and applied by the European Committee of Social Rights could indeed play a role to give a sense to the rights of the staff, beyond the rather laconic Article 49 of the Staff Regulations, which states nothing more than – I quote – “The Secretary General shall take appropriate measures to ensure the safety and hygiene of the work premises.” In this respect, let me recall that the European Committee of Social Rights has long considered not only that sufficiently clear-cut rules on health and safety in the workplace should be established, but also that the implementation of the supervisory measures provided for in Article 3, paragraph 2, of the Charter, implies the maintenance of an independent and effective labour inspection system whereby workplaces are inspected sufficiently frequently. And it has also taken the view that breaches of the rules in force revealed by inspections should give rise to adequate sanctions.

Another area is “family benefits”. Here, Charter provisions (Article 16 and Article E on non-discrimination) and the case law of the European Committee of Social Rights can be useful to overcome possible problems raised in relation to allowances and the alleged narrow conception of “marriage” and “spouse” applicable under Staff Regulations provisions (I refer namely to Appendix 4, in particular the household allowance in Article 4 of the Appendix). In this respect, the European Committee of Social Rights has long considered that *de facto* family units, whether made up of one or two adults with children or simply of two adults, should, as far as possible, be treated as families. There is no reason why the Council of Europe, following the principles deriving from the Social Charter, should not, like most of its member states, allow such *de facto* family units to be treated as families in its regulations concerning family benefits.

Another issue is that of fixed-term contracts and temporary staff. The question of temporary staff is undeniably much trickier than that of permanent staff. It is in fact temporary staff who are bearing the brunt of what can be described as the risk of a growing accumulation of inequalities in respect of:

- ▶ job security;
- ▶ pay;
- ▶ social protection;
- ▶ protection against dismissal.

In this respect, while specific replies to concrete problems cannot always readily be drawn from Charter provisions and our committee case law, the basic principle underlying both clearly is that there should be no differential treatment in these regards, except to the extent it may be justified by objective factors pertaining to the nature of the employment relationship and the work performed. In particular, the European Committee of Social Rights has pointed out on several occasions, with regard to social protection, that, despite the differences between the situation of workers in permanent jobs and workers in other types of jobs (workers on temporary or part-time contracts or with occasional contracts), certain forms of treatment, apart from possibly infringing the provisions of the various articles of the Charter, are discriminatory. This principle and this approach could usefully be taken into account, I think, by the Council of Europe when dealing with the treatment of temporary staff.

Other examples could be made and analysed, but there is clearly no time to continue now with such a tentative survey.

Anyway, the examples and issues I have tried to present are sufficient to support my conclusion. And my conclusion is that the European Social Charter and the committee case law can really be important as legal sources to be used within the system of internal administrative justice of an international organisation, especially, of course, when social and labour rights of staff and civil servants are at stake. And this applies in my view not only and primarily to the Council of Europe, in the framework of which the principles and provisions of the Charter can be referred to as general principles of European social law, but it could also apply to other non-European international organisations, since the principles and rules of the Charter, together with principles and rules of other international contexts and instruments, such as the International Covenant on Economic, Social and Cultural Rights, or some ILO conventions, can indeed be considered as elements of a global or universal social law.

Thank you very much.

MEMOODA EBRAHIM-CARSTENS, PRESIDENT OF THE UNITED NATIONS DISPUTE TRIBUNAL

Fundamental rights and international organisations: subjective rights and procedural safeguards

Fellow judges, panellists, ladies and gentlemen,

Firstly let me extend my gratitude to the Administrative Tribunal of the Council of Europe for inviting me here to speak on this eminent panel and on this milestone occasion of your 50th anniversary. Congratulations on your achievements and may you continue to thrive in your future endeavours.

My task today is to talk about fundamental rights and international organisations, subjective rights and procedural safeguards, bearing in mind the theme of this colloquy, which is common focus and autonomy of international administrative tribunals.

What I shall endeavour to do is to share with you the experiences of the new system of justice in the United Nations. As you've heard, we have a two-tier system,

particularly with regard to the application of basic fundamental rights by the UN Dispute and Appeals Tribunals.

I do not seek to give any definitive answers but I would like to highlight some interesting aspects of the development of the case law and also to pose the following questions as food for thought.

The first question would be: How do fundamental rights arise within the international organisations? And you've heard from my colleague here how certain rights or case law from different tribunals can be incorporated and used as a source of law.

The second question I would like to pose is: are these rights incorporated in and expanded by recourse to international conventions, case law from different tribunals, international custom, judicial decisions and general principles of law recognised by what are called the civilised nations?

The third question is an interesting one: is there a "one size fits all" or is each international organisation subject to its own particularities and therefore application? Is there a body of core values and fundamental rights that must apply across the broad spectrum of international organisations, regardless of the nature and size of the particular organisation or its individual autonomy?

And finally I will briefly touch upon what are the bars to access to justice and the application of fundamental rights.

In my introduction I will set out where the United Nations sources its general principles from. I think it's generally accepted that the employment relationship of international organisations and of the international civil service is governed primarily by the internal law prevailing within the respective organisation. The contract of employment is normally the main source of rights and obligations, together with the various regulations, rules and administrative issuances upon which employment and other rights are conferred including the basic fundamental rights.

Indeed one might say many of these rights are only present in the rules and regulations of each institution. However, it's inevitable that judges in international administrative tribunals will consider and apply sources of law other than the internal staff rules since no international organisation could create a self-sustaining foolproof legal framework without the need for legal interaction with the broader field of international law in a changing and dynamic global workplace.

In the UN context the preamble to the UN Charter reaffirms faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women, and undertakes to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.¹⁹ Article 1.3 of the UN Charter promotes respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. You notice there is no mention of sexual orientation; this comes later in the Secretary-General's bulletin on discrimination and harassment. So the evolving and developing nature of the law is found also in subsequent issuances by any institution.

19. See, e.g. *Obdeijn* UNDT/2011/032 at paragraph 32.

Interestingly, in the Secretary-General's Note on the Report of the Redesignated Panel A/61/758, dated 23 February 2007, which is a panel that looked into the new system and made recommendations as to its set-up, in recognising that the staff members of the UN have no legal recourse to national courts, the Secretary-General emphasised in the report – and I quote: “The United Nations, as an organisation involved in setting norms and standards and advocating for the rule of law, has a special duty to offer its staff timely, effective and fair justice. It must therefore practise what it preaches with respect to the treatment and management of its own personnel. The Secretary-General believes that staff are entitled to a system of justice that fully complies with the applicable international human rights standards.” That is interesting. It's exactly what we heard this morning from the Secretary General of the Council of Europe in his opening address.

This intention to comply with the human rights standards and norms, again, is expressed in the Secretary-General's Report A/62/294 in August 2007 and one might say that because of the nature and size of the organisation this clear intention to comply with human rights standards is befitting of the United Nations as the largest humanitarian organisation in the world, with some 60 to 70 000 staff members scattered across the globe in different geographical regions.

So are the rights that are established or recognised dependent upon the nature and size of an organisation? Are there differential rights depending on the humanitarian nature, perhaps the financial nature of an organisation? Those are questions, I think, we should pose. When the General Assembly therefore adopted the statute setting up the two tribunals by Resolution 63/253, it set up a system of administration of justice consistent with the relevant rules of international law, principles of rule of law and due process to ensure respect for the rights and obligations of all staff members, and also accountability of management.

The tribunals, therefore, in their application of the law take their cue from the General Assembly resolution and the preceding documentation and discussion papers that set the system up.

I'll pose then the very first question: are these rights expanded from time to time? Do they evolve due to the dynamic nature of the law and the changing global circumstances, be they economic or social?²⁰

I've already made reference to one aspect – that of sexual orientation – which was changed by an ST/SGB (Secretary-General's Bulletin), as the global move towards recognition of different groups, gender rights, sexual orientation rights shows that administrative issuances do change.

20. Article 38 of the ICJ Statute states:

- “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

In considering the law of the old system, there was previously the United Nations Administrative Dispute Tribunal that preceded the new system. The United Nations Appeals Tribunal – the current one – in the case of *Sanwidi*, which is a 2010 case, stated that the new system of justice would naturally have a fresh approach to the legal issues and a new jurisprudence would develop over time, which may or may not be different from that of the former administrative tribunal. Consequently, the jurisprudence of the former tribunal, though of persuasive value, cannot be binding precedent for the new tribunals to follow.

The new system, therefore, the UNDT (which is the Dispute Tribunal) and the UNAT (the Appeals Tribunal) have discharged their mandate under the General Assembly resolution by reliance on a variety of sources of law in recognising rights which may not be expressly included in the internal system. And we've done this by using as an aid to interpretation and construction the UN Charter, General Assembly resolutions, general principles of law, principles of international human rights law, administrative law, employment and contract law, various international conventions, fundamental human rights documents and international labour standards, including those derived from the reports of the ILO specialist committees,²¹ for example the Digest of Decisions and Principles of the Freedom of Association Committee. We've also made frequent reference to case law of other tribunals (the ILO Tribunal, the World Bank Tribunal, International Court of Justice) as well as established case law, interestingly enough, of national jurisdictions which espouse general international principles of law.

I will come then to the next question: is there a set of fundamental rights that is commonly and uniformly applicable across the broad spectrum of international organisations?

Among the general principles of a procedural and substantive nature – I'll be very brief for this – that have been applied by the UN tribunals and other administrative tribunals, are the duty of care including with regard to health and safety at work,²² equal pay for equal work,²³ good faith and fair dealing²⁴ and acquired rights,²⁵ which interestingly enough will not find their source in any regulation or rule but have developed under the principle of equity and other such principles.

I'll set up very briefly a few examples where the new system of justice has affirmed and recognised fundamental rights.

The first one concerns reasons for an administrative decision. In the UN system there is no expressed provision similar to Article 41.2 of the Charter of Fundamental Rights of the European Union which obligates the administration to give reasons for its decision. However, in the seminal decision of *Dane Obdeijn*, which was a 2011 case, the Dispute Tribunal departed significantly from 60 years of jurisprudence with respect to the need for the administration to provide reasons; and this was with specific reference to a case which concerned the expiry of a fixed-term contract. The argument was that

21. See, e.g. *Obdeijn* UNDT/2011/032 at paragraph 31.

22. See, e.g. *McKay* UNDT/2012/018; UNAdT Judgment No. 1204, *Durand* (2004).

23. See, e.g. *Chen* UNDT/2010/068; *Chen* 2011-UNAT-107.

24. See, e.g. *James* UNDT/2009/025.

25. See, e.g. *Omer* UNDT/2011/188; UNAdT Judgments No. 19, *Kaplan* (1953).

it had lapsed due to expiry of time and reasons were not required to be disclosed. The tribunal held that the administration had to disclose the reasons even though that it was a fixed-term contract, particularly if the applicant asked for the reasons and if the tribunal of course asked for the reasons. This decision was upheld by the UNAT; the Dispute Tribunal, in coming to its findings, relied on the ICJ, ILOAT decisions and also cited general principles of the international civil service. When the Appeals Tribunal upheld the decision, it affirmed that the obligation of the respondent to state the reasons for a non-renewal does not stem from any staff regulation or rule but is inherent to the tribunal's power to review the validity of a decision and also the functioning of the system of justice and the principles of accountability. So this was a substantial departure from 60 years of established jurisprudence.

With regard to equality in the decision of *Chen v. Secretary-General*, which again was upheld by the Appeals Tribunal, the principle cited was that enshrined under Article 23 of the Universal Declaration of Human Rights that "everyone, without any discrimination, has the right to equal pay for equal work". In fact the Appeals Tribunal went as far as stating that "budgetary considerations may not trump the requirement for equal pay". So regardless of the budgetary issues equal pay had to be recognised.

With regard to decent work and fair working conditions, which was mentioned earlier, in the decision of *Lebœuf et al. v. Secretary-General*, the applicants contested the interpretation and application of the organisation's rules on compensation for overtime work. In its observations, the tribunal referred to ILO conventions on night work and also an ILO publication (the *Encyclopaedia of occupational health and safety*) in highlighting the disruptive and potentially devastating effects of extended hours of work and rotational and fixed night shifts on a worker's physiological adjustment (health, work performance, social interaction and family life). This was an interesting case. It concerned the Translation Division. Most of the workers who were doing the late night shift were women, care givers, who worked under very onerous conditions with the result the General Assembly actually did away with sitting extended hours and at weekends – as a result of the difficulties that arose.

The other aspect I'd like to touch on is the right to an effective remedy. I think – as you heard from Judge BOOLELL yesterday (those who had the judges round-table meeting) – the status of a staff member is a necessary condition for access to the new system. However, in the judgment of Gabaldon, which is a 2011 Appeals Tribunal decision, the Court held that access to the new system of administration of justice could be extended to persons who are not formally staff members, based on the fundamental principle of the right to an effective remedy enshrined in Article 8 of the Universal Declaration of Human Rights. This case concerned an external candidate who unconditionally accepted an offer of employment and satisfied all the conditions, but the offer was subsequently withdrawn before the letter of appointment was actually issued. It was held in that case that a contract concluded following the acceptance of an offer of employment whose conditions are fulfilled gave rise to obligations for the organisation and to rights for the candidate, who was acting in good faith.

The other aspect that the new tribunals have made landmark decisions on, is what is considered to be a contestable administrative decision. The trend has been towards a wider interpretation of what constitutes an administrative decision which is capable

of being contested if that is the definitive criteria for contesting a decision. In the case of Andronov one might say it's arguable that the distinction or the definition was very restrictive, but in the case of Andati-Amwayi the UN Appeals Tribunal stated that what constitutes an administrative decision will depend on the nature of the decision, the legal framework under which it was taken, and the consequences of that decision. Thus expanding the definition.

The other very interesting development has been in the instance of the break-in-service cases. For years, the United Nations had a practice of requiring staff members to take brief breaks in service in between appointments. This avoided the conferment of rights and disentitled staff members to basic rights and entitlements. This requirement was based entirely on practices in place in the United Nations and it was not pursuant to any promulgated administrative issuance at all. In a number of cases this practice was declared unlawful by the tribunals – as the case of Castelli of 2009, Gomez of 2010, the case of Rockcliffe of 2012 and Villamoran, the case of 2011 No. 126. As a result, the United Nations subsequently revised its administrative issuances to envisage breaks in service only in limited circumstances, for example applying to those staff hired against temporary vacancies – disentitling temporary workers to fundamental rights that fully fledged staff have.

The other very interesting development is with regard to permanent residency: for 60 years, the practice within the UN was that a national of one country who had permanent residency of a different country was supposed to give up that permanent residency if hired by the UN, and he was required to relinquish it. But in the cases of Valimaki-Erk and Manco, which are 2012 cases, the UNDT found that this requirement imposed on staff to give up their permanent residencies had no place in a modern international organisation.

With regard to freedom of assembly and association, while the basic fundamental assembly, association and organisational rights of staff members have been recognised by the UN tribunals, staff associations have no representative capacity or standing or access to the tribunal. But individual members have been seen to have these rights conferred on them individually – e.g. Kisambira Order No. 36/2011; Hassanin Order No. 83/2011.

Procedural safeguards just very quickly: the tribunals recognise the *audi alteram partem* rule, the right to a fair trial. In the case of *Arida v. Secretary-General* the tribunal stated it would not condone a breach of due process rights on the basis that it made no difference in the end because there was sufficient evidence that the applicants had in fact committed the misconduct in question.

With regard to evidential rules or quality of evidence, the UNAT has held that evidence must be given under promise, oath or affirmation of telling the truth. With regard to hearsay evidence and unsworn evidence, again, the Appeals Tribunal has held that unsworn and unsigned witness statements are hearsay; they are neither reliable nor trustworthy and insufficient in themselves to prove the charges.

With regard to anonymity, there was some discussion on anonymity of applicants and witnesses yesterday. Concerning the use of statements gathered in the course of investigations from witnesses who remained anonymous throughout, including

in the proceedings before the tribunal, the UNAT held that even though you cannot exclude those statements, a disciplinary measure may not be founded solely on anonymous statements – Lijanarachchige Judgment No. 2010-UNAT-087.

With regard to whistle-blower protection and witness protection, again, there have been landmark decisions – the cases of Shkurtaj, the case of Rees and Kasmani – staff members who reported alleged misconduct enjoy legal protection against retaliation; and the same protection applies to witnesses appearing before the UNDT.

What then are some of the limitations to access to justice or to fundamental rights? As I've said, the status of a staff member is a necessary condition. Individual contractors, consultants and interns, have no access to justice, although interns do have access to the management evaluation, which is the administrative review level; they do not have access to justice. Moreover, standard internship clauses or agreements do not contain arbitration clauses. If they do – as we heard yesterday – it's quite a costly exercise. Contestable administrative decisions: as I've said, sometimes the definition is very narrow and there's been a growing trend, for example, in decisions, that certain types of application are not receivable against the Ethics Office decisions and decisions affecting groups of staff members. It has to be of individual application. It must affect you individually.

Again, another bar is that of time bars on adherence to strict time limits; and statutory limits seem to be the prevailing view in the tribunals, with some noticeable exceptions (exceptional circumstances, circumstances beyond one's control), which in some cases results in a manifestly unjust decision.

So it is at this juncture that I will pose that final question which is: should bars to the application of fundamental rights be strictly applied where basic fundamental human rights are involved? And we've heard across the board this morning, of the bars of *ratione materiae*, *ratione personae* and *temporis*. Should they be strictly applied where fundamental rights are involved or should there be more flexibility and discretion on the part of tribunals to prevent the curtailment of fundamental rights?

I hope this very brief and quick overview has provided you with some food for thought and a discussion. Thank you for your attention.

DISCUSSION AND CONCLUSIONS: SESSION 2

Dražen PETROVIĆ

My name is Dražen PETROVIĆ. I'm Registrar of the ILO Administrative Tribunal.

There is a question that I have wanted to ask for a long time and I think the Council of Europe is the institution where I can ask it. I'd like to ask President SPIELMANN and Professor PALMISANO how they see potential conflict or a need to reconcile the regional character of European Social Charter, because Professor PALMISANO seems to suggest that it can be applied beyond the European context, and case law of European Court of Human Rights definitely suggests that it can be applied to the United Nations or NATO – so organisations that go beyond the European context; so the regional character of those international instruments and global character

of some international organisations based in Europe. Some people argue that this competence that European institutions have over global international organisations amounts to application of national law to the organisations at the place of their headquarters. Well, I take a side issue whether national law should apply to international organisations but in any case it can be reinforced in international organisations. So in other words, would a staff member based in Germany have more protection than a United Nations staff member based in India? And do you see any conflict between this competence that European institutions have and the rest of the world? I noted that the European Court of Human Rights examined one judgment of ILOAT, but in the applicable law of ILOAT there is no mention of the European Convention on Human Rights. Thank you very much.

Giorgio MALINVERNI

President SPIELMANN remind us earlier that you cannot lodge an application at the European Court of Human Rights against acts originating in international organisations for the simple reason that these organisations are not parties to the Convention; they haven't ratified it. Then there is the issue of immunities of organisations: President SPIELMANN reminded us of the Waite and Kennedy judgment of 1999. But in the further case (Gasparini) from 2009, the Court found a structural shortcoming in the system to protect human rights within NATO. I think it's the whole issue of equivalent protection which President SPIELMANN referred to. Now the issue of equivalent protection did arise in the Bosphorus case before the Court concerning the protection afforded by the community legal system of the European Union – the Court holding that there was indeed equivalent protection available in that context.

Now what about other organisations which do not have a Court at their disposal as the European Union does? I mean it was considered that just because there's a Court of Justice of the European Union there was an adequate level of justice but that is now the case everywhere. For example, that is not available at universal level; there is no universal European Court of Human Rights that might be seen as equivalent to the Court of Justice of the European Union.

Now irrespective of all the complexities involved in this, would it not be a good idea if European regional organisations ratify that European Convention? Now I know that this would raise loads of difficulties with all the obstacles of accession by the European Union.

Dean SPIELMANN

Yes. I mean these are very complex matters which obviously are connected or closely interconnected. I could also stress the opening premise of my statement, namely the case law of the European Court of Human Rights on the issues under discussion this morning, a basically negative case law. If we summarise the four most important issues: first of all you cannot direct an application against a national organisation if an organisation or the host state of an organisation is the target of that application, but then the Court will examine this in relation to basic principles concerning immunity and will of course ascertain respect for the criterion of proportionality, but this is very much a marginal examination taking into account any remedies available in the host state. This was a remedy that I mentioned in relation to the case involving the

German Constitutional Court and in the Gasparini judgment where we applied the Bosphorus presumption and where we found no manifest shortcoming. But whenever the Court speaks in terms of failings in equivalent protection the protection has got to be equivalent but not identical. It's only in cases where the Court were to find a blatant shortcoming, which is not the case in Gasparini, that there might be a problem.

Now as to the question raised, as to whether a remedy should be available before a court of justice, that's an important issue but since Gasparini there has been emerging case law – not in relation to disputes by staff members but in the context of case law concerning the European Union, in particular in the Michaud judgment where we did not apply the Bosphorus presumption because the French Conseil d'Etat had not raised a preliminary question with the Luxembourg Court of Justice. So against that context recent case law, for example Michaud, can be seen as a further development and might indeed be compared to the Gasparini decision.

But for the time being I think the question is still open after the opinion given by the Court of Justice last December on accession by the European Union to the European Convention on Human Rights. So that issue is still unsettled but it will be further examined by our Court as new cases arise. But I don't think we should attempt to read too much into the case law which I mentioned in relation to Organisation staff members. I made the point that this is essentially negative case law. And the question raised by Mr PETROVIĆ is a very interesting one. The basic principles proclaimed by the European Social Charter overlap to a certain extent with the principles established by our case law cited as an example, which is a leading case. It was stated that there is no compartmentalisation or a clear distinction between social and civil rights. But I think it's difficult to infer for more basically negative case law and in general principles which might apply to a dispute arising in other regions of the world outside the European region therefore.

Giorgio MALINVERNI

Thank you. Do other members of the panel wish to take the floor on the issue raised by Mr PETROVIĆ?

Giuseppe PALMISANO

Thank you Mr president. That's an interesting question. What I tried to make clear is that the rules and principles which can be found in the European Social Charter as indeed in other international or European instruments relating to human rights should be used as, if you like, raw material to assist administrative tribunals in reaching their decisions. I think this can be contemplated whatever the context – regional, international – insofar as there is a certain number of common features to be found in these different settings, be they regional or international. So I think that the answer to that question really is to be found in the individual sensitivities of judges who sit on international tribunals. How far can one go in using such material? For example, there are cases where even if this is not stated explicitly, for example the Inter-American Court of Human Rights does make reference to principles developed by the European Court of Human Rights. There might also be cases where our committee, the Committee on Social Rights, and other European bodies might refer to the case law of the Inter-American Court of Human Rights, especially with respect

to social issues (the rights of migrants and so on) where we have a wealth of case law. So I think there is a possibility of using material from other sources to arrive at a coherent position. I think it all comes down to the individual sensitivity of courts. I don't think that the idea of simply promoting accession by international organisations to the European Convention on Human Rights would necessarily be decisive in improving or enhancing respect for human rights when it comes to relations between administrative staff and organisations. Thank you.

Nathalie VERNEAU

Good morning. Thank you chairman. I have two questions: one which follows on from Mr MALINVERNI's question on the case law of the Court as regards the staff of international organisations and another more general question to which all our panellists may reply if they so wish.

Here's my first question: President SPIELMANN, you have touched upon the whole series of decisions (Voisin, Gasparini, Beygo) concerning the staff of international organisations – a negative case law as you mindfully reminded us. In its decisions the Court, while it went further in the Gasparini decision, refrained from exerting outside supervision of the decisions of the administrative tribunals of international organisations.

Let me say from the outset that I do not wish to complain about the case law of the Administrative Tribunal of the Council of Europe since I'm a member of staff and I've used it before, but isn't there a risk of creating lawless areas within international organisations? And is there also a risk of some inconsistency from the perspective of a possible accession of the EU to the Convention, even though the prospects are getting rather dim now with the decision of the Court of Justice of the EU? However, it might happen yet at some point on the road. And in that case the EU staff might avail themselves of remedies before the European Court of Human Rights if they challenge decisions taken by the EU's internal courts, unlike the offices of the parent organisation of the Court, that is to say the Council of Europe, since the Beygo decision precisely had to do with that particular case and the Court felt that was outside its remit. Now in that case, which is still purely academic but which might yet happen, there might be some inconsistency given that the Council of Europe's own or the Court's own staff would not be able to avail themselves of remedies with the Court.

And there's an issue which has to do with the equality of arms which has been raised before the Council of Europe's Administrative Tribunal a number of times, including in recent decisions or at least in recent hearings.

The Council of Europe Secretary General may avail himself before the tribunal of the Council of services from the Dispute Department whereas the Organisation's staff need to resort to the services of an outside lawyer and pay the lawyer's fees or to ask for help from one of the trade unions. And as my colleague Ali reminded us this morning, either the trade union will foot the bill or will provide legal counsel, in other words defend their colleagues' interests before the tribunal. This is something I have done a number of times; I do this in my free time, outside my working hours; of course I have not been paid for this, I didn't ask for any compensation, but there is some inequality of arms because here we have professional lawyers who are paid

specifically to perform that function for the sake of the Secretary General. In an organisation like ours, which claims to hinge upon the rule of law and fundamental rights, shouldn't we remedy that inequality of arms?

Fabrice ANDREONE

Rather than a question this is a comment on what has just been said. I believe that for the EU staff and civil servants, as regards the jurisdiction of the European Court of Human Rights, there have been two rulings for a status transition of the migration from the old to the new status after 2004; and after two judgments of the Civil Service Tribunal, those applicants brought the matter before the European Court of Human Rights which felt this was outside its remit. Moreover, those applicants, who are EU civil servants, now tend to invoke provisions of the European Social Charter in their applications and believe that there are changes to the case law of the Civil Service Tribunal in that regard; that is to say that now it tends to include provisions of the European Social Charter – that the EU's tribunal tends to take into account the provisions of the European Social Charter.

Ali BAHADIR

This is rather a comment following on from what my colleague has just said and also I would like to comment on what the President of the Committee of Social Rights has just told us. The Court of Justice has not merely included the Charter of Social Rights; it has even gone so far as to implement some of the provisions in the directives now. In theory directives do not apply to disputes involving the European civil service. However, the Court of Justice feels that inasmuch as a provision in a directive may be interpreted as specifically expressing a right enshrined in the Charter, that provision from the directive needs to apply to that particular civil service dispute. And I believe that the Court of Justice has gone quite a long way since it has applied a directive on restrictions or the limitation to be imposed on fixed-term contracts. I cannot remember the name of the particular case but I trust that one of our speakers will no doubt remember it. Thank you very much.

Giuseppe PALMISANO

Thank you. Mr president, I would also like to make a brief consideration of the question of conflict of law raised by the professor from West London I think. Yes, the conflict of law between general principles on one side, a revision of Staff Regulations on the other; I think that the answer depends first of all on the specific nature and also the legal system as a whole the organisation at stake. First of all, this organisation and the body of law must be taken into account in order to determine and to construct the general principles insofar as it is also possible to refer to general external principles. These general principles acquire an importance which can prevail, should prevail also over eventually conflicting statutory provisions or staff regulations. But it depends also on the specific content and major fundamental or less fundamental nature of a subjective right which is involved each time; but I think that it's not an easy way to follow but we can think about emerging principles in international law. Some of these principles imply respect of fundamental human rights; and the extent to which a certain right is concerned, I think it has to be applied and it has to prevail even within the internal legal order

of an organisation since the organisation is a subject of international law, and must conform to it in all its behaviour as well as in the internal legal behaviour.

Dean SPIELMANN

Thank you. We have had a number of very interesting questions which I would like to deal with one by one, starting with the very interesting question for our own case law of conflicts between standards. Now very broadly I would like to remind you that our Court strives to interpret the Convention in compliance with the general principles of international law while recognising the specific nature of the Convention in as much as it is an instrument which guarantees human rights. I believe that the case law I have referred to this morning sheds a revealing light on the whole issue of immunities, and has given rise to numerous case law which goes far beyond litigations involving the international civil service. The judgments we have handed down are evidence that we keep in mind, the principles underpinning international law. In a recent judgment (*Hassan v. the United Kingdom*), we have recognised the specific nature of international humanitarian law with regard to the Convention.

As for the ILO's instruments, they have been recognised and very much so in our own case law. We have quoted those instruments in a great many cases as providing guidance for interpretation. I'm referring to Demir and Baykara (the judgment) that's also a crucial judgment or also, as regards social rights, the right to collective bargaining; and in that regard as well those UN instruments have a key role to play.

I would now like to address the questions you have asked. You mentioned a lawless area, which is subject to judgment, but we have to do with our own remit. It's all an issue of which state to impugn; I mean which is the state to be held responsible? What about the accountability of the host state?

In the previous panel I found it very interesting that a Dutch court is alleged to have examined or to have reviewed a case concerning an international organisation which is most likely based in the Netherlands. Now that is a very interesting development. Is the fact that a national court should step in enough to establish jurisdiction and to enable us to review applications? This might in the future give rise to some new case law.

The next question you've asked is closely connected with our case law on equivalent protection, the Bosphorus case law. The case law within the context of accession now we've had the opinion of the Court of Justice but we still do not know whether the EU will ever accede to the Convention; and if so, when or how.

The Court of Justice identified 10 different problem areas – serious ones – which will have to be addressed. Now, how are those to be addressed? Should they be addressed by altering the Treaty on the Functioning of the EU or by altering the Accession Agreement? Well, I believe that the key players are looking into those very tricky issues. However, in this context, I would like to stress the fact that the EU's courts or the Civil Service Tribunal, as well as the tribunal of first instance and the Court of Justice, have quite a lot of case law as regards fundamental rights. I am thinking of a case which gave rise to a judgment of the Court of Justice which was then brought before our Court: the Connolly case which involved freedom of expression; and the Court of Justice handed down a very detailed decision on the

limits to be imposed on freedom of expression not least with reference to the duty of loyalty which a civil servant owes to her/his employer organisation. So these are all questions to be addressed in the future. Time will tell whether, after the accession, the presumption of Bosphorus case law will be upheld. As you understand, I cannot take a stance in this regard. We will see whether the case law gives us a chance to adjudicate in this regard.

Session 3

Factors affecting the exercise of the right to appeal: access *ratione personae*, anonymity, mediation/conciliation, costs and legal aid

INÉS WEINBERG DE ROCA, SECOND VICE-PRESIDENT OF THE UNITED NATIONS APPEALS TRIBUNAL

Good afternoon to all of you. I think we should start now so as to more or less keep within the deadlines, our timetable.

First of all, many thanks to the organisers of this event. This session No. 3 is called “Factors affecting the exercise of the right to appeal”; within this broad description we have three topics: access *ratione personae*, anonymity; mediation/conciliation; and costs and legal aid.

We will start with the access *ratione personae* and anonymity. Our speaker on this topic is Ms Magali ROJAS DELGADO. She is a lawyer (a master in public administration) with 20 years of professional experience in the public sector in Peru. She’s now executive chair of the agency supervising public procurement and she has been a member of the Administrative Tribunal of the Organization of American States since 2011 and is currently the president.

MAGALI ROJAS DELGADO, PRESIDENT OF THE ADMINISTRATIVE TRIBUNAL OF THE ORGANIZATION OF AMERICAN STATES

Spanish version

Competencia *ratione personae*/anonimato

El Tribunal Administrativo de la Organización de los Estados Americanos (OEA) es un órgano autónomo con competencia para conocer las controversias suscitadas entre la Secretaría General de la OEA y sus funcionarios cuando se alegue incumplimiento de las condiciones establecidas en los respectivos nombramientos o contratos de estos últimos, o infracción de las Normas Generales para el Funcionamiento de la Secretaría General y demás disposiciones aplicables, inclusive las del Fondo de Pensiones y Jubilaciones. Fue creado el 22 de abril de 1971 por la Asamblea General de la OEA en el marco de su primer período ordinario de sesiones. El Tribunal está compuesto de seis miembros elegidos por la Asamblea General para servir por un período de seis años.

La competencia del Tribunal Administrativo de la OEA puede extenderse a cualquier organismo especializado interamericano de la Organización según se definen en su Carta, así como a cualquier entidad intergubernamental americana interesada conforme a los términos que se establezcan en acuerdo especial que celebre el Secretario General de la OEA con cada uno de tales organismos. A partir de 1976 el Tribunal Administrativo ha extendido su jurisdicción al Instituto Interamericano de Cooperación para la Agricultura (IICA).

I. Legitimidad procesal

De conformidad con el Artículo II del Estatuto del Tribunal, la competencia de este órgano se extiende a las siguientes personas:

1. Parte recurrente

- ▶ **Miembros** del Personal de la Secretaría General de la OEA (SG/OEA) o del IICA. En el caso de la OEA no se diferencia entre funcionarios de categoría general o profesional, pero en el caso del IICA, la competencia del Tribunal es extensible sólo a los empleados de categoría profesional conforme a los términos del Acuerdo suscrito entre la OEA con dicha organización.
- ▶ **Ex Miembros** del Personal de la SG/OEA y ex miembros de categoría profesional del IICA cuyos contratos cesaron. Agotados los procedimientos administrativos previos para la solución de sus disputas (que consisten primero en solicitar audiencia y luego la conformación de un Comité de Reconsideración) los miembros de personal tienen hasta 90 días luego de notificada la decisión definitiva del Secretario General para interponer su recurso. En el caso de los empleados del IICA este plazo es de 120 días.
- ▶ Toda persona que haya sucedido al miembro del personal en sus derechos al fallecimiento.

- ▶ El representante legal de un miembro del personal que esté jurídicamente incapacitado para administrar sus asuntos.

Siendo que el Estatuto del Tribunal no contempla ningún tipo de excepción al requisito de agotamiento de los procedimientos administrativos previos, tanto el causahabiente como el representante legal del miembro de personal jurídicamente incapacitado tendrán que completar esta fase, sin perjuicio de la posibilidad de que logren acordar con el Secretario General el acceso directo al Tribunal. Después de notificada la decisión del Secretario General, estos dispondrán de un año para presentar el recurso.

- ▶ **Terceros interesados.** Toda persona apta para recurrir al Tribunal podrá solicitar que se le permita intervenir en un caso, cualquiera que sea la etapa en que se encuentre el procedimiento, fundándose en un interés jurídico que pueda ser afectado por el fallo del Tribunal. El procedimiento de *tercería* se rige por las mismas reglas del procedimiento ordinario aplicable a las partes.
- ▶ **Intervención obligada.** También puede ser llamada para que intervenga en el procedimiento, a solicitud de cualquiera de las partes o de oficio, cualquier persona que pueda recurrir al Tribunal y que pueda resultar afectada en su interés jurídico por el fallo.

En todos los supuestos anteriores los recurrentes pueden actuar representados por un abogado, por otro miembro del personal de la Secretaría General, o por ellos mismos.

2. Parte recurrida

Pueden fungir como parte demandada o recurrida ante el Tribunal Administrativo de la OEA:

- ▶ El Secretario General de la OEA
- ▶ La Comisión de Jubilaciones y Pensiones de la OEA
- ▶ El Director General del IICA

II. Procedimiento de apelación

- ▶ El procedimiento de apelación de las Sentencias del Tribunal está contenido en el Artículo XII de nuestro Estatuto. Este procedimiento es aplicable sólo en los casos en que se considere que la sentencia es *ultra vires* porque el Tribunal supuestamente ha excedido sus facultades en relación con su jurisdicción, su competencia, o los procedimientos previstos en este Estatuto.
- ▶ Cada petición deberá contener los fundamentos de hecho y de derecho en que se sustenta la alegación de que la sentencia del Tribunal en primera instancia fue *ultra vires*. La petición deberá ser presentada al Presidente del Consejo Permanente dentro de los cuarenta y cinco días a partir de la fecha en que el apelante haya sido notificado de la sentencia del Tribunal.
- ▶ El Presidente del Consejo Permanente constituirá un Panel de Revisión que estará compuesto por tres miembros:

- Uno de los miembros del Panel de Revisión deberá ser escogido por sorteo entre aquellos miembros del Tribunal que no escucharon en primera instancia el caso en revisión.
 - Dos miembros serán escogidos ad hoc entre los miembros de tribunales administrativos de otras organizaciones internacionales cuyas Secretarías tengan su sede en Washington, DC que deberán ser seleccionados por el Presidente del Consejo Permanente, en consulta con los representantes debidamente nombrados por el Secretario General y los de las partes contrarias.
- ▶ El Presidente del Consejo Permanente designará uno de los miembros ad hoc para que ejerza las funciones de Presidente del Panel de Revisión y determinará la compensación a ser pagada a los miembros.
 - ▶ En forma simultánea a la petición de revisión, el apelante deberá notificar a la parte apelada la petición, sea directamente o a través de sus representantes debidamente autorizados, enviándoles una copia de la misma.
 - ▶ La parte apelada tendrá cuarenta y cinco días a partir de la fecha de recepción de la petición para someter en forma escrita cualquier observación que tenga sobre la misma. Esas observaciones serán sometidas directamente al Panel de Revisión con una copia para el apelante. Recibidas las observaciones, la parte apelante dispondrá de veinte días para presentar una respuesta escrita al Panel de Revisión y a la parte apelada. El Panel de Revisión podrá solicitar, a su discreción, alegatos adicionales de las partes.
 - ▶ Las apelaciones se decidirán basadas en los alegatos escritos y sin argumento oral ante el Panel de Revisión, excepto en circunstancias extraordinarias cuando el Presidente del Panel de Revisión lo considere apropiado.

III. Circunstancias que limitan el acceso al tribunal administrativo de la OEA

1. El caso de los consultores

A la par de los funcionarios de la organización en la Secretaría General también encontramos personas contratadas bajo la modalidad de “contratos por resultado” comúnmente identificadas como “CPR” o consultores.

Los contratos de CPR tienen cláusulas que especifican que el consultor no es ni empleado ni miembro del personal de la Secretaría General y no tiene derecho a las prestaciones, beneficios o emolumentos que corresponden a los miembros del personal (como seguro social, seguro por accidentes de trabajo, seguro de salud, seguro de vida, vacaciones o licencia por enfermedad).

Los consultores, al no ser miembros del personal de la Secretaría General, no podrían interponer un recurso ante el Tribunal y de allí que esta modalidad de contratación suele contener una cláusula por la que las partes se comprometen a resolver toda controversia que surja en relación a dicho contrato ante la Comisión Interamericana de Arbitraje Comercial o a la Asociación Americana de Arbitraje. Las leyes que se

aplicarán en los procedimientos de arbitraje serán las del Distrito de Columbia de Estados Unidos, y la decisión arbitral será final y obligatoria.

Cabe destacar no obstante que tenemos un antecedente en nuestro Tribunal donde una consultora presentó un recurso alegando mantener un vínculo de naturaleza laboral con la organización. Se trata del Recurso 90 de Carmen Mallarino decidido por la Sentencia 60 de 1981.

La recurrente argumentaba que a pesar de haber sido continuamente contratada bajo seis contratos por resultado, ella en realidad había ejercido funciones de naturaleza permanente de forma ininterrumpida y que en todo momento la correspondencia y memorandos oficiales que recibía se dirigían a su persona como “Coordinadora y supervisora de idiomas del Programa de Desarrollo Organizativo y Capacitación” de lo cual se desprendía en su opinión la ocupación de un cargo permanente.

La recurrente solicitó a Tribunal que declarase que la relación contractual entre ella y la organización había sido permanente desde el inicio; se le incorporase oficialmente al servicio bajo un puesto de nivel P-3, y se le pagare todos los beneficios caídos, entre otras peticiones.

Los apoderados del Secretario General respondieron indicando que las Normas Generales no establecen en caso alguno que un contrato por resultado pueda encubrir una relación laboral y que por ello no lo regulan; que la razón es que el contrato por resultado crea no una relación interna de empleo sino una relación externa, de carácter totalmente ajeno a la condición de miembro del personal. Explicaron que la Secretaría General puede, sin limitación alguna, contratar con contratistas independientes la provisión del resultado que satisfaga su necesidad permanente.

La parte recurrida argumentó además, entre otras cuestiones, que la situación contractual de la recurrente era la de un contratista independiente no sujeto a relación de dependencia y sumisión al control del empleador, ni a jornada laboral concreta, sino al suministro por su cuenta, cargo y responsabilidad, de determinado producto, tarea o labor, que en este caso se refería al adiestramiento en idiomas. Consecuentemente plantearon al Tribunal la excepción de incompetencia para conocer de este asunto.

Respecto de la excepción de incompetencia de previo pronunciamiento planteada por la Secretaría General, el Tribunal consideró que sería imposible rechazar la demanda *in limine* o por el contrario hacer lugar a la misma porque la cuestión planteada ameritaba el examen de fondo de la materia objeto de controversia que era determinar la naturaleza de la relación jurídica existente en el momento de los hechos entre la recurrente y la Secretaría General de la Organización.

La recurrente sostenía que la relación era de naturaleza laboral, mientras que la Secretaría General consideraba que se trataba de una relación contractual entre esta con un contratista independiente.

El Tribunal en sus sesiones de 1981, y atento a la falta de elementos de convicción suficientes para dictar un fallo definitivo resolvió dictar una resolución (la 101) a efectos de recabar de la Secretaría General y de la recurrente todo documento relativo a la relación controversial incluyendo los contratos, memoriales internos, facturas, formas de pago, evaluaciones, etc.

En la Sentencia de Mallarino el Tribunal desagregó los elementos que en su criterio son los que definen al miembro de personal, indicando lo siguiente:

- ▶ Son personas nombradas con carácter permanente o temporal;
- ▶ Reciben un salario regulado por las disposiciones internas aplicables;
- ▶ Deben concurrir diariamente al lugar de destino que se les fije;
- ▶ Deben cumplir un horario oficial;
- ▶ Deben reportar su asistencia;
- ▶ Trabajan bajo la supervisión de un funcionario de la Secretaría General;
- ▶ Trabajan conforme a una descripción de funciones del cargo respectivo;
- ▶ Deben abstenerse de ejercer cualquier ocupación o empleo alguno fuera de la Organización sin autorización por escrito del Secretario General;
- ▶ Suscriben una declaración de lealtad.

Si bien contractualmente la recurrente era un CPR y de eso no había duda, de todas maneras el Tribunal decidió darle curso a su demanda y sustanciarla hasta el final porque consideró necesario examinar la **naturaleza jurídica** de su relación más allá de la **naturaleza contractual**. En el caso en cuestión quedó demostrado que la recurrente no era empleada permanente, especialmente porque ella subcontrataba otros servicios para apoyarse en sus tareas. Pero el punto a destacar es que de haber reunido ciertos elementos esenciales que a juicio del tribunal son los que configuran una relación de empleo, no descartamos la posibilidad de que su demanda haya podido ser admitida.

Nótese que este fue el razonamiento similar de la Corte Europea de Derechos Humanos para el caso de Waite y Kennedy donde la Corte reconoce la inmunidad de la ESA al sostener que si los argumentos de los reclamantes era que ellos eran empleados fijos y no consultores, con más razón tenían que haber acudido a la Junta de Apelaciones de la ESA como paso previo a la interposición de las demandas ante los Tribunales alemanes.

2. El caso de los ex funcionarios

Las personas que deseen presentar una demanda ante el Tribunal Administrativo de la OEA que no sean miembros del personal de la Secretaría General deben presentar una fianza o depósito para que se su recurso sea admisible. Ello en virtud del **Artículo VI.7 del Estatuto** del Tribunal que reza:

Antes de admitir el recurso de una persona que no sea miembro del personal, el Tribunal exigirá que esa persona constituya un depósito, fianza u otra garantía por un importe equivalente a **un mes de remuneración (sueldo y ajuste por lugar de destino) del nivel P4, paso 6**, de la escala de sueldos de profesionales con dependientes correspondiente a la sede, a menos que el Secretario General haya renunciado expresamente al requisito de la reconsideración, o a menos que el Comité Mixto de Asesoramiento para casos de Reconsideración ... haya establecido, por voto de la mayoría de sus miembros, que las reclamaciones interpuestas de la persona tienen fundamento, o a menos que la Secretaría no haya respondido a una solicitud de audiencia o de reconsideración ...

... si la persona es un ex miembro del personal, la suma exigible equivaldrá a su última remuneración mensual (sueldo más ajuste por lugar de destino)

Vale decir que este requisito de exigir fianza no estuvo contemplado en el Estatuto del Tribunal sino hasta junio de 1997 cuando la Asamblea General de la OEA adopta la Resolución AG/RES 1526 incorporando dicho párrafo a nuestro Estatuto. En aquél entonces el Tribunal tenía 25 años de funcionamiento en los que se abstuvo de solicitar cualquier tipo de garantía como paso previo a la admisibilidad de una demanda de un ex funcionario.

El Consejo Permanente de la organización en la oportunidad de proponer esta reforma al Reglamento,²⁶ explicó que el propósito de la fianza era, primero, desalentar la presentación de demandas sin suficiente fundamento, y segundo, asegurar que la Secretaría General podrá recuperar los honorarios de abogado reconocidos por el Tribunal contra un demandante que ha sido vencido. Ello porque si el deudor en virtud de la sentencia no es un miembro del personal y este decide no pagar, no hay forma para la organización de ejecutar esa sentencia. Debe aclararse sin embargo que cuando el Comité de Reconsideración que evalúa el caso del recurrente considera que el reclamo puede tener fundamentos tal fianza no se solicita.

La realidad es que el Tribunal Administrativo por su propia cuenta solicitó la derogación de esta norma en el año 2011 cuando se iniciaron las negociaciones con los órganos políticos de la organización para la consideración de las reformas al Estatuto del Tribunal que propusimos a la Asamblea General. Como el Estatuto del Tribunal sólo puede ser modificado por la Asamblea General, esta misma Asamblea tenía que aprobar dicho cambio.

El entonces Presidente del Tribunal Administrativo, Juez Andre Surena de Estados Unidos, estuvo encargado de presentar las propuestas de reformas ante diversas comisiones políticas de la organización. Entre las razones principales que fueron esbozadas para justificar la derogación de este requerimiento de fianza era que la organización, con base al Acuerdo sobre Privilegios e Inmidades de la OEA de 1949 y de la "*International Organization Immunity Act*" de Estados Unidos (IOIA), gozaba de inmunidad de jurisdicción y por ende los ex funcionarios de la OEA no tenían otra opción para presentar sus reclamos que utilizar el propio tribunal de la organización para la resolución de sus disputas derivadas de la relación laboral. Siendo esto así, el Tribunal consideraba que era necesario propiciarle al ex funcionario las condiciones de acceso a la justicia más similares posibles a las que tendría de estar habilitada para él la jurisdicción de los tribunales domésticos. Si estos tribunales domésticos no exigen tal fianza para admitir sus demandas, *mutatis mutandi*, ningún tribunal debería de exigirla. Adicionalmente hicimos un estudio comparativo de los estatutos de otros Tribunales Administrativos y confirmamos que ninguno de ello exigía como requisito previo a la admisibilidad de un caso la constitución de un depósito.

Estos razonamientos sin embargo no fueron suficientes para convencer a la Asamblea General de derogar esta norma, por lo que el requisito de fianza fue ratificado y

26. Documento "Informe de la Comisión de Asuntos Administrativos y Presupuestarios acerca de la Revisión del Estatuto del Tribunal Administrativo" (CP/doc.2904/97).

perdura hasta la fecha. Téngase en cuenta que estamos hablando de una fianza que se aproxima a los diez mil dólares americanos.

El Tribunal como órgano subordinado a la Asamblea General se encuentra en la obligación de continuar exigiéndola y así lo hemos venido haciendo en los últimos recursos recibidos de parte de ex funcionarios. No obstante, toda vez que el Tribunal está facultado para reformar su propio Reglamento conforme al Artículo XIII del Estatuto, este órgano aprobó una reforma a su Reglamento para indicar que cuando el peticionario pueda demostrar que su reclamo pueda tener mérito substancial, pero sea incapaz de proporcionar todo o parte de la suma en concepto de depósito o fianza, por causa de indigencia, el Presidente puede eximir – total o parcialmente – de la constitución de la garantía a los individuos que actualmente no sean miembros del personal.

Ahora bien, pasando a la etapa de apelación, cabe decir que también en esta fase es exigible la fianza (Artículo XII del Estatuto del Tribunal):

Antes de admitir la petición de revisión de una persona que no es miembro del personal, el Presidente del Consejo Permanente requerirá a esa persona que constituya un depósito, fianza u otra garantía legalmente exigible por un importe equivalente a **seis meses de remuneración (sueldo y ajuste por lugar de destino) del nivel P-4, paso 6**, de la escala de sueldos de profesionales con dependientes correspondiente a la sede. Este depósito será mantenido en custodia por la Secretaría General mientras esté pendiente el resultado de la revisión y la adjudicación por el Panel de Revisión de cualquier gasto u honorarios de abogado contra el apelante.

Tres grandes diferencias podemos observar respecto a la fianza exigible en la primera instancia y en la segunda de revisión:

- ▶ La primera diferencia es que no existe en la etapa de apelación ningún tipo de excepción a la fianza como sí las hay en cambio en la primera instancia donde el recurrente puede alegar indigencia, o el Secretario General puede renunciar a su derecho de exigir fianza, o el Tribunal puede optar por no exigirla si el Comité de Reconsideración concluyó que el caso tiene mérito. Nada de esto es admisible en la etapa de apelación.
- ▶ El número total de meses de depósito a consignar en la primera instancia es uno (1) mientras que en la fase de apelación es seis (6).
- ▶ En la primera instancia existe la opción de que el funcionario consigne una fianza por el monto equivalente a su último salario si el nivel de su cargo es menor al de un P4 paso 6, pero en la etapa de apelación no existe tal opción por lo que invariablemente el apelante deberá consignar un depósito por el monto equivalente a seis meses de un salario básico de un puesto de nivel P-4.

En los 43 años de existencia de este Tribunal sólo una sentencia ha sido apelada ante el Consejo Permanente de la organización. Se trata de la Sentencia 151 correspondiente al Recurso 283 *Relinda Louisy vs Secretario General* de 2005. Esta apelación no prosperó al no haber satisfecho la recurrente el requisito de fianza.

Claro es sin duda que un filtro de esta naturaleza desalienta el impacto de demandas temerarias lo cual también es importante evitar habida cuenta de la maquinaria que se activa con un procedimiento esta naturaleza. El procedimiento de apelación no

sólo envuelve la participación de nuestro propio Tribunal, sino que también la de los órganos políticos de la OEA y de otros Tribunales afines que tengan a bien cooperar con nosotros para la designación de dos Jueces ad hoc.

IV. Anonimato

El 3 de abril de 2014 el Tribunal Administrativo aprobó un nuevo literal a su Artículo 26 del Reglamento sobre requisitos de forma para la presentación de un recurso. Este literal incluye la posibilidad para la parte recurrente de solicitar el anonimato en los documentos a ser publicados que hagan referencia a su caso (sentencias, resoluciones, informe anual a la Asamblea General o reportes jurisprudenciales que pudieran ser colgados en nuestra página web).

El literal (g) recién aprobado de nuestro Reglamento reza:

Anonimato

El recurrente que desee que su nombre no sea consignado en los documentos que el Tribunal publique en relación al caso, podrá solicitarlo fundadamente al presentar su demanda o en cualquier otro momento antes que la causa se inscriba para la consideración del Tribunal. El Secretario del Tribunal trasladará la solicitud a la parte recurrida con un plazo de 5 días para responder. El Presidente del Tribunal podrá autorizar el anonimato del recurrente en los términos referidos en el párrafo anterior cuando la publicación de su nombre pueda causarle perjuicios. Si el Presidente decidiera no autorizarlo, dará al recurrente un plazo de 5 días para decidir si continúa con su demanda o la retira.

Los aspectos que destacan de este artículo son los siguientes:

- ▶ Aplica exclusivamente a los documentos a ser publicados, no así a los de circulación interna entre la Secretaría del Tribunal y Autoridades de la SG/OEA;
- ▶ Damos la oportunidad a la parte recurrida de emitir sus opiniones al respecto;
- ▶ Si el Tribunal decide conceder el anonimato, este se concede por extensión al apoderado del recurrente para evitar cualquier tipo de relacionamiento o inferencia que pueda arrojar indicios de su identidad;
- ▶ La manera de nombrar a la parte recurrente a quien se le ha otorgado el anonimato es como “parte recurrente” y no con sus siglas y omitiendo referencia a los títulos de “Señor” o “Señora” para preservar su género y reforzar así la protección de su identidad.

El Tribunal Administrativo de la OEA publica todas sus sentencias y estas se encuentran accesibles en nuestra página web, pero creemos que ciertas materias como acoso laboral, acoso sexual, acusaciones de fraude, corrupción, o exhibición de contenidos que eran parte de documentos confidenciales de la SG/OEA, por mencionar algunas situaciones, pueden causar un serio perjuicio a la parte recurrente con independencia de que la sentencia falle a su favor dado a las situaciones personalísimas que se ventilan en la parte narrativa de la sentencia (esto se agudiza si tomamos en cuenta que las herramientas de búsqueda de documentos como Google han ocasionado que nuestras decisiones se desplieguen en primera fila, mientras que antes la persona tenía necesariamente que llegar a nuestra página y seleccionar manualmente ciertos criterios de búsqueda para llegar a la decisión. Hoy en día esto no funciona así).

Sin perjuicio de lo anterior, naturalmente la solicitud de anonimato será evaluada por el Tribunal en cada caso, tomando en cuenta el mérito de la causa (para lo cual se evaluará la opinión del Comité de Reconsideración que examinó el caso de la parte recurrente antes de llegar al Tribunal) y qué tan delicado sea el tema de la controversia.

JUDGE MAGALI ROJAS, PRESIDENT OF THE OAS ADMINISTRATIVE TRIBUNAL

***Access ratione personae/anonymity* English version**

The Administrative Tribunal of the Organization of American States (OAS) is an autonomous organ competent to consider controversies that may arise between the General Secretariat of the OAS and its staff members, in which allegations are made regarding non-observance of the conditions established in their respective appointments or contracts, or violation of the General Standards to Govern the Operations of the General Secretariat or of other applicable provisions, including those concerning the Retirement and Pension Plan. It was established on 22 April 1971 by the OAS General Assembly at its first regular session. The tribunal is made up of six members elected by the General Assembly to serve six-year terms.

The competence of the OAS Administrative Tribunal may be extended to any inter-American specialised body of the organisation as defined in the OAS Charter, and to any interested American intergovernmental organisation, in accordance with the terms established by a special agreement to be concluded for the purpose by the Secretary General with each such specialised body or interested American intergovernmental organisation. Since 1976, the Administrative Tribunal has extended its jurisdiction to the Inter-American Institute for Cooperation on Agriculture (IICA).

I. Procedural legitimacy

Pursuant to Article II of the Statute of the Administrative Tribunal, the tribunal's competence extends to the following persons:

1. Appellants

- ▶ Any *staff member* of the General Secretariat of the OAS (GS/OAS) or of IICA. For the OAS, no distinction is made between general or professional category staff, but in the case of IICA, under the terms of the agreement entered into between the OAS and that institute, the tribunal is only open to staff in the professional category.
- ▶ *Former staff members* of the GS/OAS and former professional category staff of IICA whose contracts have ended. Once prior administrative procedures for the solution of their complaints (namely the request for a hearing and then the installation of a reconsideration committee) have been exhausted, staff members have up to 90 days following notification of the Secretary General's final decision to file an appeal. For IICA personnel the period allowed is 120 days.

- ▶ Any person who has succeeded to the staff member's rights upon his or her death.
- ▶ The legal representative of a staff member who is legally incapacitated from managing his or her own affairs.

Given that the statute of the tribunal does not provide for any exception to the requirement to exhaust prior administrative procedures, both the successor and the legal representative of a staff member who is legally incapacitated must complete that phase, without prejudice to the possibility of their reaching an agreement with the Secretary General on direct access to the tribunal. Once they have been notified of the Secretary General's decision, they have up to one year to file an appeal.

- ▶ *Interested third parties.* Any person to whom the tribunal is open may apply to intervene in a case at any stage, on the ground that he or she has a legal right that may be affected by the judgment to be handed down by the tribunal. Procedures for third parties are governed by the same rules as for the regular procedure applicable to the parties.
- ▶ *Mandatory intervention.* Any person to whom the tribunal is open and whose legal right may be affected by the judgment may also be called to participate in the proceedings, at the request of any of the parties or on the initiative of the tribunal.

In all of the aforementioned eventualities, the appellants may be represented by an attorney, another staff member of the General Secretariat, or by themselves.

2. Appellee

The following may act before the OAS Administrative Tribunal as the respondent or party against whom appeal is filed:

- ▶ The OAS Secretary General
- ▶ The OAS Retirement and Pension Committee
- ▶ The Director General of IICA.

II. Appeal procedure

- ▶ The procedure for petitioning for a review of the tribunal's judgments is set out in Chapter XII of our statute. This procedure is applicable only in instances where the tribunal's judgment is alleged to be *ultra vires* because it exceeds the tribunal's authority in relation to its jurisdiction, competence or procedures under this statute.
- ▶ Each such petition shall set forth the legal and factual bases supporting the allegation that the tribunal's decision in the first instance was *ultra vires*. That petition must be presented to the Chair of the Permanent Council within 45 days of the appellant's receipt of the tribunal's judgment.
- ▶ The Chair of the Permanent Council shall constitute a review panel composed of three members:

- One of the members of the review panel shall be chosen by lot from among those tribunal members who did not in the first instance hear the case being reviewed.
 - Two members shall be chosen ad hoc from among the members of other administrative tribunals of other international organisations whose tribunal secretariats have their headquarters in Washington, DC. The two ad hoc members shall be selected by the Chair of the Permanent Council, in consultation with the duly appointed representatives of the Secretary General and of the opposing parties.
- ▶ The Chair of the Permanent Council shall designate one of the ad hoc members to serve as President of the Review Panel, and shall determine the compensation paid to members.
 - ▶ Simultaneous with petitioning for review, the appellant must notify the appellees directly or through their duly authorised representatives of the petition by sending them a copy of the petition.
 - ▶ The appellees shall have 45 days from the date of receipt of the petition to submit in writing any observations they may have on the petition. Those observations shall be submitted directly to the Review Panel, with a copy to the appellant. Upon receipt of these observations, the appellant shall have 20 days to file a written response with the Review Panel and the appellee. The Review Panel may, at its discretion, request additional submissions of the parties.
 - ▶ Appeals shall be decided based upon the written submissions, and without oral argument before the Review Panel, except in extraordinary circumstances as the President of the Review Panel deems appropriate.

III. Circumstances limiting access to the administrative tribunal of the OAS

1. The case of consultants

In the General Secretariat, along with staff members of the organisation, we also find persons hired under “performance contracts” commonly known as “CPRs” or consultants.

CPR contracts contain clauses specifying that the consultant is neither an employee nor staff member of the General Secretariat and is not entitled to the rights, benefits or emoluments of staff members (such as social security, occupational hazard insurance, health insurance, life insurance, vacations or sick leave).

Since they are not staff members of the General Secretariat, consultants cannot file an appeal with the tribunal, which is why their contracts usually contain a clause in which the parties commit to settling any dispute that may arise in relation to said contracts before the Inter-American Commercial Arbitration Commission or the American Arbitration Association. The law applicable to the arbitration

proceedings shall be the law of the District of Columbia and the arbitral award shall be final and binding.

It is worth noting, however, that we have a precedent in our tribunal of a consultant submitting an appeal in which she argued that she had a labour relationship with the organisation. That was Appeal 90, filed by Carmen Mallarino, which was decided by Judgment 60 of 1981.

The appellant argued that, despite having been hired continuously under six performance contracts, in reality she had performed functions of a permanent nature uninterruptedly and that at all times correspondence and memorandums addressed to her had referred to her as “Language Coordinator and Supervisor of the Organizational Development and Training Program”, which, in her view, signalled that she was occupying a permanent position.

The appellant asked the tribunal to declare that the contractual relationship between her and the organisation had been permanent from the start; that she be officially incorporated as a staff member at the P-3 level, and that she be paid all benefits foregone; among other petitions.

The Secretary General’s attorneys replied, pointing out that nowhere do the General Standards establish that a performance contract can imply a labour relationship, which is why they do not regulate it; the reason being that a performance contract creates not an internal relationship of employment but rather an external relationship, of a nature utterly different from a staff member’s status. They explained that the General Secretariat may, without any restriction, enter into contracts with independent contractors for the provision of outcomes that meet its permanent needs.

The appellee further argued, among other issues, that the contractual status of the appellant was that of an independent contractor not subject to a relationship of dependence or submission to an employer’s oversight, or tied to specific working hours, but rather to the provision, on her own account and upon her own responsibility of a given product, task or work, which in this case was language teaching. Consequently, they proposed that the tribunal declare itself incompetent to hear this case.

Regarding the objection that the tribunal was incompetent to issue a prior pronouncement raised by the General Secretariat, the tribunal considered that it would be impossible either to reject the appeal *in limine* or to accede to it because the matter raised merited an examination of the core issue at stake, namely the nature of the legal relationship at the time between the appellant and the General Secretariat of the organisation.

The appellant maintained that it was a labour relationship while the General Secretariat considered that it was a contractual relationship between it and an independent contractor.

At its meetings in 1981, and in view of the lack of convincing grounds to arrive at a definitive judgment, the tribunal adopted a resolution (No. 101) on obtaining from the General Secretariat and the appellant all the documentation pertaining to the

disputed relationship, including contracts, internal memos, invoices, forms of payment, evaluations, and so on.

In its Mallarino judgment, the tribunal provided a breakdown of the factors that, in its view, define a staff member, namely:

- ▶ they are individuals appointed on a permanent or temporary basis;
- ▶ they receive a salary governed by applicable in-house provisions;
- ▶ they are supposed to attend a specific place of work on a daily basis;
- ▶ they are expected to work regular hours;
- ▶ they are expected to register their attendance;
- ▶ they work under the supervision of a staff member of the General Secretariat;
- ▶ their work is governed by a job description;
- ▶ they must refrain from performing any occupation or job outside the organisation without the written authorisation of the Secretary General;
- ▶ they sign a declaration of loyalty to the organisation.

Although, contractually, the appellant was a CPR and there was no doubt about that, the tribunal decided in any case to attend to her appeal and to examine it in full because it deemed it necessary to examine the legal, and not just contractual, nature of her relationship to the organisation. In the case in question, it was finally demonstrated that the appellant was not a full-time employee, especially because she outsourced other activities to assist her in her work. However, the point worth underscoring is that, if certain essential criteria had been met that, in the tribunal's opinion, constitute employment status, it is not impossible that her appeal might have been admitted.

Worth noting, too, is that the European Court of Human Rights argued similarly in the Waite and Kennedy case, in which the Court recognised the immunity of the European Space Agency (ESA), when it maintained that if the complainants were arguing that they were full-time staff, rather than consultants, that was all the more reason for them to have resorted to the Appeals Board of ESA prior to filing suits before German courts.

2. The case of former staff members

Persons wishing to file a complaint with the OAS Administrative Tribunal who are not staff members of the General Secretariat are required to submit a filing fee or bond for his or her complaint to be admitted. This is pursuant to Article VI.7 of the statute of the tribunal which reads as follows:

Before admitting the complaint of a person who is not a staff member, the Tribunal shall require that person to submit a filing fee, a bond, or other legally enforceable security equivalent to one month's remuneration (salary and post adjustment) at the P-4, step 6 level on the "with dependent" salary scale for headquarters, unless the Secretary General has expressly waived the reconsideration requirement, or unless a Reconsideration Committee ... has found by a majority vote of its members that the person's claims are meritorious, or unless the Secretariat has failed to respond to a request for a hearing and request for reconsideration ...

... if the person is a former staff member, the amount so required will be the lesser of the former staff member's last full monthly remuneration (salary plus post adjustment).

This means that this requirement to submit a bond was only incorporated into the statute in June 1997 when the OAS General Assembly adopted resolution AG/RES 1526. By that time, the tribunal had been operating for 25 years, during which it had refrained from demanding any kind of guarantee as a prior requirement for admitting a former staff member's complaint.

In proposing that amendment to the statute,²⁷ the Permanent Council explained that the purpose of the bond was to discourage the filing of insufficiently substantiated complaints and, second, to ensure that the General Secretariat could recover the attorney fees recognised by the tribunal from a complainant who lost his or her case. The thinking behind that is that, if a complainant owing money as a result of the judgment is not a staff member and decides not to pay, the organisation has no way to enforce that judgment. It is worth explaining, however, that if the Reconsideration Committee examining the appellant's case considers that his or her claims may be well founded, such a bond is not required.

The fact is that, on its own initiative, the Administrative Tribunal requested in 2011 that this provision be repealed, when negotiations began with the political bodies of the organisation for consideration of the amendments to the statute of the tribunal that we proposed to the General Assembly. Given that the statute of the tribunal may only be amended by the General Assembly, that assembly had to approve that change.

The then President of the Administrative Tribunal, Judge Andre Surena of the United States, was charged with presenting the proposed reforms to various political committees in the organisation. Chief among the reasons put forward for repealing this bond requirement was the fact that, under the Agreement on Privileges and Immunities of the Organization of American States (OAS) of 1949 and the United States International Organization Immunity Act (IOIA), the organisation enjoyed jurisdictional immunity, as a result of which former OAS staff members had no other option for filing their complaints than using the organisation's own Administrative Tribunal to resolve their labour relation disputes. That being so, the tribunal considered that it was necessary to grant former staff access to justice conditions similar to those they would have if they could access domestic courts. If those domestic courts did not require such a bond as a precondition for the admissibility of their complaints, no tribunal should demand it. Furthermore, we conducted a comparative study of the statutes of other administrative tribunals and ascertained that none of them made the admissibility of a case conditional upon a deposit.

These arguments did not, however, suffice to convince the General Assembly to repeal this requirement, which is still in effect today. It is worth noting that we are talking here about a bond of nearly US\$10 000.

27. "Report of the Committee on Administrative and Budgetary Affairs on the 'Review of the Statute of the Administrative Tribunal'" (CP/doc.2904/97).

As an organ subordinate to the General Assembly, the tribunal is obliged to go on requiring that bond and has in fact done so in respect of the latest cases brought by former staff members. Nevertheless, in as much as the tribunal is empowered under Article XIII of its Rules of Procedure to amend its own Rules of Procedure, this body approved an amendment thereto to indicate that when the complainant can demonstrate that his complaint may have substantial merit, but is unable to provide all or part of the filing fee or bond for reasons of indigence, the president may waive the submission of the total or partial security requirement for individuals who are not currently staff members.

Now, with reference to the appeals phase, it is worth pointing out that, there too, a bond may be required (Article XII of the statute of the tribunal):

Before admitting the petition for review of a person who is not a staff member, the Chair of the Permanent Council shall require that person to submit a filing fee, a bond, or other legally enforceable security in the amount equivalent to six months' remuneration (salary and post adjustment) at the P-4, step 6 level on the "with dependent" salary scale for headquarters. This fee shall be held by the Secretary General in escrow pending the outcome of the review and the award by the Review Panel of any costs or attorney's fees against the appellant.

There are three noticeable differences between the bond required in the first instance and that required on appeal.

- ▶ The first difference is that, at the appeals phase, there is no exception to the bond requirement as there is in the first instance when the complainant may argue that he or she is indigent or the Secretary General may waive his right to require a bond, or the tribunal may opt not to require it if the Reconsideration Committee found the case meritorious. None of those exceptions is admissible at the appeals stage.
- ▶ The number of months of salary to be deposited in the first instance is one (1), whereas at the appeals stage it is six (6).
- ▶ In the first instance, there is an option whereby the staff member submits a bond in an amount equivalent to his or her last salary if her or his position is less than a P-4 step 6. At the appeals phase, that option does not exist, so that an appellant always has to make a deposit equal to six months of a basic P-4 level salary.

In the 43 years since this tribunal was founded, only one judgment has been appealed before the Permanent Council of the organisation. That was Judgment 151 on Appeal 283, *Relinda Louisy v. Secretary General* in 2005. That appeal failed because the appellant did not satisfy the bond requirement.

Obviously a filter of this kind discourages rash complaints, and avoiding them is also an important consideration considering the scope of the machinery set in motion for these proceedings. Appeal proceedings involve not just our own tribunal but also the political bodies of the OAS and other similar tribunals co-operating with us by appointing two ad hoc judges.

IV. Anonymity

On April 3, 2014, the Administrative Tribunal approved a new paragraph for Article 26 of its Rules of Procedure on formalities in the filing of a complaint. This paragraph provides for a complainant to request anonymity in the documents to be published referring to his or her case (judgments, resolutions, Annual Report to the General Assembly, or case history reports that might be posted on our website).

This recently adopted paragraph g) of our Rules of Procedure reads as follows:

Anonymity

Any complainant who does not wish to have his name included in the case documents the Tribunal makes public may so request with good reason upon submitting his claim or at any point prior to the case being placed on the docket for consideration by the Tribunal. The Secretary of the Tribunal shall transmit the request to the respondent, providing the respondent five days to respond. The President of the Tribunal may grant the complainant authorization to litigate anonymously, under the terms provided for in the preceding paragraph, when making his name public may cause him harm. If the President decides against granting such authorization, the complainant may be accorded five days to determine whether to pursue or withdraw his complaint.

Notable aspects of this article are that:

- ▶ it applies exclusively to documents to be made public, not to those that circulate internally between the secretariat of the tribunal and authorities in the GS/OAS;
- ▶ we grant the respondent an opportunity to express his/her views on the matter;
- ▶ if the tribunal decides to authorise anonymity, it is granted by extension to the complainant's attorney in order to preclude any kind of linking or inference that could reveal the complainant's identity;
- ▶ the complainant who has been granted anonymity shall be referred to as "the complainant," not by his or her initials and omitting "Mr""Mrs" or "Miss" to conceal gender and strengthen protection of the complainant's identity.

The OAS Administrative Tribunal publishes all its judgments and posts them on our website. However, we believe that certain matters, such as workplace harassment, sexual harassment, accusations of fraud or corruption, the showing of contents that formed part of confidential GS/OAS documents, just to mention a few eventualities, could cause serious harm to the complainant regardless of whether or not the judgment handed down favours him or her, given the highly personal details aired in the narrative part of the judgment. (This is exacerbated by the fact that document search tools like Google have led to our decisions being displayed up front, whereas before someone had to access our website and manually select certain search criteria to find the decision handed down. Today, it does not work like that.)

Without prejudice to the above, naturally the tribunal will assess each request for anonymity, bearing in mind the merits of the case (for which it will evaluate the opinion of the Reconsideration Committee that examined the case before it reached the tribunal) and how delicate the subject matter is.

HORSTPETER KREPPPEL, JUDGE OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (CST)²⁸

The mediating function of judges – The friendly settlement of cases before the Civil Service Tribunal of the EU²⁹

It is with great pleasure that I address this distinguished audience on a topic, which has been with me all my professional life.

First, as a presiding judge at a German Labour Court from 1977 until 1993 friendly settlements were day-to-day business, terminating 50-80% of all incoming cases. Then – to a lesser degree – during my seven years (1993-96 and 2001-05) working as a seconded national expert to the Legal Service of the European Commission in Brussels, Belgium in the field of labour and social law, friendly settlements appeared again, e.g. to end infringement procedures introduced by the Commission against failing member states before the Court of Justice. In the context of the preliminary question procedure, friendly settlements occurred when employers' associations prevented the Court of Justice from deciding interesting preliminary questions raised by national labour courts by settling the case at the very last minute before the national court. During my work as social affairs attaché to the German Embassy in Madrid (1996-2001) Spanish trade unions and employers' associations were very interested in the topic of friendly settlements, until then almost unknown in the Spanish judicial system. Since 2005, friendly settlement has been again in focus for us, the judges of the CST.

For the purpose of this contribution I would like to broaden the topic to some extent and speak about the role of the judge in finding a friendly settlement in a pending case before the court. On the other hand, I would like to limit the scope of this presentation to the experience which the judges of the Civil Service Tribunal have acquired over the past nine years.

In this respect I will cover first the legal and institutional framework in which the judges of the CST use this instrument. Then I will come to the practical experience we have acquired during the past nine years. Finally, I would like to offer a perspective on the question whether judges might have a privileged role to play in finding such friendly settlements.

28. The Civil Service Tribunal, established in 2004, ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court in the context of the reform of the European Union's judicial structure.

29. This article is a revised version of the contribution the author gave during the colloquium on New Developments in the Legal Protection of International and European Civil Servants and it is partially based on an earlier article of the author: "Sur l'opportunité pour le Tribunal de la fonction publique de l'Union européenne de disposer à l'intention des parties, d'un guide pratique en matière de règlement amiable des litiges", published in the *Revue Universelle des Droits de l'Homme* (RUDH), Vol. 20, No. 1-3, 30 June 2011, pp. 75-79. All views expressed are the author's own opinions and do not reflect any official position of the Civil Service Tribunal of the EU.

I. The legal and institutional framework of friendly settlements within the CST

The friendly settlement of disputes is not altogether new in European Union law. Even before the CST was set up, in fact, when the Court of First Instance of the European Communities (which later became the General Court of the European Union) ruled at first instance on disputes between the Community and its officials. Article 64(2)(d) of that court's Rules of Procedure already provided for the court to adopt measures intended to "facilitate the amicable settlement of proceedings". However, this possibility for friendly settlement was used rather rarely.

The Council of the European Union stressed the importance of such an alternative mode of dispute resolution when it expressly mentioned it in recital 7 of Council Decision of 2 November 2004 (2004/752/EC, Euratom) establishing the CST:

The judicial panel should try cases by a procedure matching the specific features of the disputes that are to be referred to it, examining the possibilities for amicable settlement of disputes at all stages of the procedure.

The Council also made reference to this instrument in Article 7(4) of Annex I to the Statute of the Court of Justice, which sets up the specific regulations governing the CST, and which provides:

At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement.

It is interesting, that Article 7(4) was heavily debated. The original proposition of the European Commission of 19 November 2003 (COM(2003) 705 final - 2003/0280 (CNS)) was worded differently: Article 7(3) of that proposed Annex I to the Statute of the Court of Justice read:

At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal shall examine the possibilities of an amicable settlement of the dispute and shall be at pains to facilitate such settlement. (underlining by the author)

On 17 March 2004, the Committee on Legal Affairs and the Internal Market of the European Parliament adopted by majority the report of the rapporteur, the Spanish professor Manuel Medina Ortega (A5-0181/2004 - PE 338.514). According to this report, the aforementioned paragraph 3 of Article 7 of Annex I to the Statute of the Court of Justice should be deleted. The justification for this demand is worth mentioning:

It is proposed to delete this paragraph. The purpose of the proposal for a decision is to set up a 'jurisdiction' (Article 225a of the EC Treaty uses the term 'judicial panel' and Article I-28 of the draft Constitution calls it a 'specialised court'). By definition, a jurisdiction settles a dispute on the basis of the legal provisions and case-law applicable. If the act setting up the court specified that it should 'be at pains to facilitate an amicable settlement of the dispute', there is a risk of diluting the jurisdictional nature of the court. This could also adversely affect the actual choice of candidates 'having the most suitable ... experience' (Article 3); experience in the arbitration of disputes would need to be taken into account, whereas the need is to select 'judges'. Moreover, in civil

service disputes we need to bear in mind that if an application is made it is because the appeal procedure has already shown amicable settlement of the dispute to be impossible. To include in the act setting up the Tribunal a requirement that it should 'be at pains to facilitate' an amicable settlement may also have the counterproductive effect that the court will feel 'obliged' to make detailed proposals to that end. This might even in some cases be harmful to the position of the party that declined the offer of an amicable settlement, placing it in a less comfortable position in the procedure. So it seems preferable to remove this paragraph and leave it to the court to decide whether to include the possibility of amicable settlement in its rules of procedure, on the lines of Article 64(2)(d) of the rules of procedure of the Court of First Instance.

This argumentation clearly reflects the existing differences in legal cultures.

The Commission's proposal is based on the approach of not only facilitating but also making it an obligation for the judge to try to terminate a pending case with a friendly settlement. The Commission was inspired by existing judicial systems in which the friendly settlement of a court procedure is widely accepted and established by law, as is the case in Germany. German labour court judges are – and have been for a long time – obliged by law to try to settle a case in a first hearing ("*Gütetermin*") (see paragraphs 54 and 57(2) ArbGG). Such an obligation is also provided for ordinary civil procedures (paragraph 278 ZPO). Moreover, in Germany friendly settlements are not limited to civil procedural law. Friendly settlements are also foreseen as a possibility for proceedings before the administrative courts (paragraph 106 VwGO) and for the social courts (paragraph 101 SGG).

In contrast to this approach the report of the Legal Affairs Committee of the European Parliament seems to reflect a legal tradition according to which friendly settlements should be dealt with outside the judicial procedure, as is the case in Spain, in France and in other member states inclined to follow the French system of procedural law, such as Belgium. In those systems friendly settlements are never or used very restrictedly in procedures before the courts.

In the further legislative procedure a compromise was reached. Paragraph 3 became paragraph 4 of that Article 7 and the obligation: "shall examine the possibilities of an amicable settlement of the dispute and shall be at pains to facilitate such settlement" became an option: "may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement". (underlining by the author)

This difference of legal culture is also reflected in the legal backgrounds of the seven judges of the CST, appointed in 2005, with the following nationalities: English, French, German, Belgian, Finnish, Greek and Polish. At present my tribunal consists of judges from Belgium, Netherlands, Ireland, Germany, Spain, Italy and Denmark. With the exception of the author of this contribution my colleagues had either very little or no experience at all with friendly settlements. It was therefore necessary to start intensive discussions among ourselves. In addition, we heard experts (such as Mrs Marie-Anne Bastin (Brussels Business Mediation Center), Professor Karsten-Michael Ortloff (Berlin), Mr Avi Schneebalq (Brussels) and Mr Arnold Zack (Boston)), and on the one side representatives of civil servants and their trade unions, and on the other side the administrative heads of the institutions of the EU.

As an outcome of these discussions it was decided that a specific chapter of the Rules of Procedure of the CST (hereinafter called the “Rules of Procedure”) would be devoted to friendly settlement, in order to underline the importance of this instrument but also to distinguish it from the normal judicial procedure. Title 2, Chapter 6 (formerly Title 2, Chapter 4) of the Rules of Procedure, entitled “The amicable settlement of disputes”, which comprises Articles 90 to 92 (formerly Articles 68 to 70) of the Rules, is designed to give full effect to Article 7(4) of Annex I to the Statute of the European Court.

Articles 90 to 92 of the Rules of Procedure are worded as follows:

Article 90 – Measures

1. The Tribunal may, at all stages of the procedure, examine the possibilities of an amicable settlement of the dispute between the applicant and the defendant.

The Tribunal shall instruct the Judge-Rapporteur, assisted by the Registrar, to seek the amicable settlement of a dispute.

2. The Judge-Rapporteur may propose one or more solutions capable of putting an end to the dispute, adopt appropriate measures with a view to facilitating its amicable settlement and implement the measures which he has adopted to that end.

He may, amongst other things:

- ▶ ask the parties to supply information or particulars;
- ▶ ask the parties to produce documents;
- ▶ invite to meetings the parties’ representatives, the parties themselves or any official or other servant of the institution empowered to negotiate an agreement;
- ▶ on the occasion of the meetings referred to in the third indent, have contact with each of the parties separately, if they consent to that;
- ▶ suggest to the parties that a mediator be appointed.

3. Paragraphs 1 and 2 shall apply to proceedings for interim measures also.

Article 91 – Agreement of the parties

1. Where the applicant and the defendant come to an agreement before the Judge-Rapporteur on a solution which brings the dispute to an end, the terms of that agreement may be recorded in a document signed by the Judge-Rapporteur and by the Registrar. That document shall be served on the parties and shall constitute an official record.

The case shall be removed from the register by reasoned order of the President.

At the request of the applicant and defendant, the President shall set out the terms of the agreement in the order removing the case from the register.

2. Where the applicant and the defendant notify the Tribunal that they have reached an agreement out of court as to the resolution of the dispute and state that they abandon all claims, the President shall order the case to be removed from the register.

3. The President shall give a decision as to costs in accordance with the agreement or, failing that, at his discretion.

Article 92 – Amicable settlement and contentious proceedings

No opinion expressed, suggestion made, proposal put forward, concession made or document drawn up for the purposes of the amicable settlement may be relied on as evidence by the Tribunal or the parties in the contentious proceedings.

II. Practical experience with friendly settlements in cases before the CST

What can be said now about the practical experience, which the CST judges have gained over these past nine years (2006-14)?

The fact remains that, to date, friendly settlements have occurred only in a small number of cases. Of the total 1 236 cases concluded as of 31 December 2014, only 67 (or just over 5.4%) ended with a friendly settlement. In comparison with the enormous effort invested in this new instrument by my colleagues and myself, this rather limited outcome is at first sight disappointing. But given that friendly settlements are rarely practised in the administrations of the EU institutions, as in most member states' administrations, this result is not so surprising.

There might be a number of reasons for these figures.

First, while friendly settlement at the initiative of the court is one of the current trends in alternative dispute resolution (on 17 November 2010 the Council of Europe adopted a "Magna Carta of Judges", which recalls that judges must "contribute to the promotion of alternative dispute resolution methods"), it has to be said, however, that it is not yet an established part of the culture – either of the judges of the CST, or of the European administration, the lawyers representing the plaintiffs and the institutions or of the trade unions – as can be seen from the consultations that the tribunal held in early 2006 as part of the work of drawing up its Rules of Procedure. More recently still, though to a lesser degree, there was some perceptible resistance to friendly settlement at the seminar the tribunal held on 1 October 2010 to mark the fifth anniversary of its establishment.

Secondly, the explanation often given for the limited take-up of friendly settlement before the tribunal is that, prior to the introduction of a case to the tribunal, a pre-contentious procedure (administrative complaint procedure) has already taken place during which unsuccessful attempts to reach a friendly settlement have been made. In most cases the involved parties have possibly become entrenched in their respective positions during that time. It is probably more accurate to say that such attempts should have been made, because in reality very few cases are resolved by an amicable settlement during this pre-contentious procedure. There is some doubt whether the administrative complaint procedure is altogether fit for its intended purpose. Instead of giving the administration the chance to review a decision or administrative act and thus avoid cases before the CST, institutions tend to be reluctant to reopen contested decisions and administrative acts. Nevertheless there have been efforts in recent years to improve the outcome of that procedure. This reluctance could explain the small number of cases in which the complaint succeeds.

Thirdly, the principle that an authority must act in accordance with the law (the "*principe de légalité*") could also, as is often pointed out, prove to be a very serious obstacle to the friendly settlement of disputes in cases where an applicant is, wrongly in the view of the administration, contesting a decision taken or an administrative act approved by it. According to that principle, the administration has no right to revoke the challenged decision, or, for example, grant some pecuniary benefit to the person concerned to which he is not entitled. However, aside from the fact that

the cost to the administration of continuing with the proceedings might be much greater than the cost of granting such pecuniary benefit, it has to be said, too, that the question whether a decision or administrative act is legal or illegal is not always clear-cut. In such a context, where the outcome of the dispute is to a great extent uncertain and depends on disputed facts, the parties might wish to consider a compromise solution. That solution can then be legally based on the CST Rules of Procedure on “the friendly settlement of disputes”.

Fourthly, it has also been pointed out that frequent recourse by the tribunal to the practice of friendly settlement would risk provoking an upsurge in disputes or even a “wave” of applications, with applicants hoping thereby to obtain benefits not available to them under the contentious procedure alone.

Experience over nine years has shown, however, that such a danger is more theoretical than real.

First, one can assume that the rules on costs already constitute a sufficient filter to prevent unnecessary cases (I will not discuss here the interesting question of whether such a filter is appropriate). The plaintiffs have to be represented in cases before the CST by a lawyer. An average case may cost a plaintiff between €6 000 and €10 000 for his own lawyer alone if he loses the case, irrespective of the value of economic interest involved in the case. That normally prevents plaintiffs from introducing obviously unfounded demands.

Second, although the people who come before the CST are not, generally speaking, in the category of “serial litigants”. There are, admittedly, a few applicants falling into this category, whose abusive applications expose the institutions to considerable costs. It is highly unlikely, though, that an increase in the practice of friendly settlements would produce a noticeable rise in the number of such persistent litigants.

Lastly, it is true that applications are often brought by members of trade-union organisations or staff committees. However, the reason is that it is impossible for a trade union or workers’ organisation to bring a claim before our tribunal as the law stands now. Since the majority of such cases of collective interest normally have to be dealt with by judgments, there is no incident on the number of cases introduced irrespective of the question of whether such cases can be terminated by a friendly settlement. In any event, friendly settlements offer a number of substantial advantages.

One essential feature of the methods used in seeking friendly settlements is that they take account both of the conflict as a whole (which frequently goes beyond the strict bounds of the legal dispute) and of the interests of the parties involved in that conflict. The idea is to avoid ending up with a winner and a loser, but instead to produce a “win-win” situation. Such an outcome allows the parties concerned to rebuild a “positive” atmosphere and continue working together.

A further benefit of friendly settlement is that it provides a way of ending the dispute with final effect, without the need for the tribunal to rule on it in a judgment or order. This produces obvious savings in terms of staff (for translation, reading, correction, etc.) and makes it possible for the tribunal to give faster decisions in other cases, in line with the principle that justice should be swift. Likewise, the fact that there

is no appeal from a friendly settlement also results in savings for the appeals body and the parties alike.

In summary, our experience has led us to the conclusion that it is worthwhile to continue our efforts for friendly settlements before our tribunal. It is not an instrument which can be used in all cases. But in certain cases, the friendly settlement might be the more adequate solution to a dispute than a judgment.

In the following chapters I will describe some of the conclusions we can draw from the practical experience we have gained in the past nine years.

Cases that lend themselves to friendly settlements

While it is difficult to give an exhaustive list of the circumstances that lend themselves by nature to a friendly settlement, some cases are particularly well suited to this method.

Examples are:

- ▶ cases where the appointing authority (AIPN) could have, at its discretion, lawfully adopted a different legal measure than the one that is in dispute, one less severe for the person affected by it;
- ▶ disputes where the solution need not be strictly legal in nature (for example, conflicts of an interpersonal nature, such as moral harassment, or the transfer of an official who is in conflict with his management);
- ▶ disputes where publicity might not be fully justified (like cases involving accusations of sexual harassment) or where the legal benefits of having a judgment are not obvious;
- ▶ repetitive cases, coming after a “pilot” case, in which the same solution could be applied as in the “pilot” case judgment (a system successfully tried and tested in the practice of the European Court of Human Rights);
- ▶ cases in which the difficulty of establishing the facts makes the outcome uncertain for both parties.

Cases that do not at first sight lend themselves to friendly settlements

One can cite:

- ▶ cases where there is a public interest in having the tribunal “declare the law” and clarify the position for all institutions, officials and legal scholars on the correct interpretation or lawfulness of a particular norm;
- ▶ “pilot” cases;
- ▶ applications that are manifestly inadmissible or that manifestly lack any basis in law, and which the tribunal can dismiss by order under Article 81 of the Rules of Procedure. However, in some of these cases it might become evident that the institution in question is partly responsible for the inadmissibility, e.g. it prevented the plaintiff from introducing the complaint or the application in time. In such cases a friendly settlement might be appropriate for reasons of fairness, perhaps involving the institution bearing part or all of the applicant’s costs in exchange for discontinuing the proceedings;

- ▶ cases brought by applicants who are “serial litigants”, against whom the sanctions laid down in the Rules of Procedure (Articles 101 and 108) should be applied, even where the tribunal finds in their favour on the merits (Article 102 (2)). Nonetheless, in cases where the bringing of multiple claims (and the resulting “cascade” of cases) arises from inappropriate behaviour by the administration concerned (though such behaviour might not be unlawful), it might be advisable to make an overall attempt to dispose of them, consisting, for instance, of a letter of apology from the administration and a symbolic sum in compensation. Alternatively, one could also propose an external mediation procedure to allow the parties to find an adequate solution.

When should an attempt be made for a friendly settlement?

As laid down in Article 7(4) of Annex I of the Statute of the Court of Justice, and Article 90(1) of the Rules of Procedure, attempts to seek a friendly settlement can be initiated at all stages of the proceedings before the tribunal, including after the filing of the application. This is possible even for interim measures (Article 90(3) of the Rules of Procedure).

In practice, where the solution to the dispute is obvious, it is possible for the judge-rapporteur, acting with the authority of the chamber, to invite the parties in writing, even before the defence is lodged, to consider a friendly settlement, and suggest the terms of a solution. As an illustration, in situations where there are obvious weaknesses in the application affecting its chances of success if the matter went to trial, the judge-rapporteur may suggest that the applicant discontinue the proceedings in exchange for the administration bearing all or part of the costs. A written proposal along those lines could also be envisaged in cases where it would be very costly to hold an informal meeting (for instance where the agency is situated far away).

That said, parties are often most receptive to an attempt at friendly settlement during or after the hearing, as the oral pleadings will have highlighted the strengths and weaknesses in their respective arguments. If the court formation hearing the case is contemplating making such an attempt during the hearing, it will, where possible, inform the parties in the preparatory report, so that the applicant can instruct his lawyer and be present in person, if necessary, and the defendant institution can give its attention to the various administrative procedures required to enable such a settlement.

It has to be underlined that the rejection of one proposal does not mean that a further attempt cannot be made later, especially where this is justified by the emergence of new facts during the proceedings.

Who may attempt a friendly settlement?

Under Article 90(1) of the Rules of Procedure, it is for the tribunal to examine the possibility of a friendly settlement. Nevertheless the rules stress the central role of the judge-rapporteur both in initiating and conducting the friendly settlement process.

Thus, under Article 58(2) of the Rules of Procedure, and without prejudice to his right to raise the question at any stage of the proceedings, the judge-rapporteur may, in the preliminary report, which he draws up in order to explain the case to the other judges in the judicial formation he belongs to, express his opinion as to whether a friendly settlement should be proposed to the parties and, if so, suggest the terms on which this might be achieved.

Following the preliminary report, the tribunal may, pursuant to Article 90(1) of the Rules of Procedure, instruct the judge-rapporteur, assisted by the registrar, to manage the attempt at a friendly settlement.

Lastly, the judge-rapporteur can act simply as an intermediary between the parties in order to help them reach an agreement. He may also, if he considers it appropriate, take the initiative by suggesting the main points or even the terms of an agreement.

With whom can a friendly settlement be sought? Who are the interlocutors?

The tribunal's interlocutors are the lawyer or lawyers for the applicant and the official and/or lawyer, if any, of the defendant institution.

In cases where an informal meeting is held, it is highly desirable for the applicant to attend in person. As for the institution, it is often useful for the agent responsible for representing it in the proceedings, or the institution's lawyer, to be accompanied by another official from the applicant's directorate-general (DG) or the DG for Human Resources.

Measures that can be used in the friendly settlement of a dispute

Article 90(2) of the Rules of Procedure provides that the tribunal may take "appropriate measures", including:

The Judge-Rapporteur may propose one or more solutions capable of putting an end to the dispute, adopt appropriate measures with a view to facilitating its friendly settlement and implement the measures which he has adopted to that end.

He may, amongst other things:

- ▶ ask the parties to supply information or particulars;
- ▶ ask the parties to produce documents;
- ▶ invite to meetings the parties' representatives, the parties themselves or any official or other servant of the institution empowered to negotiate an agreement;
- ▶ on the occasion of the meetings referred to in the third indent, have contact with each of the parties separately, if they consent to that;
- ▶ suggest to the parties that a mediator be appointed.

The information, particulars and documents mentioned in the preceding paragraph might be different from those produced in the contentious proceedings.

Where there is an informal meeting, at which neither the judges nor the representatives of the parties are wearing robes, the role of the judge-rapporteur may vary depending on the particular case and on the preferences of the judge-rapporteur.

One approach might be for the judge-rapporteur to open the informal meeting by presenting the case and the issues of fact and law it raises, giving an initial preliminary assessment of the risk the respective parties face by going to trial. Furthermore, the judge-rapporteur might explain the advantages of a friendly settlement in the light of the non-legal aspects of the case. He might also highlight the possible savings of discontinuing the case ("*Prozessökonomie*").

Another approach might be to leave the legal arguments out of the discussion and focus solely on the non-legal aspects of the case.

A third approach might be for the judge-rapporteur to refrain from any proactive role, and leave it to the parties to find an appropriate solution.

Obviously, the judge-rapporteur could opt for a combination of these different approaches.

The registry is responsible for practical arrangements for the informal meeting, which is held in camera and, where possible, on days normally allocated to hearings in the chambers.

As for the tribunal, apart from the parties and their representatives, the judge-rapporteur and his legal secretary, the registrar or his representative should attend, and if the judicial formation so decides, with one or more judges.

The informal meeting takes place outside the strict judicial framework of the case, and as such, is therefore not subject to the rules on languages applicable to the tribunal. According to established practice, informal meetings take place in French where this is the language the applicant has chosen for the proceedings (about 60% of cases to date). Where a different language has been chosen for the proceedings, that language will be used, provided all the participants in the meeting have an adequate knowledge of it. If not, the participants can agree to use another language they know (this is most often English, particularly in disputes where the defendant is an agency). If neither of these solutions is possible, interpreters will have to be used. The meeting will then be held in a suitably equipped room, even if this makes it more difficult to have a round-table discussion.

The outcome of the informal meeting is recorded in minutes drawn up by the registrar, signed by the judge-rapporteur and sent to the parties, pursuant to Article 91(1) of the Rules of Procedure.

It is regrettable, in this connection, that the representatives of institutions do not – in general – have the authority to enter into a binding settlement, but need the consent of the institution (the legal department, the applicant's directorate-general or the DG for Human Resources) to do so. That is why, in practice, when the parties reach an agreement in draft form, that draft is included in the minutes of the informal meeting and the defendant is given a time limit in which to give its final confirmation of the terms of the agreement. It is also not unusual for the applicant to ask for time in which to reach a final position on the proposed agreement.

The adversarial principle, according to which both sides must be heard ("*principe du contradictoire*"), does not have the same significance in negotiations for the friendly settlement of a dispute as it does in legal proceedings. However, taking the view that the principle could not be entirely dispensed with in the friendly settlement procedure, the judges of the tribunal originally agreed that bilateral contacts with either party to a dispute should be avoided.

Nevertheless, experience has shown that it is sometimes a good idea for the judge-rapporteur, in his role as "mediator", to be able to act as "confessor", by meeting the parties separately (with their prior consent) away from the negotiating table, thus being in a better capacity to evaluate the limits of each party for a friendly settlement and modify the proposal accordingly.

What might be the content of a friendly settlement?

Depending on the case, the solution might involve:

- ▶ a compromise on the claim or claims;
- ▶ an agreement on costs only; or
- ▶ a procedural agreement allowing a solution to be found outside the tribunal, either between the parties themselves, or with the help of an external mediator in cases of particular legal or factual complexity.

Where an external mediator is called upon, the parties may agree either to discontinue the case before the outcome of the mediation is known, or to await the outcome of the mediation to decide whether to proceed with the case or to discontinue it. In the latter case, it is for the parties to seek a stay of the proceedings on the conditions laid down in Article 42 of the Rules of Procedure.

Following the attempt for a friendly settlement

Where the parties reach agreement

Where an agreement is reached before the tribunal, the registrar invites the parties to state whether they wish to have the terms of the agreement recorded, pursuant to Article 91(1) of the Rules of Procedure, in minutes signed by the president or the judge-rapporteur and the registrar and/or in the order removing the case from the register.

Where an out-of-court agreement is reached, the registrar invites the parties to confirm in writing, as provided in Article 91(2) of the Rules of Procedure, if they have not already done so, that they abandon all claims. That confirmation is entered in the register. If the parties have notified the tribunal of the content of the agreement, the judge-rapporteur conducts a minimal review of the lawfulness of its contents, and if he has doubts, refers the matter to the chamber.

The case is then removed from the tribunal's register by order.

Pursuant to Article 91(3), the president shall give a decision on costs in accordance with the agreement or, failing that, at his discretion.

Where the attempt fails

In the light of the parties' reactions (where, for example, one of them informs the tribunal that it no longer intends to pursue the attempts at friendly settlement) and on the proposal of the judge-rapporteur, the tribunal takes note that the attempt has failed and the registrar so informs the parties.

The judge-rapporteur may not take any firm position during the process intended to lead to a friendly settlement but must remain prudent at all times and express only provisional opinions. Therefore the refusal by one or both parties of a proposal by the judge-rapporteur does not in itself amount to grounds for that judge to recuse himself (unless the judge in question himself asks, if he thinks it necessary, to be replaced by another judge). As a general rule, the judge-rapporteur is able to proceed with the case after a failed attempt at settlement. Automatic replacement of the judge-rapporteur by another judge if the attempt at a friendly settlement fails would significantly hamper the tribunal's productivity. It is admittedly understandable, where the parties and their representatives are not accustomed to the instrument of a friendly settlement, for them to have reservations, especially with regard to the judge retaining his functions as rapporteur in the case. However, parties and their representatives are asked to place their trust in the integrity and impartiality of the judges in question, as is common practice in countries where settlement is seen as a normal way of bringing court proceedings to an end.

The question of the costs of a failed attempt at a friendly settlement will normally be resolved by applying Articles 100 to 108 of the Rules of Procedure, having regard, where appropriate, to considerations of fairness. Notwithstanding that, the parties may agree to share the costs incurred in the course of the attempted settlement.

Confidentiality

As stated in Article 92 of the Rules of Procedure, no opinion expressed, suggestion made, concession made or document drawn up for the purposes of the friendly settlement may be used in the contentious proceedings by the tribunal or the parties. It follows that such documents do not form part of the record in the case (which, in the event of appeal, is forwarded to the General Court of the European Union), but are filed separately. Similarly, while the fact that an attempt at a friendly settlement has taken place will be noted in the judgment or order, no mention will be made in that decision or, more generally, in any other legal proceedings, either of the content of any proposals or the reasons why the attempt was unsuccessful.

Some remarks on specific aspects

Little specific statistical data exists concerning the cases where our tribunal tried successfully or unsuccessfully to bring the parties to a friendly settlement. I would like to point out in particular three sets of data.

Data concerning successful or unsuccessful friendly settlements:

	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total
Cases terminated by amicable settlement	6	7	7	2	12	8	4	9	12	67
Cases with an unsuccessful attempt	-	7	6	12	12	14	14	15	9	89
Total of terminated cases	44	136	116	141	105	144	103	160	131	1080
Total	50	150	129	155	129	166	121	184	152	1236

With the exception of the years 2009 and 2012 there was a steady increase in cases terminated by a friendly settlement. Perhaps the parties have, after some hesitation, found some confidence in this instrument.

Data concerning the duration of a case in relation to successful/unsuccessful friendly settlements in comparison to the rest of cases (in months):

	2006	2007	2008	2009	2010	2011	2012	2013	2014
Average duration with successful settlement	10.2	10.8	16.6	13.0	12.5	8.9	12.2	16.1	18.5
Average duration with an unsuccessful attempt	-	16.6	24.7	16.8	23.7	23.8	22.7	22.2	20.7
Average duration rest of cases	10.6	13.0	17.0	21.7	25.8	17.8	16.1	16.1	13.6

These figures show that, except for the last two years, cases were terminated much faster with a friendly settlement. However, the settlement of cases with unsuccessful attempts to reach a friendly settlement took longer than the rest of cases without an attempt for a friendly settlement.

This is certainly due to the fact that in the majority of cases where such an attempt was made, have taken place either by a written proposal by the judge-rapporteur at an early stage, or in an informal meeting prior to the normal oral hearing. However, if proposals for friendly settlements were predominantly made during or after the

oral hearing, such attempts would probably result in a prolongation of the average duration of cases because in general both parties need additional time to consider the proposal before giving their accord or disaccord.

A higher number of friendly settlements certainly would have an overall positive effect on the average duration of all cases, saving time and energy as well as manpower, which would then be available for the remaining pending cases. Of course, the cost savings are also considerable, both for the parties as well as for the taxpayer in the form of savings for the overhead costs of the judiciary.

Data concerning the repartition of institutions concerning friendly settlements:

	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total
Council	1	2	-	-	-	-	-	-	-	3
Commission	4	2	4	1	11	4	2	7	9	44
Parliament	1	1	2	-	-	3	1	-	-	8
Committee of Regions	-	-	1	1	-	-	-	-	-	2
Others	-	2	-	-	1	1	1	2	3	10
Total	6	7	7	2	12	8	4	9	12	67

It is clear that the Commission, with the highest number of officials of all institutions and other organs of the EU (and 45% of all cases before the CST), would also be in first place in numbers of friendly settlements.

However, and without any statistical data available to that end, the author's impression is that certain defendants are more open and others are more or less opposed to friendly settlements. That might be partially due to the personal approach of the agents or the external lawyers, but also partially due to the attitude of the lawyer on the plaintiff's side. If, for example, in a smaller institution one specialist lawyer represents many plaintiffs in this institution and that lawyer is opposed to friendly settlements, then the institution appears to have fewer settlements than other institutions. Some of the specialised lawyers on the plaintiff's side are quite open; some are not at all acquainted with this instrument or are in fact opposed to it. And to look at the other side of the bench, the same is true with respect to the seven judges some are more, and some are less proactive with respect to friendly settlements. But there I can see some convergence: the idea of the usefulness of friendly settlements is spreading.

III. Perspectives

Although my personal expectations were much higher, I can see a slow but steady increase in the numbers of successful friendly settlements.

The need to resort to this instrument would be reduced if the administrations of the EU institutions would considerably ameliorate the pre-contentious complaint

procedure. The criticism of the lack of effectiveness of this procedure to avoid cases before the CST is more than apparent, although some improvements can be acknowledged.

We have also seen that some of the trade unions and other representatives of the personnel of the EU institutions and their legal advisers are rather reluctant to accept friendly settlements. Since the entry into force of the new regulation concerning costs (applying since 1 November 2007, now the general rule: “who loses pays” – see Article 101 (formerly Article 87) of the Rules of Procedure), the friendly settlement can to some extent reduce the sometimes prohibitive effects of this rule. Here, the trade unions and other representatives of the personnel should also realise the advantages of friendly settlements from that angle.

The EU Commission is a strong defender and promoter of alternative dispute solution mechanisms. Reference is made to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136/3 of 25 May 2008). Some member states have gone further and have also developed very advanced mediation mechanisms for administrative judicial procedures. It must be hoped that the culture of friendly settlements will also spread to the EU institutions.

This will not happen by itself. It will be necessary to have extensive training for those participating in our judiciary – be they agents, lawyers and not least the judges of the CST themselves.

Finally, I would strongly recommend including external mediation into the mechanisms open for resolving the cases before our tribunal. I believe that in certain cases the judicial resolution of conflicts by judgments is not adequate. In particular, I have three cases in mind:

Firstly, on the statutory level the collective representation of civil servants and other personnel is rather underdeveloped in comparison with the level of participation found in some member states. As a result questions of collective concern cannot be adequately treated by individual plaintiffs. In such cases an external mediation would render much more satisfactory results, both in the interests of the personnel concerned, as well as in the interests of the administration involved.

Secondly, in all judicial systems the abuse of procedural possibilities by “serial litigants” exists. However, we have the experience that such querulant careers sometimes start because of maladministration. It would be worthwhile to try to stop such careers at the beginning by means of external mediation. Such an investment would be paid off easily by saving the enormous amount of costs such serial litigants normally cause. There have been cases where institutions refused the wish of a plaintiff to resort to external mediation thereby causing a further wave of additional cases with an enormous amount of costs involved for both sides. Of course there exists – as the law stands – no right to external mediation and the principal base for mediation is the free consensus of both parties to use mediation as a means to settle an ongoing conflict. But apart from legal considerations, common sense would in some of these cases strongly suggest to at least try that method to stop the spiral of continuing conflicts.

And lastly, I would like to refer to cases of harassment, where the judicial path of course is possible, but to my understanding an external mediation would be much more appropriate. I emphatically suggest to institutionalise a system of external mediators made available by the institutions to free the judiciary from these cumbersome and time-consuming cases, thereby allowing other cases to be dealt with at a much faster pace.

It is true that the Commission offers a “mediation service”, which is independent from the DG Administration and which is now a separate unit of the Secretariat General of the Commission. This service does not constitute a real “external mediation” as it is part of the Commission and does not consist of trained and certified mediators. Nevertheless I would like to highlight that the existing “mediation service” of the Commission represents a clear amelioration. But an inter-institutional “mediation service” with trained and certified mediators would certainly help to further improve the civil service of the EU institutions.

This contribution was intended to illustrate the experience of the judges of the CST as a result of the opportunity that the Council offered through Article 7(4) of the Annex I to the Statute of the Court of Justice. On the whole, I consider us – judges of the CST – to be on the right track. With some more effort we can contribute to making justice both better and quicker by using this mechanism of friendly settlement more frequently.

However, it remains to be seen whether the reform of the EU judiciary system presently under discussion in the Council and Parliament will safeguard the specific aspects of civil service cases, especially the friendly settlement.

VINOD BOOLELL, JUDGE OF THE UNITED NATIONS DISPUTE TRIBUNAL (NAIROBI)

Costs and legal aid in the internal justice system of the United Nations

It is with great honour that I accepted to speak at the colloquy entitled “Common focus and autonomy of international administrative tribunals” marking the 50th anniversary of the Administrative Tribunal of the Council of Europe held in Strasbourg on 19 and 20 March 2015. This paper is a synopsis of my presentation and my modest contribution to the compilation of essays and presentations that will be published to memorialise this important colloquy.

For the past 50 years, the Administrative Tribunal of the Council of Europe has been adjudicating labour disputes between the Council of Europe and its staff members and has produced a rich body of jurisprudence.

The history of the Administrative Tribunal of the Council of Europe bears some similarities to the evolution of the internal justice system of the United Nations. As of 1965, the Administrative Tribunal of the Council of Europe has progressively moved from being an administrative body to a judicial one by acquiring the impartiality and independence that any judicial entity is required to have. The relatively

young United Nations Dispute and Appeals Tribunals can learn a great deal from the Administrative Tribunal of the Council of Europe – an institution that has a 50-year history. This observation, however, should not be viewed as a criticism of the new internal justice system of the United Nations. It is important to recall a well-known saying of a famous French poet, dramatist and jurist – Pierre Corneille – who wrote about 400 years ago that “Aux âmes bien nées, la valeur n’attend point le nombre des années.” I feel comforted in stating then that you may also learn from us considering that in our almost six years of existence the United Nations Dispute Tribunal has rendered 1 500 judgments and the United Nations Appeals Tribunal has adjudicated over 500 appeals.

Although the Administrative Tribunal of the Council of Europe shares many similarities with the United Nations administrative tribunals, the internal justice system of the United Nations boasts a characteristic that is exclusive and unique. It has a legal aid mechanism which, in my respectful view, is a fundamental right and must be recognised as such by all international organisations aspiring to achieve the highest standards of employment practice.

Administrative tribunals of all international organisations have one aim in common – to give an opportunity to aggrieved staff members or employees to vindicate their rights. Yet, rights are meaningless unless employees or staff members who have those rights are aware of them, understand their significance and know how to use them effectively. Most administrative tribunals are equipped with comprehensive procedural rules that govern their functioning. Thus, a priori, employees who have standing before these tribunals should not normally encounter any difficulty with accessing the internal justice system or the formal dispute settlement mechanism of their organisation. However, the right of access to a court or tribunal must be meaningful and practical, not theoretical. Upon closer review, it becomes abundantly clear that employees or staff members of various international organisations struggle in representing their own interests before administrative tribunals. A number of reasons and considerations may come into play. For instance, courts and tribunals can be intimidating to the uninitiated. This dissuades employees and staff members from seeking recourse. Also, the intricacies of international public-service law can be particularly confusing for employees or staff members with no legal background. Similarly, staff members facing disciplinary proceedings can be emotionally so involved that they are unable to assess objectively their situation. There are many more reasons that could be enumerated, but for the purposes of illustrating my point, these few examples should suffice.

When we speak of legal aid or legal representation, whether in national or international jurisdictions, the paramount consideration that comes to mind is equality before the law. That concept rests on an important pillar which is access to justice, which is itself a fundamental right and without legal representation or legal aid in appropriate cases access to justice becomes difficult if not impossible.

The right of access to courts would be ineffective if a litigant cannot have the right to legal representation. A person’s ability to retain private counsel also depends on a number of circumstances.

For instance, financial constraints may prevent an individual from the possibility of retaining private counsel. This consideration is particularly relevant for employees and staff members of international organisations who are hired locally and whose salaries are not sufficiently high to pay for private counsel.

The cost-benefit analysis may also dissuade staff members from retaining private counsel. If, for instance, retaining private counsel will cost more to the staff member than the amount of monetary compensation he or she can obtain for the violation of his or her rights, the staff member will have no incentive to seek justice.

Another factor which may deprive employees and staff members of their right to legal representation is their geographical location and conditions in their duty stations. In particular, many international organisations that are part of the United Nations Common System have a significant presence in countries where living conditions are extremely difficult. For instance, staff members working in peacekeeping missions or in refugee camps do not always have the possibility of finding a competent lawyer to represent their interests before administrative tribunals.

One more circumstance worth pointing out is the limited choice of counsel staff members can hire to ensure an adequate representation. There is only a finite number of lawyers who are familiar enough with international public-service law to be able to represent employees and staff members before administrative tribunals. Retainer fees for these lawyers are most of the time high for any staff member. In any event, these lawyers may not always be available or willing to handle a particular case.

As a result, many litigants lose their right of access to justice because of such practical considerations.

I can bear witness to the fact that without legal aid many litigants would not be able to have access to the internal justice system of the United Nations. Access to justice and real equality of arms therefore can only exist in cases where staff members are guaranteed legal representation.

There can be no equality before administrative tribunals where aggrieved staff members are unable to get legal representation. A staff member who has no alternative but to represent his or her own interests before an administrative tribunal against an armada of lawyers representing the interests of the international organisation does not get equal access to justice.

At the international and regional levels, a number of instruments contain specific provisions on the right of an individual to a fair hearing before an independent and impartial tribunal. Article 10 of the Universal Declaration of Human Rights states:

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

Article 6(1) of the European Convention on Human Rights provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 14.1 of the International Covenant on Civil and Political Rights provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The right of access to justice was discussed by the European Court of Human Rights in the case of *Golder v. the United Kingdom* in 1975 where it was observed as follows:

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

The Court concluded that Article 6(1) guaranteed a right of access to a court of law.

In a speech³⁰ delivered in Brussels in 2010, Ms Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship emphasised that:

It is my firm belief that anyone involved in a civil or commercial dispute must be able to assert their rights in the courts, regardless of whether or not they can bear the costs of the proceedings. The personal financial situation of the citizens should not be an obstacle to justice.

The Charter of Fundamental Rights of the European Union guarantees the right to an effective remedy and to a fair trial, including legal aid to those who lack sufficient resources.³¹

Article 6 of the European Convention on Human Rights does not specifically provide for legal aid in civil cases. Judicial interpretation has however included that right in Article 6.

In *Airey v. Ireland*,³² the European Court of Human Rights held that in some circumstances the Convention may require legal aid for indigent litigants in civil disputes. The Court found that without legal aid and a lawyer the litigant would have no access to court. The Court observed:

However, despite the absence of a similar clause for civil litigation, Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.

30. Legal Aid: a Fundamental Right for Citizens. Effective Access to Justice in the European Union. Council of Bars and Law Societies of Europe (CCBE) and Academy of European Law (ERA) conference on the occasion of the CCBE's 50th anniversary, Conrad Hotel, Brussels, 26 November 2010.

31. Article 47 of the Charter.

32. Judgment of 9 October 1979.

Both the European Convention and the International Covenant mention that legal assistance may be required where it is in the interests of justice. The Human Rights Committee that monitors the Covenant has ruled, at least in criminal cases, that severity of a charge would satisfy the interest of justice criterion. The same principle should be applicable in civil cases.

I have referred to some of the principles deriving from the European Convention and the International Covenant to emphasise how legal aid is important if the concept of access to justice is to be effective and have any meaning. The right to get access to the courts of law must be accompanied by the ability to do so and without proper financial resources this ability would be inexistent.

The norms articulated in these international or regional instruments are reflected in the laws of most states. While these instruments enjoin states to comply with the international norms of the rule of law and human rights we may ask whether these instruments are or should be binding either legally or morally on international administrative tribunals.

In the United Nations internal justice system there is no specific mention of a right to legal representation. But it can be inferred from the preamble to the Charter of the United Nations that speaks of “faith in fundamental rights” and from various General Assembly resolutions where the General Assembly has consistently referred to “a system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members” that such a right exists. Pursuant to these principles the General Assembly has put into place a legal aid mechanism.

The internal justice system of the United Nations which was established in July 2009 by General Assembly resolution is a two-tier system comprising at first instance the United Nations Dispute Tribunal and at the appellate level the United Nations Appeals Tribunal.

Before the establishment of the new internal justice system there was an internal mechanism to deal with grievances of staff. The number of reports and judgments handed down by the former Joint Appeals Board, the Joint Disciplinary Committee and the former United Nations Administrative Tribunal respectively bear testimony to that fact.

After about 60 years of the existence of the United Nations organisation, the need for change and reform of methods of addressing staff grievances became an urgent necessity.

To that end a redesign panel on the United Nations System of Administration of Justice (Redesign Panel) comprising independent experts was established by the Secretary-General pursuant to General Assembly Resolution 59/283 of 15 April 2005 to review the system of administration of justice. The Redesign Panel published its report on 28 July 2006³³ and found that the existing internal justice system was “outmoded, dysfunctional and ineffective and that it lacked independence”. The Redesign Panel also commented that the then internal administration of justice “was

33. General Assembly Resolution 61/205.

not professional and failed to meet many basic standards of due process embodied in international human rights instruments”.

A new system was established as a result of the report of the Redesign Panel, with the core guiding principle being the need to establish a new, independent, transparent, professionalised, adequately resourced and decentralised system of justice, consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.

Both the Dispute Tribunal and the Appeals Tribunal are governed by two statutory instruments; the statutes are voted on by the General Assembly and can only be amended by the assembly. The Rules of Procedure are drafted or amended by the judges but they must be approved by the General Assembly.

With respect to legal representation, the Redesign Panel observed that:

to guarantee equality before courts and tribunals, access to lawyers and legal services is crucial. In the present system, staff members have, theoretically, the right to a lawyer of their choice, but, in practice, access is not effective and equal.

The Redesign Panel stressed that professional legal assistance is critical for the effective and appropriate utilisation of the available mechanisms within the system of administration of justice. In Resolution 61/261 the General Assembly reiterated its support for the strengthening of professional legal assistance for staff in order for staff to continue to receive legal assistance, and subsequently in Resolution 62/228 established the Office of Staff Legal Assistance (OSLA) to succeed the Panel of Counsel.

Pursuant to the reforms of the internal justice system of the United Nations an Internal Justice Council was established. The Council is vested with an important role in the system of administration of justice. Its main mandate is to make recommendations to the General Assembly on candidates for judges to be appointed by the General Assembly to the UN Dispute Tribunal and the UN Appeals Tribunal. It also has to present an annual report to the Secretary-General on the functioning of the justice system and makes a number of recommendations and proposals on the system. The Council highlighted the importance of legal representation in its report to the General Assembly in 2011 by stating:

The Internal Justice Council repeats that equality of arms is an important principle that should guide the development of the internal system of justice. Both the Office of Staff Legal Assistance and management legal representatives assert that they have insufficient staff members to represent their respective clients adequately before the new Tribunals. The Council considers this to be a matter of concern. The need to maintain a reasonable equality of arms persists and the Council intends to keep the matter under review in future years.

The Council referred to the importance the General Assembly attaches to legal representation. “The General Assembly has repeatedly stressed the positive role played by the Office of Staff Legal Assistance in the system of administration of

justice and has stressed that all staff members should have access to its services.”³⁴ The General Assembly has also stressed that “professional legal assistance is critical for the effective and appropriate utilization of the available mechanisms within the system of administration of justice.”³⁵

The Office of Staff Legal Assistance (OSLA) is the new internal justice system’s legal aid mechanism. It is staffed by full-time legal officers in New York, Addis Ababa, Beirut, Geneva and Nairobi. All staff members are entitled to have access to legal advice and representation from OSLA. The New York office has three legal officers while Beirut, Geneva and Addis Ababa have one legal officer each. The Nairobi office has two legal officers.

As long as the litigant is a staff member within the meaning of the Staff Rules and Regulations he/she is eligible for legal assistance by OSLA lawyers. There is no restriction on who can have access to the services of OSLA. The grade which a staff member holds is not relevant. There is no means test.

Consultants, contractors, interns, and United Nations Volunteers are not staff members and do not have access to the tribunals. This does present an anomaly that has been highlighted in a report³⁶ of the United Nations Joint Inspection Unit in 2012 where the report observes:

The General Assembly recognized this issue and put forward the question as to whether or not it would be appropriate to grant consultants and individual contractors access to existing internal justice mechanisms or to set up a separate justice system for that purpose. The Secretary-General submitted a proposal for recourse mechanisms for non-staff personnel to Member States, taking into account the legal and financial aspects of granting access to existing dispute and appeals tribunals or establishing a separate dispute settlement mechanism. He proposed a two-stage process, consisting of an informal dispute resolution phase and an expedited arbitral proceeding in case the informal dispute resolution phase fails (paragraph 96).

The General Assembly requested the Secretary-General to present a report at its 67th session further elaborating on the proposed mechanism and including an analysis of the policy and financial implications should individual contractors and consultants covered by the proposed expedited arbitration procedures be granted access to mediation under the existing informal system. The Secretary-General presented the said report. At the completion of this review, the final decision of the General Assembly was pending (paragraph 97).

In one case,³⁷ the UNDT observed that: “It is a disturbing state of affairs that contractors cannot have access to a justice system as staff members considering that the functions they perform are generally no different from those performed by staff members.”

Is the legal aid mechanism of the United Nations effective? Considering that OSLA, which only has eight legal officers, serves over 74 000 staff members of the UN

34. Resolutions 68/254, paras. 32 and 35, 67/241, para. 45, 66/237, para. 26, 65/251, para. 36.

35. Resolution 65/251, para. 35.

36. Review of Individual Consultancies in the United Nations System, JIU/REP/2012/5.

37. *Kimungui* UNDT/2014/147.

Secretariat, its principal funds and programmes, it is reasonable to argue that it is effective. In March 2015, OSLA had handled 5 000 cases since its inception. For an office with such limited resources, this figure is impressive.

From data available in 2014, OSLA declined legal representation in a number of cases. A total of 35% were rejected on the merits of the claim, 31% were rejected because of evidentiary problems and 20% were rejected because of time bars, with the remaining being rejected for a variety of substantive reasons. The Council noted that the office had even declined representation in a case where a Dispute Tribunal judge had recommended that OSLA represent the applicant and the judgment expressed regret for that action.³⁸

One could also argue that OSLA's limited resources significantly reduce the efficiency of the legal aid mechanism. The administration is represented by a much larger number of lawyers. The United Nations Secretariat alone employs approximately 15 legal officers in the Administrative Law Section of the Office of Human Resources Management who litigate exclusively before the Dispute Tribunal. An additional number of lawyers employed in the Office of Legal Affairs handle appeals exclusively. Moreover, each fund and programme has at least one and often several legal officers against whom the OSLA legal officers argue cases.

In Nairobi, for example, the tribunal covers the whole of the African continent as well as the Arabian Peninsula. Africa has the largest number of United Nations peacekeeping operations, and hosts the headquarters of the United Nations Environment Programme (UNEP), and UN Habitat. The tribunal in Nairobi receives applications from these offices as well as from the funds and programmes like UNICEF, WFP, UNDP, UNOPS, OCHA and UNHCR that are based in African countries. The geographic jurisdiction of the UNDT in Nairobi therefore is one that is heavily staffed, but not commensurately resourced in terms of available legal aid. Four lawyers have to manage disputes emanating from the whole African continent and the Arabian Peninsula. Obviously OSLA cannot take all these cases. The question may be asked whether staff members who wish to challenge an administrative decision can readily have access to OSLA.

OSLA is in the process of setting out on its website a criterion for acceptance or rejection of applications for legal representation. The criterion consists of determining whether the staff member has reasonable prospects of success. Generally, the threshold of reasonable prospects of success is less than that of balance of probabilities but more than a *prima facie* case. When OSLA denies representation, it always informs the staff member why he or she has no reasonable prospects of success. That decision itself becomes a reviewable administrative decision that can be challenged like any other decision affecting a staff member's contractual rights.

38. In UNDT/2014/023 (*Kashala*) the tribunal stated "it is a matter of immense regret that OSLA declined to represent the Applicant in this matter. Its submissions on what is essentially a novel point of law and fact before the UNDT could have served to assist the Applicant in comprehensively canvassing the issue of receivability after the Respondent chose to fall back on the oft beaten track of *ratione temporis* instead of exploring the real reasons for the late filing of the Application before the UNDT" (paragraph 40).

The General Assembly has put into place, on an experimental basis in 2014-15, a scheme whereby staff members are encouraged to make voluntary contributions to the financing of OSLA in order that its resources may be strengthened.³⁹ It must be pointed out however that many staff members have opposed that decision. The opt-out rates are significant with Nairobi being among the highest at approximately 60%. This opt-out rate may be attributed to the Staff Union's opposition to the voluntary contribution scheme. The Staff Union believes that contributing to OSLA is a slippery slope. Nonetheless, as a result of this voluntary contribution scheme, which is only a pilot project, OSLA is recruiting two more legal officers for its largest offices, New York and Nairobi.

It is noteworthy that Article 12 of the Rules of Procedure also provides for other means of representation. Staff members may represent themselves, engage private counsel or be represented by another staff member. Of course, representation by another staff member is rare. Most staff members would either not have the time or would fear retaliation.

Staff members are placed in quite a difficult situation when they cannot afford a lawyer or because OSLA has refused representation for one reason or another. While some would give up on the claim at this stage, others choose to represent themselves. The difficulties facing the court and its registry when faced with self-represented litigants requires little description – incoherent pleadings, ignorance of the rules and methods of litigation often give rise to all sorts of complications and delays. Consequently, the written proceedings are not well structured, the arguments are not clearly articulated and the evidence filed is often not relevant to the points at issue. Often, the applications themselves are not well founded in law or simply not receivable for jurisdictional reasons. Such unfounded applications are an unfortunate and significant waste of valuable judicial resources.

In essence, the legal aid mechanism within the internal justice system of the United Nations is an inadequately resourced one. It is however doing its best with what little it has.

When discussing legal aid mechanisms, it is necessary to address the issue of costs. Litigation is free in the United Nations justice system. A litigant does not have to pay any court fees as we know them in most national jurisdictions.

The tribunals have no power to award costs against losing parties. The tribunal has no power to award exemplary or punitive damages. It is only in cases where the tribunal considers that a party has manifestly abused its proceedings that it can award costs. The Appeals Tribunal has the same power. What amounts to abuse of proceedings is decided on a case-by-case basis.

The UNAT Tribunal has ruled that:

the jurisdiction of a Tribunal to award costs is narrowly restricted by statute to cases in which it determines that a party has manifestly abused the proceedings before it. In view of this limited discretion, it is incumbent on a Tribunal awarding costs to state the reasons on which its award of costs is based.⁴⁰

39. General Assembly Resolution 68/254, paras. 33-34.

40. *Machanguana* 2014-UNAT-476.

Costs have been awarded in a few instances. Where a party deliberately delays the proceedings of the tribunal, files frivolous and vexatious applications or disobeys an order of the tribunal it may see costs awarded against it. However, a “delay, in and of itself, is not a manifest abuse of proceedings”. In order to award costs against a party causing the delay, it is necessary for the tribunal to be satisfied on the evidence that, in causing the delay, a party has manifestly abused the proceedings. In other words it is necessary to determine on the evidence that the delay was clearly and unmistakably a wrong or improper use of the proceedings of the court. The delay must be frivolous or vexatious.⁴¹

In one case, UNAT held that the award of costs in the amount of US\$15 000 against the Secretary-General was fully justified because from the extensive procedural facts and the posture of the Secretary-General, his refusal to comply with the production or discovery orders issued by the UNDT was deliberate and longstanding and delayed the proceedings; thus it was frivolous and vexatious.⁴²

There are other examples where costs have been awarded. In the case of *Hosang*⁴³ the tribunal awarded costs against the Secretary-General for abuse of process. The tribunal observed that parties should work within proper parameters of legitimacy and propriety if they are to avoid incurring the risk of being found to have acted in a manner amounting to a manifest abuse of process. In *Yakovlev*,⁴⁴ the tribunal ordered an applicant to pay US\$5 000 as costs for abusing the proceedings of the tribunal on the ground that his claim was not only frivolous and vexatious but it took up time and resources to judicially address. In *Harrich*,⁴⁵ the applicant was ordered to pay US\$2 000 costs for abuse of proceedings in that he refused to comply with orders of the tribunal.

When the tribunal began its operations, the significant number of cases filed with the registry raised important concerns from various stakeholders. Although the numbers have started to stabilise, the same two questions were regularly and consistently resurfacing: “should a litigant be made to pay, at least a nominal fee, when filing a case?” and “should costs be awarded against a losing party?”

If fees are imposed or costs awarded, they should not be such as to amount to a denial of access to justice. This principle is clearly established by the European Court of Human Rights.⁴⁶

Can there be convergence or a common focus in relation to the rules governing legal aid and costs? In the field of human rights we may say there has been a convergence of the basic principles in many regional and international instruments. If we agree that legal aid is a fundamental right that facilitates access to justice then there should be no impediment to harmonising the rules governing legal aid at the level of international administrative tribunals.

41. *Bi Bibea* 2013-UNAT-370.

42. *Wasserstrom* 2014-UNAT-457.

43. *Hosang*, UNDT/2013/038.

44. *Yakovlev*, UNDT/2014/040.

45. *Harrich*, UNDT/2014/109.

46. See for example *Kreuz v. Poland*, Judgment of 19 June 2001; *Ciorap v. Moldova*, Judgment of 19 June 2007; *Stankov v. Bulgaria*, Judgment of 12 July 2007.

DISCUSSION AND CONCLUSIONS: SESSION 3

David DION

Hello. My name is David DION, I'm representing the staff association of the FAO of the UN. I just wanted to add to Mr LAKER's statements that not only are there 80 000+ staff that are excluded from the UN system, there is a big part of the UN that is excluded because it's now part of the secretariat. My organisation – the FAO – is the largest UN organisation and it is not part of that system. So there are really quite a lot of people who are not involved.

In our organisation, if you're a staff member with a complaint you have to go through an internal process of appeal which ultimately relies on the director general and so you really don't have any objective justice there. If that practice doesn't work, eventually years later maybe you can get it to the ILO; but it's not a very welcome prospect for the staff member, if they are being laid off. I just wanted to make that clear. Thank you.

Anne TREBILCOCK

Thank you. I'm Anne TREBILCOCK. I'm a member of the Asian Development Bank Administrative Tribunal.

Several people today have mentioned Article 14 of the International Covenant on Civil and Political Rights which refers to equality of access to justice. I just want to mention that the Human Rights Committee – which is the treaty body for that convention – has issued a general comment on that subject and obviously it's addressed to member states and it makes a clear distinction between rights in relation to criminal matters and rights in relation to civil matters and administrative procedures. But nevertheless there is some interesting language in that general comment that would be worth looking at. It was also cited by the International Court of Justice in an advisory opinion involving the International Fund for Agricultural Development from 2012 and it was again cited recently by the Asian Development Bank Administrative Tribunal in a case decided in February of this year. Thank you.

Horstpeter KREPPEL

What is preferable? To have a general court or to have a specialised court? I think my tribunal is a good example of a successful specialised court. And it is very surprising that next year probably this tribunal will be finished and will not continue, but the reason is not because we were so good but is a completely different one. You know that we have 28 member states – it's the European Union. My tribunal has seven judges. The General Court has 28 judges. So each member state can nominate a member. When we found out that the General Court has a backlog of several hundred cases and the duration of the cases is extremely long and we have now several cases before the Court of Justice where companies ask for 24 million euros in damages because of the length of the procedure. It was decided that the General Court would be enlarged by nine judges. That was more than two years ago. The member states cannot agree in what way member states would nominate or would accept these nine judges; and with our tribunal with seven judges every time one judge left (because of the end of his mandate or because he was promoted to the General Court or was leaving for

other reasons) we had a huge problem because some member states blocked the decision to nominate the successor. And this is why I am here still. Otherwise, with my 70 years, I would have already retired. My mandate ran out last year. So the reason why the Court of Justice has now proposed to double the number of judges in the General Court from 28 to 56 is to have a “*déblocage*” of that problem. We don't want that one or two member states can block any longer because the nomination has to be anonymous. And some member states use this and take the judiciary hostage to get their own people there. It is very egoistical too and I think it's a disrespect vis-à-vis the judiciary for some member states to have such an attitude. And to avoid this, the Council of the European Union (or Council of Ministers) asked the Court of Justice to present a proposition which was then made: double the number and not have 28 new judges to be nominated with the cabinet and all that, and wanted to have us – the seven judges – reintegrated so we don't have to nominate 28 new judges but only 20. It's for a cost reason. It's just for a cost reason that we are reintegrated into the General Court.

However, the General Court now has to decide if they want to have a specialised chamber and that again is heavily debated. [Laughter] And I don't understand that. We are so successful and I'm sure that the staff would profit if we would continue to have a specialised section within the General Court and even I would suggest to have a specialised chamber of appeal in the Court of Justice.

Fabrice ANDREONE

Fabrice ANDREONE from the European Commission. I have a question for Judge KREPPPEL about the cost of justice with the EU's tribunals for EU civil servants; the lawyers have a kind of monopoly you have to show up with the Council in case of a complaint.

I was saying that EU civil servants have to resort to the services of the Council. Now the cost of an EU trial is approximately €10 000 per litigation – sometimes more, sometimes less. Now up to 2004, the unsuccessful party of the trial was expected to pay the costs. However, that rule was removed by the Council of Ministers: first of all you have to pay approximately €10 000 for a lawyer and then you have to cover the expenses which will depend on the costs incurred by the administration. The administration itself may resort to the services of some of their own lawyers or to outside lawyers – in which case if the civil servant were to lose the trial he/she would have to incur the costs of her/his own lawyer plus the administration's lawyer, so doubling the costs. Now here, again, access to justice is at stake because in EU institutions, there are not only permanent staff but also contract-based staff – approximately 10 000 of them – with very low wages.

Here is my question: given the changes made, does the tribunal consider reintroducing that waiver from the cost expenses? And also there's unequal treatment between institutions or even within institutions because the larger institutions will resort to the services of members of their legal department whereas the smaller ones have no or very small legal services and therefore their routine is to resort to the services of outside law firms. So depending on where a given member of staff is hosted if he/she should lose the litigation then the costs might vary greatly depending on which institution you work for. So there is definite unequal treatment of the litigants depending on which institution they work for.

Ali BAHADIR

Ali BAHADIR, I represent the Staff Committee of the Council of Europe. The issue of anonymity hasn't really been explored during this section and it isn't a crucial issue which we attach great importance to. The system which is currently at work in the Council of Europe is so unsatisfactory: an applicant can apply for anonymity but the president of the tribunal will ultimately decide whether it is appropriate, given the circumstances, to grant him/her anonymity for simply the basic principle of the rule is publicity; the exception is anonymity. So the applicant has got to prove an interest in remaining anonymous. This is a fairly obsolete approach if you think what happens in domestic legal systems. It should be the other way round. The rule should be anonymity. I think that when the applicant applies, anonymity that should be automatically granted unless there is a particular value or interest in the name appearing in the sentence.

Perhaps I could add a further point to what was already said. The problem is not just one of actual publication of the sentence and the fact that you can find the name on the internet. You see, once an application has been lodged with the Administrative Tribunal it will be made known to all other staff members so that third parties can make submissions. So that means that the whole of the staff will know who has lodged an application. And I didn't make the point this morning that the fear of reprisals has deterred quite a few staff members from lodging applications because rightly or wrongly they are concerned that if they lodge an appeal against the administration this will be held against them sooner or later; it's seen as a sort of "*lèse-majesté* crime". And there are situations which manifestly should call for anonymity where it hasn't been granted. Obviously I'm not going to name the case but I have in mind a colleague who worked at the European Court of Human Rights and complained about her evaluation reports. She applied for anonymity and the President turned that request down and originally it was only her superior who was evaluating her who knew about this appeal but after that, all her fellow colleagues knew that she had apparently not worked enough in the previous year. This is the type of confidential information, quite frankly, which I think is no business of the rest of the staff of the Organisation. I'm sure that Mr SANSOTTA wants to answer that question. Thank you.

Gregor SCHNEIDER

Thank you very much. Gregor SCHNEIDER, President of the Staff Committee of OHIM.⁴⁷ I just wanted to subscribe to what Mr ANDREONE said before and I would like to thank Judge BOOLELL for his very clear and non-encapsulated remarks which become much more noble because of not being encapsulated. What you said is true. What is the value of the right if you don't have the ability to claim it? And it's true that in the European Union this equality of access to justice is not totally complete because in small agencies or administrations that may have recourse to lawyers the costs of these lawyers that work for the administration are dissuasive: the cost risks are too high so people will not go, they don't have access to justice. So this is something that needs to be tackled and maybe this unfortunate funeral that we might attend

47. On 23 March 2016, OHIM became the Office of the European Union for Intellectual Property (EUIPO).

in one year of this Tribunal de Fonction Publique might be the rebirth of some kind of more equal access to justice.

Now important in this context is also this possibility of an alternate settlement or mediation but now I understand the reluctance. I come from the same system where mediation or the judge tries to find a friendly settlement. In other legal systems, the judge is biased, or at least there are suspicions in that sense, which is very difficult to overcome. We tried this in a corporate project in Turkey and it was a no go; I mean they wouldn't accept this. So how about thinking about the possibility of (what you also said) to have some different judges or to have an external mediation system? Within the court procedure, stop the procedure for a friendly settlement and then give the case back to the juge rapporteur. So I think this is something that we should seriously examine for the reason of costs of the procedure. Thank you very much.

Sergio SANSOTTA

Perhaps I just could make two factual points.

First of all, if we have in mind the same application, this individual hadn't received poor evaluations; she'd simply got an evaluation which was less than she expected she was entitled to and she filled in the same evaluation form as anybody else. We did not disclose any personal information in the sentence that her evaluation was positive but it didn't come up to her expectations.

Secondly, as to publication of the fact that the case has gone to the Administrative Tribunal, this is an arrangement which was put into effect about 10 years ago at the request of the Staff Committee. They thought that this was the only way of preserving the rights of other staff members to be parties in the proceedings. We have had a discussion with the Data Protection Commission concerning this need to get the balance right between data protection and confidentiality. But you see it was at the request of the Staff Committee.

Inés WEINBERG de ROCA

I think that what has been the subjects of this afternoon is the access of staff members and the legal cost this entails, how many staff members can pay for access to justice, the need for an alternative way of solving disputes. But one subject matter which was the topic of the Washington conference last year which we had yesterday afternoon and which was only shortly referred to today is the anonymity issue and I just want to raise my concern because there's been much said in favour of anonymity. My concern is how can we have on the one hand fair and public trials and on the other hand anonymity? It seems to be a conflict there and in national systems, when a plaintive starts a case, he/she does not expect anonymity and in the 21st century, to ask for anonymity even if the risk due to the internet is bigger, I wonder how we could achieve this. Even now we were asked whether the conferences can be put on the cloud or whether we want our names to be shortened but any of us in this room with an iPhone can just make photos and have a record of everything that was said. So it's a subject we have to go back to perhaps at the next conference, for example if your court is not defunct but has a 10-yearly conference, but it's a subject which I really don't see being sorted out easily.

Vinod BOOLELL

Very quickly on three points. It's true that in Article 14.1 of the Covenant, the Human Rights Committee has ruled that in tribunal trials legal aid may be necessary in the interests of justice. And so the question may be raised whether on occasion the Human Rights Committee might not follow what was said in the European Court in a particular case where the European Court opened legal aid to civil policies. I know there is a case coming from Jamaica before the Human Rights Committee. I know that in some administrative tribunals – I have not studied all the tribunals – that people must disburse their costs first and then expenses or costs are given back. But that is still rather the issue: if somebody cannot afford that money even though he will get it back how can he have access to justice?

Thirdly, anonymity – and Judge WEINBERG has just stated something about anonymity – is a very sensitive subject. There cannot be any unanimity on anonymity. And I know that in two recent cases the Appeals Tribunal of the UN has refused anonymity to applicants who asked for anonymity; and in one case where I gave anonymity the Appeals Tribunal said no. No anonymity. Thank you.

Horstpeter KREPPEL

Yes. Thomas, you asked or you pointed out that in your system you have a twofold path: one path is the judiciary and the other one is to the ombudsman. Within our European Union system we also have an ombudsman and we have also a mediation service within the Commission, but the main problem is that the delay for introducing an application is not suspended whereas I think in your case, it is suspended. This is a major flaw within our system because you cannot continue with the ombudsman as soon as you have started a case before us. So he has to stop work, which is stupid. I think there should be a change in the legislation. Otherwise, I think it's a good idea to have these possibilities.

Cost argument: it seems to me that you have read my order because in my chamber, we compel the institution to bear their own costs exactly for the arguments which you gave, but the General Court overruled us and so you again have to bear the complete costs. If you have €500 which you didn't get from the insurance company you can not even go to court because the cost is such that it is not worth it, and if the administration takes a lawyer, you end up paying €20 000 for a grievance of €500. That doesn't work.

Magali ROJAS DELGADO

Now to try to wrap up a sort of conclusion to this panel discussion, I can say that ultimately I think that there are contradictions between general principles and practices but I think what we need to do is to strike the proper balance in the way in which we apply them. When it comes to anonymity, there is the requirement of transparency versus confidentiality. When it comes to consultants, there is the possibility that persons who are working in the same location should enjoy the same entitlement to have access to a judgment and bear similar costs to ordinary staff members. But when it comes to the different positions and standards, they require that the different administrative tribunals within the sphere of competences need to establish flexible regulations in order to take into consideration exceptional situations or propose regulations which are applicable to respecting constitutional principles and of course human rights. Thank you.

**MEETING OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS
18 MARCH 2015**



Left to right: Christos ROZAKIS (Chair of the Administrative Tribunal of the Council of Europe), Giorgio MALINVERNI (Deputy Chair), Jean WALINE (Judge)



Catherine O'REGAN (President of the International Monetary Fund Administrative Tribunal)



Left to right: Chris DE COOKER (President of the North Atlantic Treaty Organization Administrative Tribunal), Laura MAGLIA (Registrar a.i.)



Left to right: Lakshmi SWAMINATHAN (President of the Asian Development Bank Administrative Tribunal), Thomas LAKER (Judge and former President of the United Nations Dispute Tribunal)



Centre: Vinod BOOLELL (Judge of the United Nations Dispute Tribunal)



Meeting room



Andrés RIGO SUREDA (International Monetary Fund Administrative Tribunal)



Participants in the meeting

INTERNATIONAL COLLOQUY “COMMON FOCUS AND AUTONOMY OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS” 19-20 MARCH 2015

Speeches – Introduction to the conference



Christos ROZAKIS (Chair of the Administrative Tribunal of Council of Europe)
Opening speech



Thorbjørn JAGLAND (Secretary General of the Council of Europe)
Opening speech



Ali BAHADIR (Member of the Staff Committee of the Council of Europe)
Opening speech



Left to right: Thorbjørn JAGLAND, Christos ROZAKIS, Ali BAHADIR

Participants in the colloquy









Centre: Andrzej ANTOSZKIEWICZ (Deputy Director and OSCE Ethics Co-ordinator, Department of Human Resources)



1st row, left to right:
Andrés RIGO SUREDA (International Monetary Fund Administrative Tribunal), Magali ROJAS DELGADO (President of the Administrative Tribunal of the Organisation of American States), Inès WEINBERG DE ROCA (Second Vice President of the United Nations Appeals Tribunal), Weicheng LIN (Registrar, United Nations Appeals Tribunal)

Session 4

Effectiveness of decisions before judgment (stays of execution) and after judgment (enforcement measures) – Appeals system

CHRIS DE COOKER, PRESIDENT OF THE NATO ADMINISTRATIVE TRIBUNAL

Good afternoon. I'm Chris de COOKER. We will now start the fourth session.

We have a rather challenging topic. Well, quite frankly, there are two topics: one is the effectiveness of decisions before a judgment and after a judgment; and the second topic is that of the appeals system. I have noticed this morning, when Thomas LAKER was chairing, that people already could not wait to talk about a two-tier system and so on. But there is still some more to be said about this. But I don't want, not again, everybody jumping on that topic. So I really want to devote some time and energy on the first, the longer, part of the title.

When an appeal is lodged, the period between that moment and the judgment is a fascinating period for many, including for the judges. It is not just like: "Oh! Here's an appeal, a written procedure and a judgment". A lot of it is happening in the meantime: case management, things have to be decided, small things, procedural things; sometimes bigger things if the case management goes into the details of the subject matter, etc. So the judges are asked to take decisions and to issue orders: join cases, accelerate the process, sometimes to summarily dismiss a case, involvement of third parties, witnesses, interventions of *amicus curiae*... All these things are taking place in this period of time and hopefully the most important part is that, as we have heard earlier this afternoon, parties try to find solutions and settle the cases. And also there the judges can be more or less – I hope more – active.

If no settlement intervenes a judgment is issued, and this is the second part of the title of this session. What happens after the judgment? Well, of course, a judgment is only as good as it is. But even more important is: it's only as good as it is accepted and whether the parties can live with the judgment. Of course, if there is an appeal mechanism, one can show one's unhappiness there, but there are a lot of other subtle ways of reacting to the judgment: by only partly implementing it or not fully implementing it, or by questioning it and sometimes even going as far as the International Court of Justice. So there is, also here, a whole pattern of things that we would like to cover.

And then, of course, some organisations have an appeal system – only a few words from my side. This morning we were talking about a two-tier system, but there are related issues: what, for example – and this is not really an appeal – what is the relation between the grievance process and the process before the tribunal? And what are the preconditions for that? What kind of a grievance process does one need? And what is the interface in terms of fact-finding in that process and that done by the tribunal?

I am in very good company: Anne-Marie THEVENOT is a lecturer at the University Paris 2, Panthéon-Assas, in particular specialising in exactly our subject matter. So, she will tackle the first part. Then I have two practitioners. One is from inside an international organisation: Yves RENOUF, from the World Trade Organization. He is a professional. He has to defend cases, but also find solutions. Alex HAINES is a professional from outside: he is an attorney defending staff cases before a number of tribunals. So I think we have a very nice team together.

I am already breaking my commitment to be short. So the first speaker is Anne-Marie.

ANNE-MARIE THEVENOT-WERNER, LECTURER AT THE UNIVERSITY PARIS 2, PANTHÉON-ASSAS

The effectiveness of international administrative court judgments⁴⁸

Thank you, Mr chairman. Ladies and gentlemen,

It is generally acknowledged that international administrative tribunals are, in effect, administrative courts. They may further be classified as international courts, because they were set up under instruments governed by international law, and international law accordingly applies to them and is applied by them.⁴⁹ In order to understand the legal framework applicable to any international administrative tribunal, one must

48. Some of the work that went into this contribution is taken from the author's doctoral thesis on "The right of international officials to an effective remedy. Towards a common law of international administrative procedure", under the direction of Professor Pierre Michel Eisemann. The thesis was defended at the Sorbonne School of Law (Paris 1 University, Panthéon-Sorbonne) on 1 December 2014. The author thanks the Administrative Tribunal of the Council of Europe for its invitation, and also Claudine Hourcadette.

49. See, for example, United Nations Appeals Tribunal (UNAT), Judgment No. 2013-UNAT-370, 17 October 2013, *Bi Bea v. Secretary-General*, section 23.

therefore take the case law of the international courts into account. As regards the effectiveness of the judgments, in a judgment of 13 September 1928 in the Chorzów factory case (Claim for indemnity) (merits) the Permanent Court of International Justice (PCIJ) identified an “essential principle contained in the actual notion of an illegal act”. By virtue of that principle, “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”. The courts must therefore order “restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear”.⁵⁰ That raises the question of how the international administrative tribunal can guarantee that an appellant effectively obtains full reparation for the prejudice suffered as a result of an illegal act committed by the respondent organisation. One “upstream” means of achieving this is to prevent any aggravation of the prejudice suffered by ordering the suspension of action, or interim measures (which we shall refer to together as provisional measures for the sake of simplicity) (1) and, further down the line, another means is to strengthen the *res judicata* principle (2).

1. Preventing any aggravation of the prejudice suffered by ordering provisional measures

In international administrative law the principle applicable is that administrative appeals or appeals for judicial review have no suspensive effect, in order to allow the organisation to continue to operate. How, then, does one guarantee full reparation and thus the enforcement of the law in the presence of the risk of irreversible damage? For example, where dismissal could lead to the suppression of the post or the replacement of the official concerned by another? Applying general international law to international administrative tribunals gives them an inherent power to order provisional measures (A) even if recourse to that power remains the exception (B).

A. The inherent power of the courts to order provisional measures

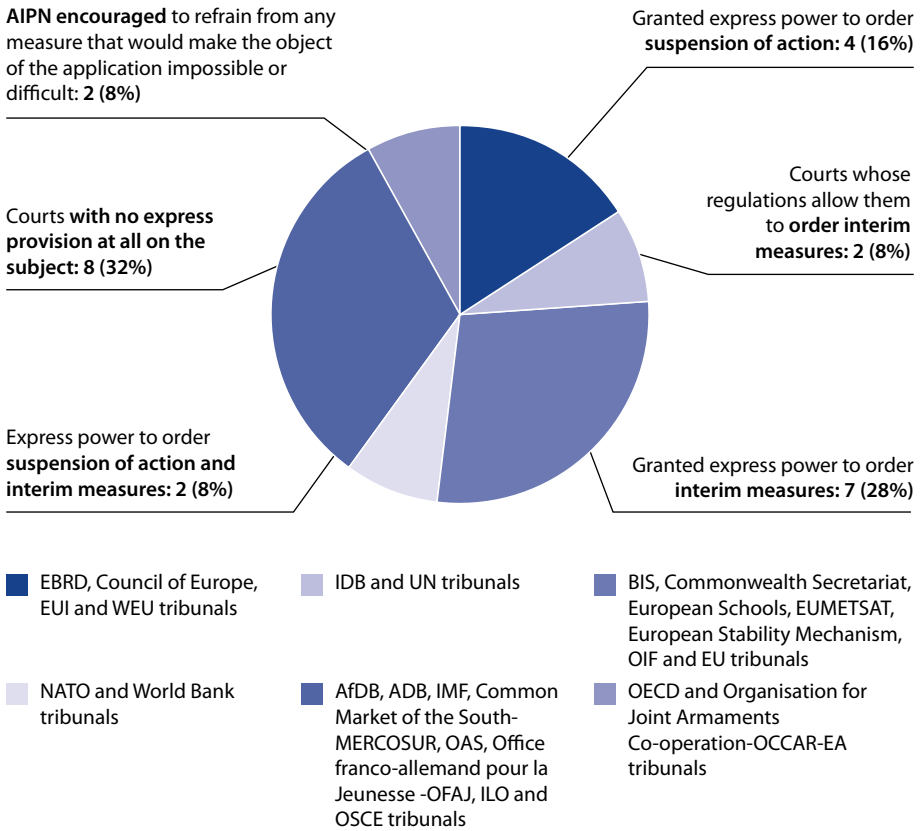
Provisional measures that may be taken include the suspension of action and interim measures. The suspension of action is ordered to stay the execution of the administrative decision pending the outcome of the hierarchical review process, while an interim measure suspends the execution of the administrative decision pending judicial review. The possibility of ordering a suspension of action, for example, is expressly provided for at the European Bank for Reconstruction and Development (EBRD), the Council of Europe, the European University Institute (EUI) and the Western European Union (WEU). The Bank for International Settlements (BIS), the Commonwealth Secretariat, the European Schools, EUMETSAT, the European Stability Mechanism, the International Organisation of La Francophonie (OIF), the European Union (EU), the North Atlantic Treaty Organization (NATO) and the World Bank all explicitly attribute the power to order interim measures to the competent

50. PCIJ judgment, 13 September 1928, *The Factory at Chorzów (Claim for indemnity) (merits)*, Series A, No. 17, p. 47.

court. The United Nations (UN) organisation and the Inter-American Development Bank (IDB) have even made express provision for both possibilities, with the proviso, under Article 10, paragraph 2, second sentence, of the Statute of the United Nations Dispute Tribunal, that no interim measure may be ordered in cases of appointment, promotion or termination.

In 15 of the 25 international organisations studied here (Figure 1), the tribunal has the express power to order provisional measures. It may either order the suspension of the action in the event of a hierarchical appeal or order interim measures in an appeal for judicial review.

Figure 1: courts with the power to order provisional measures (15 out of 20)



This raises the question whether an international administrative tribunal can order provisional measures even where there is no express provision for it to be able to do so. In addition to the Chorzów factory case mentioned above, another case which comes to mind is the order issued by the Permanent Court of International Justice in 1939 in the Electricity Company of Sofia and Bulgaria case. The court referred to the existence of a “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

and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.”⁵¹

The power to order both suspension of action and interim measures, the purpose of which is to avoid aggravating or extending a dispute, is thus inherent in the judicial function of any international tribunal. That is why the Permanent Court of International Justice gave itself the power to order interim measures⁵² and why the European Court of Human Rights (the Court) also provides for interim measures in its Rules of Court, even though there is no express provision for such measures – which it considers binding – in its statute.⁵³ As with the European Court of Human Rights, Rule 24 of the Rules of Procedure of NATO’s Administrative Tribunal empowers the tribunal to “request that the head of the NATO body consider taking action under Article 6.3.5 of Annex IX”, namely interim measures.⁵⁴ While it does not expressly provide for the NATO Administrative Tribunal to take action, but only for the head of the NATO body to order interim measures, Rule 24 of the Rules of Procedure is in conformity with the relevant international law for the reasons mentioned above. The approach of the Administrative Tribunal of the World Bank (ATWB) is even more like that of the Court, providing in Rule 13 of its Rules of Procedure for the possibility of granting provisional relief⁵⁵ – something the Statute of the ATWB does not expressly authorise. These examples illustrate the fact that international administrative tribunals do indeed have the inherent power to order interim measures. As with interim measures, the purpose of a suspension of action is to avoid irreparable damage. The difference between interim measures and the suspension of action lies in the timing: in the case of a suspension of action the internal remedies have not yet been exhausted. Where administrative decisions are enforceable even before they become final, irreparable harm may be done even before all internal remedies have

51. PCIJ, order, 5 December 1939, *Electricity Company of Sofia and Bulgaria (request for the indication of interim measures of protection)*, Series A/B No. 79, p. 199, confirmed by the International Court of Justice (ICJ), judgment, 27 June 2001; *LaGrand (Germany v. United States of America)*, ICJ Reports 2001, p. 503, section 103.

52. ICJ, judgment, 27 June 2001, *LaGrand*, *ibid.*

53. ECHR, 1 July 2014, Rules of Court, Rule 39, section 1; ECHR (Grand Chamber), judgment, 4 February 2005, *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, sections 108-129.

54. NATO, Civilian Personnel Regulations, Annex IX, Article 6.3.5: “Although an appeal shall not stay the execution of the decisions appealed against, pending the conclusion of the case and at the request of the staff member or a member of the retired NATO staff, the Head of the NATO body may suspend the contested decision, and/or refrain from taking any further action during the period within which an appeal may be brought or is being heard that would change the position within the NATO body to the detriment of the appellant, by rendering impossible or impractical the relief sought by the appellant, in the event of the appeal being upheld.”

55. Rules of The World Bank Administrative Tribunal, Rule 13: “Provisional Relief. 1. The filing of an application shall not suspend the execution of the decision contested. However, the applicant may submit to the President of the Tribunal a request to suspend the contested decision until the Tribunal renders its judgment in the case. 2. A request for the suspension of the contested decision shall, unless it is manifestly unfounded, be transmitted to the respondent for its answer within a period of time to be determined by the President of the Tribunal. 3. The Tribunal or, when the Tribunal is not in session, the President of the Tribunal may grant such a request in a case in which the execution of the decision is shown to be highly likely to result in grave hardship to the applicant that cannot otherwise be redressed.”

been exhausted. It is accordingly logical to consider that international administrative tribunals also have the inherent power to order a suspension of action. However, suspension of action is a more delicate issue than provisional measures, which is why the existence of express provisions to this effect strengthens legal certainty.

So how and in what conditions is the power to order provisional measures implemented?

B. Exceptional use of the power to order provisional measures

In spite of the diversity of terminology and the variations in the number of express conditions, analysis of the various provisions applicable to the tribunals reveals a common thread between them that may be summarised as follows: the tribunal must clearly have jurisdiction, the applicants' claims must be plausible, there must be a risk of irreparable damage – and therefore a necessity – and the need must be urgent. Since what is at issue here is an exception to the principle that provisional measures have no suspensive effect, these conditions must be interpreted narrowly. In the event that all these conditions are met, the measures ordered by the court are binding until such time as the final decision is reached – be it an administrative or a judicial decision.

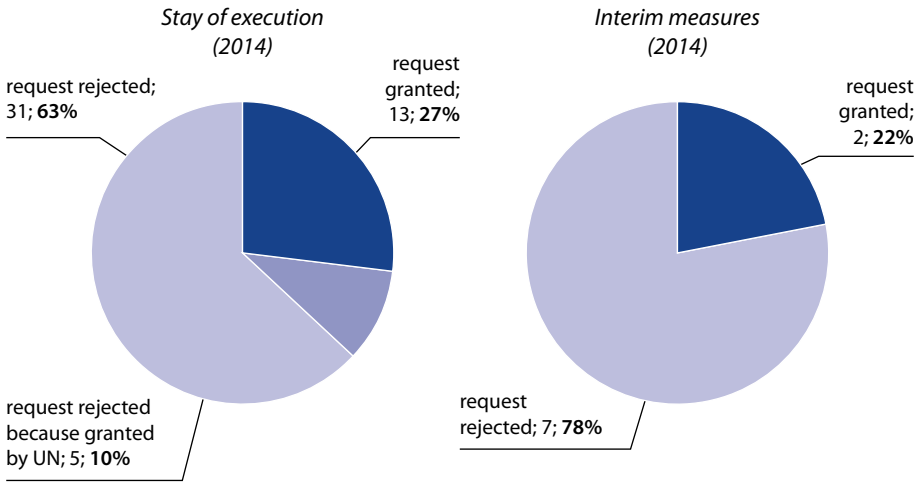
In practice the Administrative Tribunal of the Council of Europe and the Civil Service Tribunal of the European Union, in particular, have recourse to these measures. Here, however, let us look in more detail at the United Nations Dispute Tribunal (UNDT), where both types of measure (suspension of action and interim measures) are clearly used in practice and the case law is particularly accessible and useful. Although few requests are allowed, the number is not insignificant. In 2014 provisional measures were granted only in the event of termination of employment (non-renewal or non-extension of contract, dismissal: suspension of action in six cases; interim measures in one case) or where the applicant was placed on unpaid administrative leave or such leave was extended (suspension of action in seven cases and interim measures in one case). The Administrative Tribunal of the Council of Europe, on the other hand, tends to reject requests of this type in such cases, while sometimes allowing them in matters of appointment, even if the interpretation is equally restrictive and the measures ordered are few and far between.⁵⁶

The following charts illustrating the example of the United Nations Dispute Tribunal (Figure 2) show that five requests for suspension of action were rejected because the administration agreed to order the measure before the tribunal reached a decision. This shows that this is an effective means of exerting pressure on the administration. However, one of the challenges thrown up by Article 10, paragraph 2, second sentence, of the UNDT's Statute is that interim measures are ruled out in cases of appointment, promotion or dismissal, where the risk of irreparable damage is highest. In addition, several requests were rejected because the decision in respect of which suspension was requested had already been implemented by the administration, particularly where appointments were concerned. That is justified by the need also to limit the

56. ATCE, Appeal No. 463/2010, 4 November 2010, *Libs v. Secretary General* (appeal allowed in part), section 11; Appeals Nos. 486-489/2011, 491/2011, 498-500/2011 and 502/2011, 20 April 2012, *Ümit Kilinc and Others v. Secretary General* (appeals allowed in part), sections 20-21.

aggravation of the prejudice caused to any other people potentially affected – which is the whole point of provisional measures. However, such cases show that it is in the administration’s interest to apply the disputed decision as soon as possible. This means that the effect actually achieved is the opposite of that intended in providing for the possibility of requesting provisional measures.

Figure 2: the example of the UNDT



For these reasons, and as Judge MAHONEY mentioned in general terms with reference to the case law of the Civil Service Tribunal of the European Union, which rarely orders interim measures, it would be a good thing if international administrative tribunals were less reluctant to use their powers to order provisional measures and relaxed their jurisprudential criteria so as to render the “right to a court” practical and effective, not theoretical and illusory.⁵⁷ The question of the effectiveness of the judgment and the qualitative monitoring of the right to a court also arises after the judgment has been pronounced, in order to strengthen its authority.

2. Strengthening the principle of *res judicata* after the judgment

On the one hand, it has proved useful in practice to establish an appeal procedure as a guarantee of the quality of judgments pronounced (A), and on the other hand, the effectiveness of a judgment is ensured when the international administrative tribunal agrees to monitor the execution of judgments (B).

57. Mahoney P. (2012), “Le droit à un procès équitable au sens de l’Union vu de la perspective du contentieux de la fonction publique de l’Union européenne” [The right to a fair trial in the European Union seen from the perspective of European Union civil service disputes], in Picheral C. (ed.), *Le droit à un procès équitable au sens du droit de l’Union européenne*. Proceedings of the symposium of 5 and 6 November 2010, organised by the Institut de droit européen des droits de l’homme, Faculté de droit et science politique – Université Montpellier I, coll. “*Droit et Justice*”, Vol. 100, Brussels, Nemesis publishers, pp. 237-38.

A. Providing useful guarantees of the quality of judgments

On the first point, the International Court of Justice only recently reminded us that there is no obligation in international law to provide for a right of appeal, based on the Human Rights Committee's General Comment No. 32.⁵⁸ Consequently, few international organisations offer a right of appeal. However, as Professor HAKENBERG, Registrar of the Civil Service Tribunal of the European Union, has pointed out, a right of appeal does have its advantages. First of all it helps to oversee the quality of judgments: "its *raison d'être* is the fact that a court's decision may affect individuals' rights much more than a badly operated appendicitis". And secondly, a right of appeal has a harmonising effect on the judgments of different first-instance courts applying the same law.⁵⁹ All in all, therefore, a right of appeal helps to strengthen legal certainty, the quality of judgments and the right to an effective remedy.

We found that six international administrative tribunals afford a right of appeal (Figure 3). It is worth noting that the fear that the parties will systematically appeal – or challenge decisions on points of law, as the case may be – is unjustified because in the European Union, for example, only one third of the decisions of the Civil Service Tribunal are challenged. And while in 2012 and 2013 "appeals" were lodged against almost half the judgments of the United Nations Dispute Tribunal, in 2014 the figure was less than a third.

Among the organisations that offer a right of appeal, there are those which provide for an appeal to a different body on points of law – for example in the event of a breach of the regulations governing jurisdiction, errors of law, misinterpretation of the facts, or procedural irregularities (European Union,⁶⁰ European University Institute⁶¹ and United Nations⁶²) and those that have a more original appeal system. For example, the power of the Review Panel of the Administrative Tribunal of the Organization of American States is limited under Article XII, paragraph 1, of its statute to cases where it is claimed that the OASAT has exceeded its authority in relation to its jurisdiction,

58. ICJ, 1 February 2012, Judgment No. 2867 of the ILOAT upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, section 39; Human Rights Committee, doc. CCPR/C/GC/32, 23 August 2007, General Comment No. 32, Article 14, section 12.

59. Hakenberg W., "The European Union Civil Service Tribunal: a three-tier structure", in Elias O. (2012), *The development and effectiveness of international administrative law. On the occasion of the thirtieth anniversary of the World Bank Administrative Tribunal*, Martinus Nijhoff Publishers, Leiden/Boston, pp. 251-52.

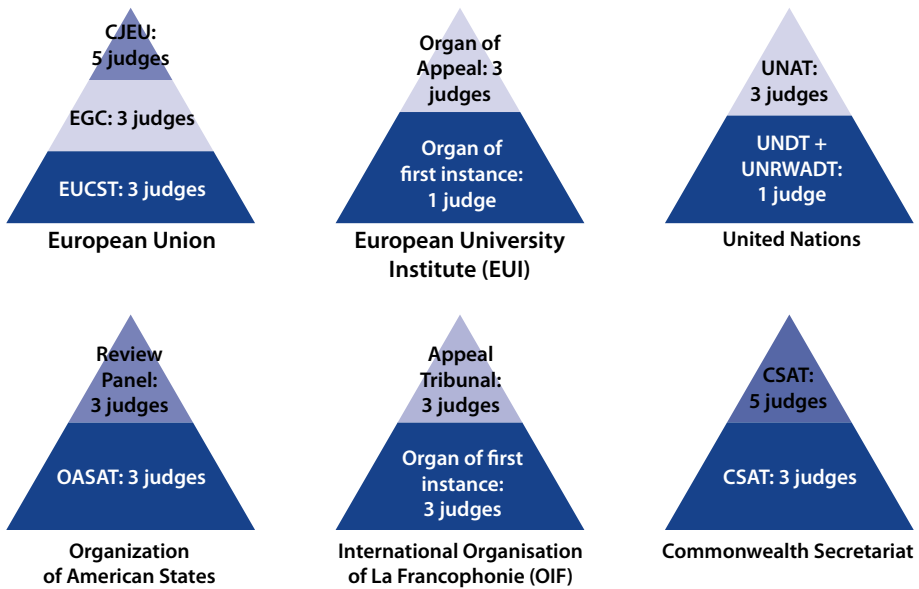
60. Statute of the EU Civil Service Tribunal, Article 11: "1. An appeal to the Court of First Instance shall be limited to points of law. It shall lie on the grounds of lack of jurisdiction of the Civil Service Tribunal, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Tribunal. 2. No appeal shall lie regarding only the amount of the costs or the party ordered to pay them."

61. EUI, Decision No. 8/06, Statute of the Organ of First Instance of the EUI, Article 5, sections 1 and 2 uses the same wording as Article 11, sections 1 and 2 of the EUCST statute.

62. Statute of the UNAT, Article 2, section 1: "The Appeals Tribunal shall be competent to hear and pass judgment on an appeal filed against a judgment rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has: (a) Exceeded its jurisdiction or competence; (b) Failed to exercise jurisdiction vested in it; (c) Erred on a question of law; (d) Committed an error in procedure, such as to affect the decision of the case; or (e) Erred on a question of fact, resulting in a manifestly unreasonable decision."

competence or procedures. It does not have competence to re-examine the merits of the underlying dispute. Conversely, the power of the Appeal Tribunal of the International Organisation of La Francophonie (OIF) is broader than that of the EU Tribunal, the appeal organ of the European University Institute or the UN Appeals Tribunal, there being no provisions which expressly restrict it.

As to the fear that the right of appeal will make the administration of justice more cumbersome, the Commonwealth Secretariat Arbitral Tribunal has found a remedy. It is a fairly original solution because the appeal – which resembles a traditional appeal on points of law⁶³ – is not lodged with a completely separate body but with a different formation of the same tribunal: the panel is composed of five judges different from the three who heard the case at first instance.⁶⁴ This could be an interesting solution for those tribunals against which few appeals are lodged. Only 3 of the 31 cases brought before it have given rise to an appeal and one of those appeals was allowed.⁶⁵ See the figure below:



63. Statute of the CSAT, Article XI, section 5: "A party to a case in which judgment has been delivered who challenges the judgment on the ground that the Tribunal has exceeded or failed to exercise its jurisdiction or competence, or has erred on a question of fact or law or both, or that there has been a fundamental error in procedure which has resulted in a failure of justice or that the Tribunal has acted unreasonably having regard to the material placed before it, may apply to the Tribunal, within a period of 60 days after the judgment was delivered, for a review of the judgment."

64. Statute of the CSAT, Article XI, section 8.

65. CSAT, APL/16 (No. 3), 7 June 2013, *Monica Oyas v. The Commonwealth Secretariat* (dismissed); APL/20 (No. 2), 30 April 2014, *Julius Ndung'U Kaberere v. The Commonwealth Secretariat* (dismissed); APL/22 (No. 2), 1 April 2015, *Carmaline Ravindrani Bandara v. The Commonwealth Secretariat* (allowed in part).

While each organisation enjoys some flexibility as to the type of appeal procedure it sets in place, if any, no court can seriously dispute its own power to monitor the execution of its judgments.

B. The inherent power of the tribunal to monitor the execution of its judgments

Monitoring of the execution of judgments may be approached preventively, by setting up a monitoring mechanism, like that of the Administrative Tribunal of the Council of Europe.⁶⁶ In this case the Organisation informs the tribunal, within 30 days of the judgment being given, that it has been executed. Another means of ensuring in advance that a judgment will be executed is to specify, in the judgment itself, the consequences of failure to execute it, as the United Nations Appeals Tribunal sometimes does.

Once the judgment has been pronounced, on the other hand, if there is any dispute over its execution an application for execution may be brought before the same body – even where there is no express provision for such action – as the Administrative Tribunal of the International Labour Organization has regularly affirmed since its Judgment No. 82 of 10 April 1965 in the case of *Lindsey (No. 2) v. International Telecommunication Union*. It is established in the case law of the ILOAT that the power to hear such an application is inherent in the competence of the tribunal, because “[p]ending full execution the dispute remains unresolved and the tribunal remains competent to rule on any issues that execution may raise”.⁶⁷ Once the application for execution has been allowed, the tribunal has different means of securing execution: the easiest way, in terms of the consequences, is to award default interest. Another, more rarely used possibility is to award non-pecuniary damages. An even more exceptional solution is for the tribunal to order penalty payments. Regarding default interest, I would like to take this opportunity to ask those members of the ILOAT who may be present the reason for the differences in the interest rates applied in its judgments; sometimes the rate is 5%, sometimes 8% and sometimes 10%. The United Nations Appeals Tribunal, on the other hand, has fixed the rate once and for all at 5% per annum for failure to execute the judgment within 60 days of delivery, based on the US Prime Rate.⁶⁸

In conclusion, all administrative tribunals have inherent powers to ensure full compensation for prejudice suffered as a result of an unlawful act. It is therefore in their interest to apply those powers before the damage is done, by allowing themselves to order provisional measures, and also a posteriori, by ensuring that their judgments are executed. In so doing they can themselves strengthen the principle of *res judicata* – as indeed the Administrative Tribunal of the Council of Europe very skilfully does; and let me take this opportunity to congratulate it on its 50th birthday.

66. Council of Europe, Staff Regulations, Article 60, section 6: “Decisions of the Administrative Tribunal shall be binding on the parties as soon as they are delivered. The Secretary General shall inform the Tribunal of the execution of its decisions within thirty days from the date on which they were delivered.”

67. ILOAT, Judgment No. 1328, 31 January 1994, *Bluske (No. 3) v. OMPI*, section 10.

68. UNAT, Judgment No. 2010-UNAT-059, *Warren v. Secretary-General of the United Nations* (formation of seven judges), sections 17-18.

By virtue of the principle of *res judicata*, every judgment is binding on the parties once it has been delivered. For that reason it is particularly important that its quality is guaranteed. In addition, *res judicata* can have a deterrent effect on third parties precisely because of the quality it guarantees, at least implicitly and in the long term. For these reasons it might be interesting to strengthen the principle, and one might well wonder whether, *in fine*, a system of courts would not have everything to gain by accepting to provide for a right of appeal. Thank you for your attention.

YVES RENOUF, LEGAL COUNSEL FOR THE ADMINISTRATION, WORLD TRADE ORGANIZATION

I would like to focus my presentation on some elements which may not immediately come to mind when one thinks about the “efficiency” of international administrative justice, and I will start with a few preliminary remarks.

The first one is that the term “efficiency”, when applied to international administrative justice, encompasses in my view both the efficiency of international tribunals (how quickly and cost-effectively they handle cases) and the efficiency of judgments themselves (whether they provide – or contribute to providing – some solution to the dispute). Moreover, tribunals are but one of the ways of dealing with disagreements between staff and international organisations. Disputes can be settled (or suppressed) through different means and it is important that tribunals be a reliable and credible alternative to these legitimate and less legitimate options, in order to preserve the rule of law in international organisations. To maintain this essential role, the judicial resolution of disputes has to be perceived as “efficient” and I consider that, eventually, a large part of the efficiency of international tribunals lies in the “acceptability” of their rulings by those who are subject to their jurisdiction: staff members and international organisations. “Acceptability” of judgments starts with a balanced and reasonable interpretation of the texts by tribunals and a consistent jurisprudence creating a certain level of predictability. It continues with the more delicate issue of the *dispositif* of judgments and the remedies contained therein.

Indeed, it seems that in our discussions we often take it for granted that organisations not only will co-operate but are also willing to co-operate in any circumstances with the judge: that whatever the latter decides, the organisation will comply with it and implement it. We know already from what we were told this morning that it is not always the case. Leaving aside the usual foot-dragging and the occasional grumbling of legal advisers at losing a case, which are innocuous, there are quite a few examples in the jurisprudence of international administrative tribunals of situations where judges had to address the same matter a second and even a third time to ensure full compliance. For instance, organisations will try to dodge around a judgment by changing the rule when it has been interpreted in a way that doesn’t suit them, or simply by only partly implementing a judgment and waiting to see if the staff member concerned goes back to the tribunal. If an organisation, which is a purely legal creation, is ready to show so much disregard for the rule of law, this may result from a problem of “acceptability” of the judgment.

A similar issue of acceptability can occur with complainants frustrated with a judgment which, after years of waiting for its issuance, does not take or insufficiently takes into account, in their opinion, certain facts or inappropriately treats evidence which – they believed – were totally compelling. In such situations, this will lead to requests for review of judgments or new appeals, sometimes labelled as “frivolous” but in all instances adding to the workload of judges. Or it will derail any attempt to find a reasonable way to implement the judgment (e.g. when a suitable position has to be found for a reinstated complainant). This also pleads for efforts, on the part of the judge, to facilitate the “acceptability” of judgments by complainants.

A second element confirming the importance of “acceptability” in the efficiency of judgments is the well-known absence, in international law, of a coercive power equivalent to the state in domestic law. Who is going to go after an international organisation if it does not comply with a judgment? Who is going to go after the organisation if it doesn’t implement provisional measures, if it doesn’t pay damages? There is no international police and no bailiff that can go to an organisation’s headquarters, arrest its officials or seize its computers and furniture to enforce a judgment of the UNAT or the ILOAT. All this requires in practice the consent of the organisation. We are definitely dealing with a different situation than in domestic legal orders where, ultimately, the state can intervene and force the implementation of judgments.

And for tribunals to integrate “acceptability” in their assessment of appeals is all the more appropriate in that international administrative tribunals address labour issues and, in domestic legal systems, labour disputes can be brought before conciliators, arbitrators or peers (e.g. courts where employers and employees are equally represented). The cases brought before international administrative tribunals are not criminal cases, something that complainants’ counsels tend to overlook in the heat of the battle. Of course, a number of these issues relate to such serious matters as summary dismissal further to a disciplinary procedure, or separation from service due to restructuring or insufficient performance, but a lot of the cases that are being heard by tribunals have to do with promotions or performance evaluation reports that are not as positive as the complainants would have liked them to be. Overall, it is not a matter of life or death, individual liberties are not at stake. There is no reason to demand from international administrative tribunals that they apply criminal law standards to staff cases.

This leads me to my last preliminary comment: it’s not always because a certain mechanism is satisfactorily applied in domestic courts that we should, without further reflection, immediately extend it to the international level. I’ve already mentioned that there is no state to enforce a judgment by an international administrative tribunal. Due to this absence of ultimate coercive authority, it’s not sure that all the components of domestic judicial systems, often premised on the existence of a central coercive authority, would *ipso facto* solve apparently similar problems before international tribunals. Provisional measures are but one example. Sometimes, we ought to recognise that international administrative law is a branch of law in and of itself, leave our legal comfort zone – be it common law or civil law – and innovate.

In order to determine what kind of elements or factors could ensure the satisfactory implementation of judgments, thus promoting their overall efficiency, we need to look at what we want to achieve with a judgment. We’ve heard it this morning and

I think that I won't say anything outrageous if I state that we all – complainants or defendants – want the judge to “solve the issue”. Yet, not everybody in a dispute always shares the same understanding of what the issue really is, and the issue may itself evolve over time and eventually turn into an irrepressible desire for retribution.

What is in theory “solving the issue” for a tribunal? Legally, solving the issue is achieved through *restitutio in integrum*, by bringing things back to the way they were or as close as possible to the way they were before the problem at the origin of the judgment occurred. This is, with all due respect for international law scholars, quite impossible to achieve in real life, particularly in staff matters. Actually, it becomes even more difficult as the period of time between the event and the judgment increases. When an international official goes to court, he or she has already made one major step towards removing himself physically or mentally from the organisation for which he or she works. I'm not talking about loyalty to the organisation, although this can sometimes become an issue. I'm talking for instance about the potential discomfort this official may feel when working with or simply seeing, even occasionally, colleagues whose deeds he/she described in the most unpleasant and sometimes colourful way during the appeal (everyone directly concerned by a case can easily identify him/herself in the redacted version of a judgment). Someone who has gone through the process of litigating against his/her employer actually changes, and I witnessed it on a number of occasions. A disgruntled complainant may experience a lasting sentiment of injustice, become withdrawn, lose interest or pride in his/her work or experience difficulties in dealing effectively with colleagues. As recognised by the UN Dispute Tribunal (UNDT), appeals generate a certain amount of stress for complainants, which the UNDT has found relevant to compensate financially, even when the complainant did not otherwise prevail.

So how far can we go to re-establish the situation pre-existing the events that led to the judgment? And how far can we go to force the organisation to bring the situation back to the way it was? As I said, it seems to me psychologically and technically unrealistic to mandate measures intended to bring the situation back to the way it was when everything was nice and friendly. The extent of the deterioration of the staff member situation in the organisation must guide the *dispositif* of judgments, but not be the only benchmark. The judge must identify the actual issue, not merely tell the law (*dire le droit*), but contribute to actually solving the matter. It's not sufficient (in terms of efficiency of judgments) for the judge to order such or such measure according to the breach identified and/or to order material or moral damages. Financial compensation has been, since Saxon and Frankish laws, a conventional way to make up for a situation that cannot be mended (such as the loss of a limb). However, society has evolved since the 16th century and the situation of a staff member in a 21st century international organisation is a complex mix of law, personal interaction and psychology. In such a context, the efficient handling of staff appeals probably requires a more flexible or holistic approach.

Beside the applicable norms, a number of elements may need to be taken into account in order to issue an “efficient” judgment. I will address only a few of them hereafter.

First the judge should – and the ILOAT already seems to do so in managing its caseload – assess the real expectations of the complainant who files an appeal.

Some cases are initiated “as a matter of principle”. The complainant only wants the tribunal to vindicate his/her opinion against that of the organisation. His/her professional situation will hardly be affected by a judgment one way or the other. In an overcrowded docket, this type of case should be moved down the priority list.

The number of cases initiated before international administrative tribunals only “as a matter of principle” may not be that small, but they do not deserve our attention in a discussion regarding efficiency of judgments. What we should focus on are those cases where, either because of the gravity of the measure at issue or because of the circumstances of the complainant, a judgment will have an actual impact on his/her career, employment or even health.

It is a truism to say that justice cannot be rushed, but that a prompt judgment significantly contributes to the positive resolution of a matter. It now often takes a staff member three to four years to obtain a judgment and – if some people have their way – another two years of appeal may soon have to be added. It is hardly a caricature to say that by the time a final judgment is issued, that staff member will have actually spent almost a quarter of the average career of an international official litigating against his/her employer. Thus, the first important contributor to the efficiency of a judgment is speed, way before quality of the reasoning. Everybody can go along with a judgment that comes quickly even if no one is totally happy with the result. A judgment that comes several years after the case was initiated and, in addition, is not what the complainant expected or that is totally disconnected from his/her current situation will, unfortunately, only “add insult to injury”.

However, it is unlikely that a solution will be found anytime soon to assist administrative judges in accelerating the review of cases. For the moment, we can only take note of the issue and try to compensate this handicap. One option is that the judge should review the law and facts as they stood at the time of the challenged decision but, when deciding on remedies, the judgment should integrate the situation of the complainant and the organisation at the time of the judgment.

This is already done through the award of damages to be calculated from the date of the identified violation, plus interest, the latter not really reflecting financial realities. However, this is making the organisation pay for the consequences of something it does not really control, i.e. the time that the tribunal takes to issue a judgment. On the other hand, any income the complainant received over this period can be deducted from the material damages due by the organisation.

Whereas integrating in the calculation of damages the amount of time that passed between the challenged decision and the judgment in order to impose higher damages is to a certain extent unfair to the defendant, considering what happened to the complainant during that period is relevant. Indeed, once a staff member is in litigation for years, either he/she becomes completely engrossed into it, giving all his/her attention to the case and falling back on his/her professional skills, or he/she moves on.

If the staff member has moved on, the task of the judge is easier. Reasonable pecuniary damages will do. I believe that a large number of complainants move on with their lives and for them the judgment is ultimately, at best, some form of moral satisfaction and any damages awarded contribute to paying the lawyer's bills.

The situation where the complainant has been – so to speak – “eating, drinking and breathing” his/her dispute for years is the most psychologically complex. It is also a type of situation likely to mobilise a large amount of the organisation’s resources, human and financial, if the complainant initiates new appeals before other courts, or for instance sues member states of the organisation before the European Court of Human Rights.

This is where the judge should seek to be a bit forthcoming and innovative. Not providing for specific remedies in the judgment is not an option since, after several years of litigation, the parties are not very likely to be on the best speaking terms. Parties are more likely to follow an implementation “road map” drawn by the judge, provided it seems reasonably fair. At a minimum, the road map should set boundaries within which the parties should find a solution (financial damages versus reintegration, new assessment of posts commensurate with the staff member’s qualifications, etc.).

In this regard, this conference has discussed the relevance of adding new “upstream” procedures such as a stay of execution or a right of appeal, and this panel has discussed provisional measures as part of an improved enforcement mechanism. I have strong doubts regarding the need for provisional measures. What is their actual scope? They deal essentially with situations of urgency and irreparable damages. They are not meant to address structural delays in the administration of justice.

More generally, many international organisations have what we call an internal appeals system. These internal appeal systems have to complete their work generally in a period of time that is much, much shorter than tribunals. Internal appeals boards – at least the one we have at the WTO – normally seek to provide a solution to a complaint within a few months. So if a complainant is indeed in a very difficult situation as a result of an illegal decision, and not only in case of emergency or irreparable damages, the internal appeals process can provide a prompt solution. At the WTO, it has done just that on a number of occasions. We’ve had a dismissed staff member whose child had to undergo surgery. The Joint Appeals Board (JAB) worked out a solution with the director general to continue the medical coverage of the child. Another staff member was inappropriately dealt with in a disciplinary procedure. The WTO Joint Appeals Board found that the administration had failed to comply with due process and recommended that the procedures be started anew. The complainant was informed that a new investigation would be initiated and that, in the meantime, he would be compensated for his loss of income between the dismissal and the completion of the investigation. If the WTO were to find no serious misconduct as a result of the new investigation, the former staff member would either be reintegrated or compensated financially if reintegration was not possible. If the second investigation confirmed the existence of serious misconduct, then the dismissal would be confirmed, but the former staff member would still be compensated for loss of income for the time since he was first dismissed. The organisation paid for its mistake, but it was a reasonable amount both for it and for the staff member. The staff member did not have to remain in damaging uncertainty for several years pending a judgment and he could more easily move on with his life.

If, as demonstrated above, speed is of the essence to achieve effective results in a dispute, we must address the impact of a possible second degree of jurisdiction,

as it will undoubtedly further delay the completion of proceedings. Leaving aside dogmatic arguments and focusing on efficiency, I believe that, if you have an operational and respected internal appeals system, you do not need to get rid of it like the United Nations did and introduce a court of appeal. The WTO internal appeals system does solve problems quickly and pragmatically and avoid appeals before the ILOAT in all but the most difficult cases. We already hear complaints about how long it takes to obtain a judgment from most international administrative courts. If we add a second degree of jurisdiction it is obvious that it will slow things down even further and discourage the search for pragmatic solutions on both sides, because the appeal gives parties “another bite at the cherry”. We’ve also been talking about costs. Most arguments have been expressed already and I don’t think it’s necessary to carry on. The UN went one way at a tremendous cost of more than 50 million US dollars while other organisations remained with the existing model. Personally, I am more favourable to developing any procedure that can help solve a dispute at the earliest stage, including mutually agreed settlement, than to a system which we know takes more time, is more costly, and still has to prove that it limits unnecessary disputes and promotes effective solutions. Of course, what I suggest does not cater for those looking purely for revenge in the form of maximum disruption and reputational cost to their current or former employer (but often for the complainant too), but no system would ever satisfy those individuals, and they are hopefully a minority. I think that 99% of the cases are cases where people genuinely believe that they have been done wrong and just want it to be fixed in a satisfactory way. Those cases deserve to be addressed in good faith by international organisations, from doing some explaining to reviewing the decision at issue, to offering formal apologies or finding a mutually agreed solution. But, first and foremost, international organisations must seek to avoid antagonising the other party, be it by negligence or arrogance. I think international organisations are ready to do that because they have a real interest in it: not going through long litigation, saving on human and budgetary resources, and most importantly preserving a healthy working climate conducive to more efficiency.

Another point for consideration, which I mention with all due respect for our judges, is that tribunals must pay attention not to damage their own credibility by being overly “legalistic” in their determination of remedies at the expense of efficiency. International courts do not operate in “splendid isolation” but in the real world. Too much attraction to the judicial niceties found primarily in domestic systems (including stays of execution, preliminary rulings and a second degree of jurisdiction) may delight lawyers representing the parties, but they may divert the judges’ attention from the constructive and pragmatic resolution of disputes and imperil their role as the ultimate resort of staff members.

All the elements above partake in the concept of “acceptability”. A judgment must be acceptable, and not only in the interests of the organisation. Some will claim that the only acceptable judgment for an international organisation is a judgment that fully dismisses the complainant’s claims. This is actually quite far from the reality. The organisation – like the complainant – must not only be convinced that the judgment was fair in its result and well-reasoned, but also that it fixes the problem and can be implemented in good faith. This is the only way to maintain the parties’ confidence

in the judicial system. We always talk about the confidence of the complainant in the judicial system, but what about the defendant? Of course, an international organisation in such a case is a kind of “captive audience” and has no option but to defend itself if challenged before a tribunal. But the organisation is the party that will have to implement the judgment and, for that very reason, it needs to be prepared to implement it. I’d rather have, for the sake of due process, an international organisation that implements quickly damages of 10 000 Swiss francs than an organisation that replies to a judgment awarding hundreds of thousands of Swiss francs to a former staff member with a threat to withdraw from the tribunal’s jurisdiction.

There is, by the way, another factor in this equation: we are talking about public money. If judgments start awarding huge damages to complainants because they come too late in the day to solve the matter otherwise, they may still fail to contribute to solving the actual problem in a cost-effective way, and they will face a challenge about what taxpayers’ money is used for. Therefore, it is important to combine telling the law and identifying a constructive solution to the matter, but awarding high damages partly because the court cannot materially issue its judgment within a shorter time period is not adapted to the specificities of international administrative justice.

In conclusion, I believe we should move not towards provisional measures and a second degree of jurisdiction, but towards a system which promotes early resolution of issues, mutually agreed settlements and prompt issuance of judgments, even if this implies that judges engage in a more holistic approach and make the research for an actual solution prevail, where necessary, over legal reasoning. We’ve been discussing a lot of legal problems today but it’s important not to lose sight of the purpose of our judicial system and the fact that judgments ultimately deal with human beings and real-life problems. The more judgments will seek to achieve “acceptability” by the defendant, as defined in this presentation, the more they will be promptly and fully implemented and the more effective our judicial system will be, even without a second degree of jurisdiction. The alternative, for instance in the form of longer proceedings including a second degree of jurisdiction and ever-increasing damages awarded years after the fact, would almost equate to denial of justice.

Thank you very much.

ALEX HAINES, BARRISTER, BRETTON WOODS LAW

I’m much less polite than Anne-Marie and I do want to contradict Chris from the outset: I don’t always defend and represent employees. I do mostly, but I also represent international organisations against employees and I think that’s important because the lawyers for organisations see things from one perspective whereas a lawyer who has actually got experience of both sides may have a certain advantage from other perspectives.

I’ve got the worst slot today: the last slot before the drinks reception, so I’ll get straight to the point. Oscar Wilde once wrote that “there is only one thing in the world worse than being talked about, and that is not being talked about”. In the world of international organisations, and specifically the world of their internal justice systems including their appeal systems, we often talk about the international organisations with a

two-tier jurisdiction (or as Anne-Marie said a “*double degré de juridiction*”) such as the UN, the EU, the Organization of American States or the Commonwealth Secretariat. We analyse best practices and we follow their ground-breaking jurisprudence. And we also talk about (like Yves was talking about) international organisations who have evolved with hybrid appeal systems, retaining certain elements perhaps of those with the traditional two-tier jurisdiction. Examples include the IMF, the World Bank, and the Asian Development Bank.

But if we go back to the Oscar Wilde quote for the moment: what are we not talking about? Well, in my respectful submission, we are not talking about the gap in quality and indeed legality that is widening between appeal systems of international organisations. This is what I would like to address you on today. And before 1875 the appeal system in England and in Wales was chaotic and this was acknowledged by those who had the power to change it; and a series of parliamentary acts redesigned the entire British appeal system. And it’s now arguably one of the most robust in the world.

Although the appeal systems of international organisations do not suffer from chaos, or at least I’ve never experienced chaos in that way, there is in 2015 a remarkable discrepancy in equality. As a starting point the appeal system within the internal justice systems of international organisations has a different connotation depending on which international organisation is being examined. And that’s very important. And to be clear: when we talk about appeal system we are talking here about the process in place to grieve an administrative decision and then appeal the result of that grievance or the grievance process thereafter; so beyond the exhaustion of the normal administrative process.

Now as a gentle reminder, the internal justice systems provided by international organisations, including the appeal systems, are a substitute for the employment courts and tribunals of national jurisdiction. And this substitute should be a reasonable alternative means and Judges O’REGAN and SPIELMANN covered this already today. But despite the minimum adequate standard of an internal justice system from a fair trial or due process perspective, which is imposed – in my view – on international organisations by general principles or public international law and customary international human rights law, it is clear that the appeal systems of international organisations are very different. And these differences are not only expressed in the procedure of the system itself but also in the nature of the international administrative tribunal or whatever body it may be that sits at the top of the appeal system.

And to illustrate this striking disparity between the appeal systems of international organisations there are two case studies, practical examples if you like, that in my view are particularly poignant and that provide a good insight into some of these differences. First case study: it is of little interest to compare two international organisations which are different in nature and different in size. So here are two large and similar multilateral development banks or international financial institutions: the European Bank for Reconstruction and Development based in London and the Inter-American Development Bank based in Washington DC. In 2013, the conciliation committee, which was the IDB’s peer review process if you like, which sat beneath its Administrative Tribunal, was abolished and replaced by compulsory

mediation. Now just to be clear: this isn't a parallel alternative dispute resolution mechanism but a substitute, a replacement of what the bank had in place before. So the result of this change, this very recent change, is that there is now at the IDB no fact-finding body, even if it was only a recommendatory body or any body sitting beneath the tribunal. Now with this change the tribunal became the only body in the IDB's internal justice system, arguably depriving staff members of the possibility of having their cases reopened and re-examined. In this example there is no appeal system in the traditional sense because there is nothing to appeal to or nothing to appeal from; the Administrative Tribunal of the IDB exclusively conducts our hearings because it does not consider itself to be an independent body. It is in fact, in my view, incorrect to label the IDBAT's hearings as *de novo* because *de novo* implies that the tribunal is hearing the grievance afresh or beginning again. It is in reality not even a *de novo* hearing; it is less *de novo* if you like; it is a first-instance body which hears staff members' grievances for the first time. And the statute of the tribunal itself does not refer to appeals or to applications.

Now that on its own may not appear particularly remarkable depending on where you stand, but it's the contrast with its cousin in London, and like the IDB, the EBRD is also a multilateral development bank but as far as the EBRD's appeal system is concerned, compared to the IDB they could not be more different. Now the Administrative Tribunal's Rules and Statute of the EBRDAT refer to an appeals procedure – a very specific language – and just in case we thought that's just a semantics issue, it specifically refers to reliance on findings of facts. But the rules also state that the Administrative Tribunal should decide the appeal on the basis of, *inter alia*, the findings of facts of the grievance committee; the grievance committee at the EBRD is the body that sits beneath the tribunal. All references to an employee's grievances in these rules are defined as appeals. The tribunal's judgments at the EBRDAT are based on points of law and rely upon the grievance committee's findings of facts; and this reinforces the need for the grievance committee to have adequate procedures for eliciting or reducing evidence.

This tribunal in London rarely holds our hearings precisely because the grievance committee has already done that exercise, has already conducted the whole hearing to test the evidence and determine the facts. And, perhaps most importantly, the grievance committee's hearings are recorded and transcribed for the very purposes of an appeal to the tribunal. And just to give you a practical example: if the grievance committee hearing lasts three days, on day one by the time the lawyers and the employees and HR from the bank get back to their homes or get back to the office, the hearing's transcript has already been e-mailed in a PDF form. And that is very far removed from – in this particularly case study – a similar organisation in Washington DC.

So to conclude with regard to the EBRD, the Administrative Tribunal does not arrive at its own findings of facts, although in certain circumstances it might have to if there were deficiencies at the first level. But this is not a two-tier jurisdiction. The grievance committee cannot make decisions; it only makes recommendations. So this is an example of a hybrid system but still has the different definition attributed to the tribunal.

I don't propose to go through any of this now but this is just to give you an idea. This is comparing – if we call the first tier of each of these two multilateral development

banks – now I should point out that the EBRD also has mediation. This has not replaced the grievance committee but it's in parallel. And the question I would ask is simply this: is it normal that two similar international organisations of the same size and the same nature should have such different appeal systems?

Now I won't answer that question and neither will Oscar Wilde but the next case study is very different. These are two international organisations that are very small and both based in London: the International Coffee Organisation and the Commonwealth Foundation, which is not the Commonwealth Secretariat although it is in the same premises in London. And this is again a remarkable contrast in my view. The International Coffee Organisation does not have a tribunal. Not only does it not have its own tribunal, it doesn't have an external tribunal. It doesn't use the ILOAT or any other. After the peer review panel has examined a staff members' case, it makes a recommendation to the director; nothing unusual about that, but there is no appeal from the director's decision. The director, in 2015, in London, in an international organisation, has the final say in all staff members' grievances. And that's even if the original grievance was in relation to a decision taken by the director. So there is, in my submission in this example, no appeal system whatsoever. There is in fact no reasonable internal justice system because there is no right to appeal.

Now the Commonwealth Foundation: this is one of my favourite examples because it's a good example to rebut the argument that small organisations can't afford decent internal justice systems; there's not enough money, there's nothing we can do, we can't provide our employees with a decent system in which to air grievances. Now some international organisations chose to join an external tribunal. But the Commonwealth Foundation, in my opinion, in a very... a moment of clarity and maturity agreed to lower its immunities solely for the purpose of allowing staff members to have access to a system which guarantees them due process; and that system is simply the UK's employment courts and tribunals. So specifically for employment disputes in the Commonwealth Foundation, which is very small, I think it's about 20 people, it's really small, anybody who has an issue can go to the employment tribunals of England and Wales; and the staff members who bring those grievances have their cases aired in the English courts and the applicable law is not international administrative law – it's English law. And that should be seen as a threat to international organisations. That's not saying that there's a movement towards moving away from international administrative law; this is just a practical response to a problem and the solution in this case was: well, we don't need a tribunal. Let's just use the laws of England and Wales because they happen to be based in London and the system is pretty decent.

In terms of the internal justice systems of international organisations in international administrative law, appeal systems of these organisations vary to such an extent that to define "an appeal system" is particularly difficult. But the question is perhaps: which direction should international organisations take in the pursuit of their proper administration of justice? In other words: which direction achieves real progress and strengthens employees' fundamental rights?

I would just like to share with you two graphs from the Internal Justice Systems of International Organisations Legitimacy Index 2015. This index (which I won't go into

now) ranks international organisations against each other with regard to the factors and questions within their internal justice systems. The whole index is available on the cloud by the way.⁶⁹ Two graphs here or two charts – left and right. On the left, you have the first instance of litigation and on the right the second instance of litigation. And the point is simply this: somewhere on these charts we can imagine the Waite and Kennedy “reasonable alternative means” line – an imaginary line perhaps but a line nonetheless. And it’s not for me to say where the line lies, but in the interests of international administrative law and for the sake of everything we’ve achieved since the end of the Second World War, let us not shy away from scrutinising those international organisations that sit firmly at the bottom of the pile. I should say this is just representing 28 organisations.

I promised I’d be brief – and I have been. In fact, I like to think I’ve got the record today for the shortest speaker. But I would just like to finish, if I may, on a beautiful quote by August Reinisch specifically on this topic: “That national courts are increasingly looking not only at the availability of such alternative means of protection but also at their adequacy from a ‘fair trial’/‘due process’ perspective should not be viewed as a threat to administrative tribunals. Rather, in the sense of an enlightened judicial dialogue which might contribute to the strengthening of fundamental rights, it should support administrative tribunals in their quest for reforming their own methods of the ‘administration of justice.’” Thank you.

DISCUSSION AND CONCLUSIONS: SESSION 4

Jean-Didier SICAULT

Thank you chairman. Perhaps I could just react briefly to what has just been stated by Mr HAINES on his comparison between two organisations. The Inter-American Development Bank... one might regret it but it’s one choice... with the conciliation committee. It should be said that proceedings before the Administrative Tribunal of the Inter-American Development Bank is one of a kind. It is much lengthier. Let me explain what I mean. In the other organisations, there is a request for a re-examination administrative tribunal but what you usually have in an administrative tribunal is just an exchange of four memorials. But in the Inter-American Development Bank what happens is that when the fourth memorial reaches the registry we often realise that there is a different version of the facts being given and once the facts are presented in a different way ... you know one might argue that the interview at issue lasted 30 minutes as opposed to 35 minutes. Well what have they got to do then? They have to actually initiate an investigation, that investigative phase which the judges were not very concerned about 10 or 15 years ago but they have focused on this phase increasingly in recent years. That means that the parties now have the possibility of requesting from the president the right to question such or such a director or administrator on a particular subject. So usually the president will make a decision and convene this investigation session, which can last for a day at least and then all the facts are looked at very carefully; once there’s a transcription taken of that inquiry

69. www.coe.int/T/AdministrativeTribunal/Source/IJS_LegitimacyIndex2015_BrettonWoodsLaw.pdf.

you will receive a copy of it and you have a further opportunity of lodging a brief on the probative value of the evidence proffered. So it's not just a question of an exchange of four memorials; two memorials which have to be sent out at the same time which make further comments on the evidence. So I think that really gives a genuine opportunity to review a case which was originally based on written submissions with a real sort of genuine investigation. It's not a second tier or a second level or a second stage; I think that the suppression of the conciliation committee may be a regrettable development but the fact that there are these additional procedures built into the procedures slightly changes the picture. Thank you.

Emanuele REBASTI

I am Emanuele REBASTI from the Legal Service of the Council of the European Union and I would like to react to this idea that international administrative tribunals should also be driven by the principle of the acceptability of their judgments, so they should mind whether the organisations accept or not or can accept – if this decision is acceptable. I have to say, as a member of the Legal Service, of course I'm quite fascinated about this idea but I'm also quite sceptical, and I'm quite sceptical because on one hand there are already tools in the civil service law that allow full consideration of the concerns of the administration. I may refer to the principle of the interest of the service; I may refer also to the great level of discretion that is allowed to the administration. I can also refer to the structure itself of this judicial control that is a control of legality, so it's not going to replace the discretionary power of the administration but just to stay the law in another decision. This, by the way, raises a problem of effectiveness of the judgment sometimes when the administration takes a similar decision on different grounds.

But I'm also sceptical by reason of the function of an administrative tribunal that, at least in a central system that comes under a broader legal order, like the one of the European Union, is not just one of finding solutions with the administration but also and foremost one of setting the law on the basis of the basic human rights principles that sometimes come from the civil service law but more in general from the Charter of Human Rights, let's say the system that is used within the institution. So there are of course other means of taking into account the concerns of the administration. We have quoted before the possibility for friendly settlements; other means are provided by the ombudsman for instance and there is more a kind a dialogic exchange within the administration. But as far as we remain on the side of judicial control, I think that sometimes the role of the judge is exactly to stay firm and to declare what the law is – without being too much concerned about acceptance. After all, it's true that effectiveness is one of the principles that have to underpin the legitimacy of an international organisation. But, at least in an organisation like the European Union, the legitimacy comes foremost from the principle of legality and democratic entitlement and this of course can be respected only if/when something happens and an independent judicial body decides regardless of any kind of issue of acceptability.

Max JOHNSON

My name is Max JOHNSON and I was a legal adviser for 20 years at one of NATO's military subsidiary bodies – Supreme Headquarters Allied Powers Europe. In my 20 years

of defending my organisation before the NATO Appeals Board, before it became NATO's Administrative Tribunal, never once was an interlocutory issue, a provisional request... motivated by the board and I wondered to what extent the panel members believe that such decisions should be memorialised, either as issues come up or in the ultimate decision rendered by the tribunal? Because no staff member has the slightest idea of what kind of rationale there might be for or against one or another interlocutory matter: whether it be the question of the relevance of the board or tribunal calling witnesses; whether it be the issue of anonymity. So indeed I would be very appreciative to hear your comments on to what extent these decisions should be motivated?

Valérie MONTEBELLO

I come from the Legal Department of the European Parliament. I would like to give a brief contribution which is fully in keeping with what the previous speaker said concerning the suggestion about whether the administration or institution should accept or sign up to judicial decisions handed down by the administrative tribunal. Is that really an issue? But I think one point needs to be recalled, a matter which we attach great importance to in the Legal Department of the European Parliament; any decision taken by the administration, and I am speaking here to the legal adviser for the WTO, there is a presumption that these decisions are lawful. So from the standpoint of a staff member it is very difficult to challenge them before a judicial body where they obtain an element of that decision which is presumed to be lawful, the organisation is duty-bound to restore the staff member to the situation that obtained prior to the dispute arising. That has always been one of the guiding principles in the European Parliament. Where this is unfeasible – an exception has to be made – so there we have to think in terms of some form of compensation. But I think one of the foundations of international law or European employment law as recalled by the previous speaker is a clear separation between the powers of the judge and the administration and I think we need to be very concerned not to transgress this dividing line.

So I would like to put a similar question and I'm rather perplexed about this whole issue about ensuring that judicial decisions should always be acceptable to the administration. Thank you.

Horstpeter KREPPEL

Now since we are talking about the European Union jurisdiction, I feel that we have a problem with "*efficacité des jugements*" since we have only two forms: annulment and payment. And since we have only the possibility to annul a decision but not say what to do, it happens not rather seldomly that the administration does not execute our judgment and that the staff member then has to go again before the court, spending money and waiting for another two years before the second judgment comes. And if there is an administration which does not want to comply with that, we cannot do anything. And we have cases where the original problem was the REC, the annual evaluation in the 1990s, and we are now confronted by I think the fourth or fifth case concerning the original REC. What is the effectiveness of our jurisdiction? I think one of the major demands which we should make is to allow all the judges to make injunctions. I hope that the message was there.

Alex HAINES

It wasn't really a question but the gentleman – I forgot his name – who was talking about the Inter-American Development Bank, absolutely point taken. I mean the example was an extreme example but despite the system you've laid out, it still doesn't remedy the fact that there is just one body. So except that particular stage of the procedure, it doesn't – in my view – replace the simple truth that it's a step backward not a step forward, but point taken.

Anne-Marie THEVENOT-WERNER

Some points: one on the provisional measures where it was asked, I'm not sure if I understood the question correctly, what would be the rationale of having decisions on provisional measures? Well, of course, it's not a question of life and death really for staff members, but in some cases it can become almost a question of life and death – if you lose your job; if you lose your possibility to have a career in that organisation; if you're on administrative leave without pay for a long time and you even have to wait another six months and you are in Liberia and you have a family to feed and it's very difficult to find another job – it can be very useful if all these conditions which are interpreted very restrictively by the first-instance tribunal of the United Nations, it can make a lot of sense to allow the tribunal to adopt such decisions.

Furthermore, it was stated by another member of the panel that you need implementable judgments and provisional measures that allow you to ensure that the decision that will be taken will be implementable. So actually it would be useful to accept such a possibility especially as it enforces the idea of... well, the organisation will rapidly say: "okay, the tribunal is actually rather favourable for the complainant, so okay let's try to find another solution maybe in order not to continue the procedure". So there are actually a lot of advantages to allow provisional measures to be taken.

I agree that there needs to be a restrictive interpretation but not too restrictive either; and it should be accepted and it's astonishing that the Administrative Tribunal of the ILO does not have a practice on that question.

Furthermore, on the quality of the judgments, I think also that it's a little bit too easy to say: "okay, let's just have a judgment and then the case is settled and whether it's a good judgment or not, who cares?" I think that's a little bit too easy and I think taking into account that we are at the beginning of the 21st century we should take into account the human rights standards at least at a minimum. I think I'll leave it to that. Thank you.

Yves RENOUF

I think that if the courts were only stating the law, well, I guess we probably would not have the European constructions; a number of things would be missing. So I mean I'm very happy to have courts only stating the law but I don't think that's enough. Thank you.

Session 5

The specific nature of international civil service law when compared with national law

LINDA TAYLOR, EXECUTIVE DIRECTOR, OFFICE OF ADMINISTRATION OF JUSTICE, UNITED NATIONS

My name is Linda TAYLOR and I'm privileged to moderate this session on the specific nature of international civil service law when compared with national law. We are fortunate to have three distinguished panellists who will address various aspects of this topic:

- ▶ Ms Celia GOLDMAN is Registrar and Senior Legal Adviser at the International Monetary Fund Administrative Tribunal; she also serves as Judge of the European Stability Mechanism Administrative Tribunal. She is a frequent contributor to symposia on the law of the international civil service and many of you will remember her as the convener of last year's symposium in Washington on the future of international administrative law.
- ▶ Doctor Yaraslau KRYVOI is an Associate Professor at the University of West London. Professor KRYVOI is the immediate past Co-Chair of the American Bar Association Committee on International Courts and Tribunals. He practised international dispute resolution with law firms in Bold, Washington DC and London. He's also served as a consultant for the Economic Court of the Commonwealth of Independent States advising on international administrative law matters.
- ▶ Mr Christos VASSILOPOULOS is a Legal Counsel at the Central Bank of Luxembourg and a judge of the NATO Administrative Tribunal. He's exercised senior positions in the Greek Public Administration and has lectured in public law and European law at several universities. He's been *référéndaire* at the Court of First Instance and the Court of Justice of the European Union and former alternate member of the NATO Appeals Board.

The format of the session will be that each speaker will make a presentation for 15 minutes. At the end of the presentations the speakers themselves will have a chance to react to each other's presentations for a few minutes; after that the floor will be opened for discussion. Thank you. I now call upon the first speaker, Ms Celia GOLDMAN.

CELIA GOLDMAN, REGISTRAR OF THE IMF ADMINISTRATIVE TRIBUNAL AND JUDGE OF THE ADMINISTRATIVE TRIBUNAL OF THE EUROPEAN STABILITY MECHANISM

Good morning. First of all, I would like to thank the organisers of the conference: Sergio SANSOTTA and his team. I wish a very happy 50th birthday to the Administrative Tribunal of the Council of Europe!

I would like to invite you this morning to think about the law of the international civil service from a pluralist approach; there are a couple of overarching points that I hope to make this morning. One is that international administrative law is a dynamic system with multiple actors who may advance a variety of competing claims, and it is the role of international administrative tribunals frequently to referee these competing claims. My view is that the legitimacy of the law of the international civil service depends on its ability to find a reasoned approach to balancing the claims of these competing legal communities.

The international civil servant stands at the crossroads of several competing legal communities: one is the law of the organisation itself, which is made up of legislative rules as well as rules adopted by management. The international civil servant is also subject to his own national law, the national law of the host country, and sometimes the member states' national law. At the same time, there are international norms that often govern the law of the international civil service and these may be established by other international administrative tribunals, by other sorts of courts and tribunals, as well as by international human rights declarations.

I am going to start with a very early case of the Council of Europe Appeals Board, as it was known back in 1973, because I think it demonstrates some important principles; it's a little bit of a bridge to some of the things that were discussed yesterday morning. So in the case of *Artzet v. Secretary General* (Council of Europe Appeals Board, No. 8 /1972), an official brought a challenge to the application of a staff regulation that provided for the payment of a family allowance to heads of family, where the definition of heads of family differed as to men and women. One of the interesting things about this case is the sources of law that were used, and quite expressly pointed to, in the decision. These included the "general principles of law that must prevail in the legal system of international organisations", as well the European Convention on Human Rights, the European Social Charter which we discussed yesterday, and global international human rights instruments:

The absence of discrimination based on sex, and equal pay for workers of either sex constitute, at the present time, one of the general principles of law. Without wishing to go into the question of the national laws of member States of the Council of Europe, in particular that of the State in which the Council's headquarters are situate, the Board notes that Article 14 of the European Convention on Human Rights prohibits ... any discrimination based on sex. Moreover, under ... the European Social Charter, the Contracting Parties undertake "to recognise the right of men and women workers to equal pay for work of equal value".

An important piece of this long quotation is that the tribunal did not wish to go into the question of national law, so it quite explicitly relied upon international law.

Another important element of this decision was testing the regulation against “general principles of law,” which the tribunal found to have greater “legal weight” than the regulation in question.

So, just to summarise some of the main points on this decision: first, I think it is very important because it does show a principle of judicial review in testing the legality of the staff rules against higher norms. Second, I’ve mentioned the applicable sources of law, in particular that the tribunal wanted to abstain from applying the national law of the member states or the host state.

Now I am going to consider a much more recent case from a different tribunal, the Commonwealth Secretariat Arbitral Tribunal: *MH and Commonwealth Secretariat*, CSAT Judgment No. 15 (2010). This is a case that challenged the organisation’s mandatory retirement age. This is an interesting case because the applicant cited national law on behalf of his challenge to the mandatory retirement age, and the tribunal was very clear in articulating its sources as being first of all the “Commonwealth principles relating to fundamental human rights”, the practice of other administrative tribunals, and a very interesting provision in the CSAT Statute (Article XII.1) which says that the “Tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries.” So I think that’s about as clear a statement as one can find about the preference for international law.

Why do international administrative tribunals eschew national law? I think there are a couple of reasons for this: one is that they recognise that the organisation’s obligation is not to favour the law of one state over another; there’s also the recognition of the staff member’s obligation to the organisation rather than to an individual member state. And finally I think it also does recognise that there is a common body of international administrative law.

While the jurisprudence shows a preference for international law, sometimes, however, international administrative tribunals do confront the issue of nationality and national law directly, and these confrontations often occur at the margins of the employment relationship, most commonly in issues relating to family status. These are, I think, very interesting cases, and they have generated some of the very few dissenting opinions that one finds in the administrative tribunals.

The first question we might ask is: does an international civil servant shed his nationality at the workplace door? And I think the answer to that is “yes” and “no”. Yes, certainly in carrying out their functions, their loyalty will be to the organisation. Nonetheless, nationality may be relevant for certain elements of the employment relationship, as we will see.

We start with a basic principle of equal treatment; we see this in the standard of review that was articulated by the World Bank Administrative Tribunal in *de Merode*, WBAT Decision No. 1 (1981), in which unjustifiable discrimination between individuals or groups of staff is a basis for invalidating a decision. Likewise, the Statutory Commentary on the IMF Administrative Tribunal picked up the same notion in articulating the standard of review for that tribunal. The word “discrimination” is used here to signify a basic principle of equal treatment, and there’s a series of

cases from the IMF Administrative Tribunal considering distinctions made between different categories of staff for the purpose of certain benefits, for example, for expatriate benefits. That kind of discrimination (which may be justifiable or unjustifiable) is different from the kind of discrimination we talk about when we talk about violation of human rights norms.

So, as a starting point, I think whenever an administrative tribunal is reviewing a decision, it may look to a basic equal treatment principle. This may come up in terms of nationality in a couple of ways. I think probably the most interesting application of this is the question of whether the organisation's obligation to treat staff equally requires it to remedy inequalities that might be attributed to national law. The best known example of this problem is found in the tax reimbursement cases. I'm not going to go into a discussion of these cases here; there are many of them, and it's really quite a nuanced area. Of course, what it touches on is the principle of "equal pay for equal work" and whether that should be assessed on the basis of net pay or gross pay. It's a complicated question that, as you will see in reading the cases, depends on the law of the organisation and the relationship that the articles of agreement create between the organisation and the member states.

A much simpler example of the equal treatment problem that arises in relation to nationality is the example of national holidays. In the case of *Vollering* (EPO), ILOAT Judgment No. 1194 (1992), the ILO Administrative Tribunal considered a challenge to the granting of a special leave day for German staff members of the European Patent Office (EPO) who were posted at The Hague but not to staff members of other nationalities posted at The Hague on the date of German reunification. In this case, the ILO Administrative Tribunal applied the basic equal treatment principle, i.e. that like facts require like treatment and different facts allow for different treatment. The ILOAT decided that the differentiation in treatment of the German staff was justified because they were not in the same position as staff of other nationalities.

Now we are going to turn to another issue which raises not only the issue of basic equal treatment but also the possibility of considering human rights norms, in particular the norm against discrimination on the basis of sexual orientation. There are a series of cases on the question of how the tribunal might define the word "spouse" for the purpose of family benefits. There are a number of potential approaches: one can look to the law of the staff member's nationality; the law of the host state; the law of the state of the partnership or marriage. These cases raise both the question of equal treatment of staff members of different nationalities, as well as the human rights issue. I am going to talk about a couple of these cases.

One of the first was *Mr R.A.-O.* (UNESCO), ILOAT Judgment No. 2193 (2003). The applicant was denied a dependant allowance which he sought for his partner, with whom he had established a partnership under the French "PACS" law. The ILO Administrative Tribunal examined this as an equal treatment case, as opposed to a discrimination case implicating international human rights, and decided that the official was in a different situation from someone who had a legal marriage because, under French law, there was a distinction between marriage and the "PACS." There's a very interesting dissenting opinion which suggests the inadequacy of the equal

treatment principle in a case where, in the opinion of the dissenting judge, there was discrimination on the basis of sexual orientation.

Another ILOAT decision, *Mr D.B.* (ILO), ILOAT Judgment No. 2550 (2006), involved a German life partnership agreement. This is an interesting case because the staff member expressly raises the issue of discrimination on the basis of sexual orientation, as well as nationality, as well as discrimination vis-à-vis international civil servants in other organisations where same-sex partnerships are recognised. He points out that international civil servants' lives are not normally governed by national law. The organisation also has interesting arguments here: it argued that the regulation was not intended to discriminate on the basis of sexual orientation and that this was indeed one of those differences in treatment that was the result of differences in the law of the countries concerned. Moreover, the organisation makes the argument that national laws reflect the diversity of opinion of the member states and that there should be respect for that diversity. In this case, the ILO Administrative Tribunal looked to the law of Germany, and the outcome here was different from in the other case, but the method is the same in looking at the law of the state in which the partnership was formed.

Turning to the jurisprudence of another international administrative tribunal, we will look at one further case on the issue of same-sex partnerships. This case, *Wv. European Commission*, Case F-86/09 (2010), is from the European Union Civil Service Tribunal (EUCST), where the rules of the organisation provided for a household allowance to what they termed a "stable non-marital partner" if the couple has no access to legal marriage in a member state. So the question here was whether this particular couple had access to legal marriage in a member state. The facts are very interesting in this case: the official was a dual national of Belgium, where legal marriage is available for same-sex couples, and Morocco, where homosexual acts are criminalised. So I think this is a very courageous decision of the EUCST where it cites the legislative interest here, as articulated in the preamble to the regulations, which was to ensure equal opportunities regardless of sexual orientation or marital status. It cites the EU Charter of Fundamental Rights and basically says that although there was formally access to marriage in Belgium it was effectively not access because of the risk that this official would take given his dual nationality in Morocco.

I just would like to mention another, completely different, approach to dealing with this problem of defining family status and that is one that the IMF and some other organisations have taken, which is to allow the organisation essentially to allow staff members to define their own family status through registration of a domestic partnership with the organisation, by affidavit or by producing legal documentation from the jurisdiction where the partnership was formed and recognised.

We are now on the last little chapter here, which is to discuss how a host state can actually influence the law of the international civil service in a sort of indirect way on the basis of the organisations' immunities. One example is that non-compliance with local laws may constitute misconduct under the laws of the organisation; those regulations are a direct result of the immunities that the international organisations enjoy and hope to continue to enjoy by enacting regulations like that.

So we have a couple of interesting cases from the IMF Administrative Tribunal; these have to do with family support orders. These cases arose out of the background of the host state's issuing a diplomatic note that warned international organisations about employees' using the organisation's immunity to shield themselves from personal obligations as a result of court orders for family support. Essentially, the United States Government was suggesting that it might withdraw immunities if the organisations did not take action to see that their staff members complied with domestic court orders. So the IMF and a number of other organisations headquartered in the US amended their internal law in accordance with this.

In the case of *Mr. "P" (No. 2) v. IMF*, IMFAT Judgment No. 2001-2, Mr. "P"'s ex-spouse sought to give effect under the IMF staff retirement plan to a US divorce judgment which granted her a percentage of the retiree's pension benefits. The retiree invoked a competing divorce from Egypt that did not include support obligations. The decision of the IMF Administrative Tribunal was to give effect to the US judgment because it met the criteria prescribed by the IMF's internal law for giving effect to such judgments. The tribunal expressly dealt with the issue of what law it applied and said that it did not enforce either the law of Maryland or the law of Egypt; rather, its decision responded to what it called the "public policy of its forum," that is, the internal law of the Fund.

In a later case of this type, *Ms. "M" and Dr. "M" v. IMF*, IMFAT Judgment No. 2006-6, the IMFAT may be said to have expanded on the principles embodied in the staff retirement plan. In this case, the court orders (which were for child support) came from Germany. The German orders did not expressly require making an allocation from the retiree's pension. The tribunal noted that the Fund had amended its internal law in response to issues that had arisen in the United States, but it was concerned that the policy raised an issue of fair treatment of the Fund's staff and their dependants in diverse legal systems. And for this reason, the tribunal commented that the Fund is a "universal organisation that in its operation must give due weight to the legal principles and procedures of a variety of jurisdictions". Again, it mentioned the public policy of its own forum, which is the internal law of the Fund, and it did give effect to the German court orders.

Another interesting comment that the IMF Administrative Tribunal made was that one of the considerations in deciding to give effect to the German court orders was that, because of the effect of immunities, national courts might be reluctant to issue an order directly against the retirement fund of the international organisation.

These cases show what may happen when the host country adopts a policy using its power to grant and withhold immunities: the organisation amended its law in response, and then the tribunal, through its jurisprudence, has universalised the principle that grew out of the concerns that had been articulated by the particular host country.

I understand my time is almost up so I think I will leave it at that. Thank you.

Abstract

This article examines the law applied by the administrative tribunals of international organisations when resolving disputes between international organisations and international civil servants. The analysis suggests that international administrative tribunals primarily rely on employment contracts and internal law of international organisations while only rarely referencing international law. This article argues that international administrative tribunals should specifically define in their relevant statutes the sources of law applicable to international administrative disputes, and that they should specifically distinguish such sources from non-legal norms. The article further notes the modern trend of international administrative tribunals of giving more weight to general principles of law, and ultimately argues that these tribunals should instead establish the supremacy of international law, particularly fundamental principles of international labour law, to the internal law of international organisations. The establishment of such a hierarchy will make international administrative law more legitimate, coherent and predictable.

1. Introduction

When the Statute of the International Court of Justice (ICJ) was drafted, the majority of states considered that it would hardly be possible to compel states to submit their disputes to a court of law without specifying the applicable law. According to the US member of the drafting committee, “[I]t [was] inconceivable that a Government would agree to allow itself to be arraigned before a court which bases its sentences on its subjective conceptions of the principles of justice.”⁷¹

As a result, Article 38 of the Statute of the ICJ lists the applicable sources of international law.⁷² Yet, statutes of most international administrative tribunals remain silent

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71. League of Nations, Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice, *Proces-verbaux of the Proceedings of the Committee* 309 (2007).

72. Article 38(1) of the Statute of the International Court of Justice provides for international conventions, international custom, general principles of law as well as judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

on the applicable law⁷³ when resolving employment disputes between international civil servants and international organisations.⁷⁴

For example, most founding documents of international organisations do not even explicitly mandate that the organisations respect human rights.⁷⁵ International civil servants are hired, employed, trained, and fired not in accordance with national labour laws but in accordance with specially devised legal rules that apply only within a particular organisation.⁷⁶ The number of people working in an international organisation may rival the number of people living in some small states⁷⁷ and therefore rules which regulate their employment are not just a theoretical matter.

Although international organisations were originally only tasked with preparing documents for political meetings, they now engage in a range of varied activities – from the harmonisation of law and the standardisation of technical rules to international peacekeeping missions and the temporary administration of sovereign territories.⁷⁸

Disputes arising out of employment relations between international civil servants and international organisations require specially designated dispute resolution bodies, such as the International Labour Organization (ILO) Administrative Tribunal,⁷⁹ the United Nations (UN) Dispute Tribunal,⁸⁰ and the World Bank Administrative

73. See Amerasinghe C. F. (1994), *The law of the international civil service*, (vol. 1, 2nd edn.) at 103-09.

74. International organisation for the purpose of this article means an organisation established by a treaty or other instrument governed by international law and that possessing its own international legal personality. International Law Commission, "Draft articles on the responsibility of international organizations", 2011, Article 2, available at: http://legal.un.org/ilc/texts/9_11.shtml.

75. Peters A. (2011), "The Constitutionalisation of International Organisations", in Walker N., Shaw J. and Tierney S. (eds), *Europe's constitutional mosaic*, pp. 253, 267.

76. See Section IV below.

77. The United Nations (UN) International Civil Service Commission developed a common system of salaries, allowances, and benefits that applies to approximately 100 000 staff members serving at over 650 locations around the world. United Nations International Civil Service Commission, United Nations Common System of Salaries, Allowances and Benefits, 2012, available at <http://icsc.un.org/resources/pdfs/sal/sabeng12.pdf>. The World Bank has over 9 000 employees and maintains over 124 offices across the globe. See The World Bank, About us, available at www.worldbank.org/en/about.

78. See, e.g. Security Council Resolution 1244 (1999) establishing the United Nations Interim Administration Mission in Kosovo (UNMIK) S/RES/1244 (1999).

79. The International Labour Organization (ILO) Administrative Tribunal is one of the oldest tribunals, functioning as a successor to the League of Nations Tribunal. The ILO Administrative Tribunal has decided over 3 000 cases. In addition to having jurisdiction over disputes involving the ILO, the ILO Administrative Tribunal also has jurisdiction over disputes involving employees of other international organisations, such as the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, and nearly 60 other organisations. See www.ilo.org/tribunal/lang--en/index.htm.

80. The UN Dispute Tribunal evaluates complaints from the UN and the UN specialised agencies, such as the UN General Secretariat, the International Maritime Organization, the International Civil Aviation Organization, and nearly 30 other entities. In 2009, the UN Dispute Tribunal replaced the UN Administrative Tribunal, which had previously considered such employment disputes between 1949 and 2009. See www.un.org/en/oaj/dispute/jurisdiction.shtml.

Tribunal.⁸¹ However, the statutes of these tribunals often do not contain provisions outlining the applicable law, even though such tribunals are completely detached from domestic legal systems. Rather, these tribunals usually base their analysis solely on the interpretation of employment contracts or applicable staff regulations.

Moreover, international administrative tribunals, including the ILO Administrative Tribunal, which has decided the highest number of employment disputes between international organisations and international civil servants,⁸² fail to recognise explicitly the applicability of fundamental ILO conventions to their decisions.⁸³ Not surprisingly then, scholars point to a concerning low rate of decisions made by international administrative tribunals in favour of employees.⁸⁴ Most of these employment disputes are decided on the basis of written evidence, without discovery, and by judges without tenure who are usually appointed by the same organisation against which an employee has filed a complaint.⁸⁵ Some scholars refer to this system of administrative justice as “a fig leaf of justice, a woeful pretence of due process.”⁸⁶

A concrete example demonstrates the practical implications of this problem. Assume that the internal rules of an international organisation provide that only male dependants can benefit from having their non-dependant spouses travel on home leave at the organisation’s expense.⁸⁷ If a male employee brings a dispute to the Administrative Tribunal to cover the travel expenses of his female dependant, the tribunal will likely decide that the internal law of the organisation should prevail over the general principle of non-discrimination on the grounds that the organisation’s rule is more specific. Such a ruling would clearly contradict the principle of gender non-discrimination proclaimed in Article 8 of the UN Charter,⁸⁸ numerous human rights instruments,⁸⁹ and ILO conventions and recommendations.⁹⁰ Yet, the

81. The World Bank, the International Monetary Fund, the European Bank for Reconstruction and Development, the Asian Development Bank, and several other organisations each maintain their own tribunal.

82. See the Administrative Tribunal of the International Labour Organization, available at www.ilo.org/tribunal/lang--en/index.htm.

83. See below.

84. Parish M. (2010), “An essay on the accountability of international organizations”, *International Organizations Law Review* 7, 2 (explaining that in 2009, none of the cases decided by the World Bank Administrative Tribunal provided applicants with a substantial award in accordance with the remedies sought).

85. *Ibid.*

86. *Ibid.*, pp. 10-11.

87. This example is based on the facts of the UN Administrative Tribunal’s decision in *Mullan v. The Secretary-General of the United Nations* (UNAT, Judgment No. 162, 10 October 1972). The UN Administrative Tribunal refused to apply the general principle of non-discrimination because a specific internal regulation permitted such discrimination.

88. Article 8 of the United Nations Charter states, “The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.”

89. Part II, Article 4 of the International Covenant on Civil and Political Rights (1966); Article 14 of the European Convention on Human Rights (1950); Article 1, American Convention on Human Rights (1969).

90. Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111); Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111).

international civil servant cannot challenge this judgment in the absence of an appeal procedure. In other words, a controversial internal regulation prevails over the internationally recognised principle of non-discrimination.

This article explains the need for a hierarchy of sources of law to avoid situations similar to the one described above. Specifically, this article proposes a hierarchy between international law, including general principles of law, and the internal law of international organisations, in which international law prevails over conflicting provisions of an international organisation's internal law. The article further argues that this proposed hierarchy will help to distinguish between legal and non-legal rules that are applicable in international administrative proceedings and help to limit administrative discretion – a primary goal of any administrative law.⁹¹ A clear normative hierarchy will also enhance the clarity of the law, increase the coherence of principles and procedures, and establish the mechanisms needed to fill gaps in existing law.

This article proposes that this hierarchy could follow from amending statutes of administrative tribunals or changing their jurisprudence to establish a rule that principles of international administrative law, such as non-discrimination, non-retroactivity, proportionality, legitimate expectations, and fundamental labour rights recognised by the ILO should prevail over conflicting rules of internal law prescribed by international organisations.

Part II of this article introduces the concept of international administrative law and explains how it differs from the traditional branches of international public law. Part III then analyses the regulations and jurisprudence of various international administrative tribunals to demonstrate which sources of law these bodies apply to dispute resolution proceedings. Next, Part IV explains how the proposed hierarchy between international law and the internal law of international organisations will enhance legal certainty, equality of the parties, and overall legitimacy of international administrative law. Lastly, Part V briefly concludes by describing how to transform the idea of normative hierarchy into practice.

II. The evolution of international administrative law

International administrative law⁹² initially developed following the creation of the League of Nations Administrative Tribunal in the 1920s.⁹³ This branch of international public law determines the rights and obligations of international civil servants in their dealings with public bodies, primarily intergovernmental organisations.⁹⁴ International administrative law imposes restraints on the exercise of power by international

91. See, generally, Galligan D. J. (1990), *Discretionary powers: a legal study of official discretion*.

92. International administrative law should not be confused with global administrative law. Global administrative law is a relatively new concept much wider in scope than international administrative law and comprises “the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies” and includes rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management. See Kingsbury B., Krisch N. and Stewart R. (2005), *The emergence of global administrative law*, available at SSRN: <http://ssrn.com/abstract=692628> or <http://dx.doi.org/10.2139/ssrn.692628>.

93. Amerasinghe C. F. (1994) *The law of the international civil service*, Vol. 1, pp. 49 et seq.

94. *Ibid.*

organisations vis-à-vis international civil servants and provides accountability and legitimacy for the exercise of public power.⁹⁵

The structure, scope, and content of administrative regulations appear surprisingly similar from one organisation to another. International administrative regulations typically provide for the right of international civil servants to appear before international administrative tribunals and extend these tribunals' jurisdiction over disputes involving alleged violations of employment contracts or terms of appointment.⁹⁶ In addition, most statutes of international administrative tribunals and their rules of procedure describe in detail the composition of the administrative tribunals and their obligation to act independently and impartially.⁹⁷ These statutes usually confer on the relevant body the power to render binding judgments.⁹⁸

Although the phrase international administrative law is well established in academic literature, the phrase may be somewhat misleading. Unlike states, which receive restricted immunity, international organisations enjoy absolute immunity,⁹⁹ and international civil servants employed by international institutions are therefore generally precluded from filing complaints in national courts against their employer organisations.¹⁰⁰ As a result, procedures of administrative tribunals often resemble court proceedings involving employment law rather than traditional administrative reviews. Furthermore, an international organisation can prevent another court from scrutinising an international administrative tribunal decision by simply asserting immunity from jurisdiction.¹⁰¹

International administrative law bears a number of distinctive conceptual features compared to traditional branches of public international law, such as international labour law. Unlike international administrative law, the primary instruments of international labour law include international conventions and recommendations,¹⁰² case law of ILO committees,¹⁰³ and fundamental principles contained in the Declaration on Fundamental Principles and Rights at Work.¹⁰⁴

95. von Bogdandy A. et al. (2008), "Developing the publicness of public international law: towards a legal framework for global governance activities", *German Law Journal* 9, pp. 1375, 1380.

96. See, e.g. Statute of the Administrative Tribunal of the International Labour Organization, available at www.ilo.org/tribunal/about-us/WCMS_496759/lang--fr/index.htm, European Bank for Reconstruction and Development Administrative Tribunal Statute and Rules of Procedure, available at www.ebrd.com/downloads/integrity/appeals.pdf.

97. *Ibid.*

98. *Ibid.*

99. Council of Europe Parliamentary Assembly, Accountability of International Organisations for Human Rights Violations, 17 December 2013, paragraphs 28-39.

100. See, e.g. EBRDAT, *Appellant v. EBRD*, Decision on Remedy and Judgment, 2006/AT/04.

101. The purpose of the immunity from jurisdiction enjoyed by international organisations is to preserve the independence of international organisations and international civil servants, and to protect them from any undue interference by the host state. Pingel-Lenuzza I., Gaillard E. (2002), "International organisation and immunity from jurisdiction: to restrict or to bypass", *International and Comparative Law Quarterly* 51, 1.

102. See Servais J.-M. (2005), *International Labour Law*.

103. See, e.g. *Freedom of Association. Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 4th (revised) edn, 1996.

104. ILO (1998), Declaration on Fundamental Principles and Rights at Work, available at www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

However, each of these sources only regulates the conduct of states, and in order for international labour standards to bind private parties, states must actually implement such standards by means of domestic legislation.¹⁰⁵ Unlike international labour law, however, international administrative law does not have a basis in any domestic legal system and actually creates rights and obligations that directly bind private individuals and intergovernmental organisations. In a sense then, international administrative law represents a completely autonomous form of international labour regulation as it does not require implementing domestic legislation.

International administrative law also differs from other international dispute resolution regimes, such as international human rights law and international investment law where individuals bring direct claims against subjects of public international law such as states. Similar to international human rights law, international administrative law involves disputes between private actors and subjects of public international law.

International administrative law also engages disputes, which arise out of exercise of public authority by a subject of international law. But unlike international human rights law, international administrative law does not directly intersect with domestic legal systems. The system of international human rights law, such as the European Convention on Human Rights, usually serves as a next step after exhausting all remedies in domestic litigation,¹⁰⁶ while intergovernmental organisations are typically immune from jurisdiction entirely in domestic courts. As a result, if an individual sought to enforce the judgment of an international administrative tribunal in a national court, an international organisation would likely respond by asserting an immunity defence.¹⁰⁷

As many conceptual issues of international administrative law remain unaddressed, cross-regime comparisons with other fields, such as international investment law, international human rights law, or the emerging principles of European administrative law, could prove useful. One must understand, however, that international administrative law represents a unique self-contained system that must be distinguished from other international legal regimes.¹⁰⁸ A full understanding of this system requires a detailed examination of international administrative law, its sources, and its relationship with general international law.

105. Shaw M. (2008), *International law*, pp. 129-39.

106. *Ibid.*, p. 273.

107. In practice international organisations almost always respect judgments of such tribunals. See Amerasinghe C. F. (2005), *Principles of the institutional law of international organisations*, p. 793.

108. In a broader sense, self-contained regimes are interrelated wholes of primary and secondary rules that cover some particular problem differently from the way it would otherwise be covered under general law. Examples of other self-contained regimes include WTO law or laws of diplomatic protection. See generally, report of the International Law Commission, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". Report of the Study Group of the International Law Commission, 58th sess., 1 May to 9 June, 3 July to 11 August 2006, UN Doc. A/CN.4/L.682, 65-69 (13 April 2006) (finalised by Martti Koskeniemi).

III. Sources of international administrative law

A. The concept of sources of law

In its 2004 report on the accountability of international organisations, the International Law Association recommended that international administrative tribunals refrain from adopting too restrictive an approach towards the sources of law at the tribunals' disposal.¹⁰⁹ However, it appears that the opposite problem remains more serious, namely the lack of clarity on the applicable law governing decision making in international administrative law.¹¹⁰

According to the concept of source of law, law is determined by its source and ultimately boils down to a pedigree test.¹¹¹ The very term law helps to avoid replacing usual binding norms with non-binding arrangements. The notion of sources of law presumes an exhaustive statement of the ways in which law can be established and changed.¹¹² The concept aims to ensure stability and certainty in the ascertainment of law.

Early positivists rooted the source theory in authority.¹¹³ According to this construction, in order to ascertain a rule of law, one had to identify the authority of the legal norm's origin. Later positivists believed that legal rules derived from social conventions rather than authority.¹¹⁴ Yet, other schools of thought argued for the process-based identification of law, emphasising the role of sociopolitical factors in blurring the distinction between law and non-law.¹¹⁵ However, positivism remains the only school that refers to the structural foundation of law without referring to subjective perceptions, such as policy, liberalism or feminism.¹¹⁶

109. International Law Association, Berlin Conference (2004), *Accountability of International Organisations*, Final report, p. 48, available at <http://tinyurl.com/n6fk5pa>.

110. Most existing international dispute resolution regimes require rendering decisions on the basis of an applicable law. For example, under rules of the International Centre for Settlement of Investment Disputes, failure to apply applicable substantive law may constitute an excess of powers and lead to annulment of the award. Article 52(1)(b) of the ICSID Convention. For example, the ad hoc committee in *Klöckner v. Republic of Cameroon* decided that the tribunal manifestly exceeded its powers when the award's reasoning seemed more like a reference to equity, rather than the agreed-upon applicable law of a contracting state. *Klöckner v. Republic of Cameroon* (ICSID Case No. ARB/81/2), Decision on Annulment of 3 May 1985, 2 ICSID Reports 124 (1994). In the commercial arbitration context, failure to comply with applicable law may result in the setting aside of an arbitral award under the New York Convention. Article V, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf. But in international administrative law, the notion of applicable law plays a more modest role, if any.

111. D'Aspremont J. (2011), *Formalism and the sources of international law*, p. 26.

112. Thirlway H. W. A. (1972), *International customary law and codification*, p.39.

113. Austin J., Campbell R. (ed.) (1869), *Lectures on jurisprudence, or, the philosophy of positive law*; Hobbes T. (1889), *The elements of law, natural and politic*.

114. D'Aspremont J. (2011), *Formalism and the sources of international law*, p. 41.

115. See, e.g. Morgenthau H. (1940), "Positivism, functionalism and international law", *American Journal of International Law* 34, p. 260; Lasswell H. and McDougal M. (1992), *Jurisprudence for a free society: studies in law, science, and policy*.

116. Orakhelashvili A. (2008), *The interpretation of acts and rules in public international law*, p. 53.

The question of legitimacy underpins the debate regarding sources of international administrative law. As with any other legal model, international administrative law should be legitimate. While standard procedures of public accountability for the legislative process, public consultations, and media debates shape national labour laws in democratic countries, international organisations function in a different context. As extraterritorial autonomous bodies, intergovernmental organisations lack the same level of democratic legitimacy characteristic of their national equivalents.

Additionally, the hierarchical review of higher courts, public opinion, and professional reputation of administrators and regulators limit any discretion in the implementation of national law. Yet, these controls do not exist in international administrative law.¹¹⁷ Unlike other international dispute resolution regimes or domestic legal systems, the international administrative legal system remains truly self-contained. This weakens the link with the original source of power, the state. Moreover, civil society involvement is not available to the same extent as in a domestic setting. In the absence of an effective and fair dispute resolution procedure, the threat of leaving the organisation may remain the only option for international civil servants.

According to Rüdiger Wolfrum, authority in an international context can be legitimised through its original source of power (for example, the consent of states to international treaties), through the use of fair and adequate procedures, or by satisfactory outcomes in its decisions.¹¹⁸ Therefore, to remain legitimate and accountable, international organisations must subject themselves to the rule of law. It is important to establish a hierarchy of international law for international organisations through which all acts conform to the organisation's constituent treaty or founding act.¹¹⁹

Finally, an international administrative tribunal's primary task is to apply the law to disputes, not to create law.¹²⁰ The ICJ in the Fisheries Jurisdiction case explained that a court of law "cannot anticipate the law before the legislator has laid it down".¹²¹ The tribunals were not established to function as lawmakers¹²² but rather as adjudicators with their powers restricted by international law.

B. Importance of defining sources of law

Any legal system aims to predict the conduct of other parties and to distinguish between permissible and impermissible conduct. Some scholars argue that it is

117. In most jurisdictions, administrative dispute resolution decisions are subject to judicial review. See, e.g. Rose-Ackerman S. and Lindseth P. (eds) (2010), *Comparative administrative law*.

118. Wolfrum R. (2010), "Legitimacy of international law and the exercise of administrative functions: the example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations", in von Bogdandy A. et al. (eds), *The exercise of public authority by international institutions*, pp. 917, 919.

119. Peters A. (2011), "The Constitutionalisation of International Organisations" in Walker N., Shaw J. and Tierney S. (eds), *Europe's constitutional mosaic*, pp. 253, 266.

120. Lauterpacht H. (1933), *The function of law in the international community*, pp. 373-74.

121. Fisheries Jurisdiction, *UK v. Iceland*, Merits, ICJ Reports, 1974, 23-24.

122. Wouters J. and De Man P. (2011), "International organisations as law-makers", in Klabbers J. and Wallendahl A. (eds), *Research handbook on the law of international organizations*.

more important for a rule of law to be certain rather than just.¹²³ Yet, those engaged in international administrative legal disputes may find it difficult to build expectations regarding their rights and obligations. In the absence of stipulated sources of law, it remains difficult to establish coherent, non-contradictory rules that can be predicted and reasonably followed.

In addition to increasing the legitimacy of international administrative law already discussed above,¹²⁴ a clarification of the sources of law applicable in international administrative proceedings and the establishment of a normative hierarchy will also make international administrative law more predictable. Predictability in the law is imperative, as it remains unreasonable to leave to one's judgment the decision of whether a court will approve certain actions.¹²⁵

As the ICJ observed in the *Gulf of Maine* case, legal regulation is produced by "any convincing demonstration of the existence of the rules that each had hoped to find established by international law" rather than by "preconceived assertions."¹²⁶ Similarly, Lion Fuller argues that law should correspond to the requirements of publicity, non-retroactivity, clarity, consistency and non-contradiction, and that the actual administration of law should be congruent with the "rules as announced."¹²⁷ Indeed, law represents equilibrium between certainty and justice, and it is important to leave the discretionary element within the narrowest possible limits.¹²⁸

Additionally, any legal system must have clear criteria separating legal norms from politically desirable rules or moral rules of courtesy. Otherwise, the absence of such criteria may facilitate a decline in the normative power of the law.¹²⁹ In the past, interested parties have invoked various notions ranging from class interest to democracy and human rights in efforts to manipulate international law.¹³⁰ Therefore, it is important to distinguish between binding legal norms and other social regulators, such as morality, religion or political necessity.¹³¹ Greater transparency in the decision-making process and rules outlining the hierarchy of international administrative legal sources will help to address accountability and legitimacy problems.

The absence of clear applicable law also affects the equality enjoyed by civil servants vis-à-vis their employers. According to Article 14(1) of the International Covenant on

123. Wade H. W. R. (1941), "The concept of legal certainty. A preliminary skirmish". *The Modern Law Review* 4, pp. 183, 187. Ludwig von Mises famously wrote, "[T]he worst of all is better than bureaucratic tyranny.", von Mises L. (1946), *Bureaucracy*, p. 76.

124. See Part III.A.

125. Wade H. R. W. (1941), *op. cit.*

126. ICJ Reports, 1984, 289.

127. Fuller L. (1969), "The morality of law". This summary is taken from D. Dyzenhaus, "The concept of (global) administrative law", IILJ Working Paper 2008/7, available at www.iilj.org.

128. *Ibid.*, pp. 197-98.

129. Danilenko G. M. (1993), *Law-making in the international community*, p. 17.

130. *Ibid.*, p. 18.

131. See Pellet A. (1988-89), "The normative dilemma: will and consent in international law-making", *Australian YIL* 12, pp. 22, 25.

Civil and Political Rights, "All persons shall be equal before the courts and tribunals."¹³² The UN Human Rights Committee noted in *Lederbauer v. Austria* that the guarantee of equality before courts under Article 14(1) encompasses impartiality, fairness, and equality of arms regardless of whether a particular judicial body is specifically tasked with imposing disciplinary measures on civil servants.¹³³

While international organisations usually staff their legal departments with experienced experts, international civil servants (particularly non-lawyers) may lack the ability to understand previous legal decisions impacting their employment rights or even access such decisions.¹³⁴ The classical reason behind the separation of employment law and contract law is to address inequality in an employee's bargaining power vis-à-vis an employer.¹³⁵ Employees bear the risk of being exploited by an employer, and employment law attempts to protect the vulnerable employee from such employer abuse.¹³⁶ Therefore, vague or difficult-to-research employment regulations place an unsophisticated employee in a difficult position, even when an employee has access to a staff association specifically tasked with supporting employee interests.¹³⁷

The lack of clear standards dictating the hierarchy of applicable international legal sources also affects international civil servants' incentive to use such tribunals. As in any other dispute resolution system, when the rules are unclear, an individual has little incentive to refer the matter to a tribunal for resolution.¹³⁸ Political manoeuvring or efforts to maintain the status quo may replace a legal process that would otherwise lead to an improvement in the legal system.

Furthermore, in the absence of binding international administrative legal norms articulated with reasonable clarity, individuals are unable to know the bounds of legal activity and unable to adjust their behaviour accordingly. In the US, statutes that lack clear standards are "unconstitutionally vague" and unenforceable.¹³⁹ According to US constitutional law, notions of fair notice and control of arbitrary enforcement underpin the vagueness

132. United Nations International Covenant on Civil and Political Rights (1966), Article 14, available at www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

133. Communication 1454/2006, 11 September 2007, at para. 7.2.

134. Administration of Justice at the United Nations (2000), "Report of the Joint Inspection Unit", JIU/REP/2000/1, paras. 136-43. See also Reinisch A. and Knahr C. (2008), "From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal: Reform of the Administration of Justice System within the United Nations", *Max Planck Yearbook of United Nations Law* 12, pp. 447, 452.

135. See, e.g. International Labour Office, "The employment relationship", Report V(1), International Labour Conference, 95th Session, 2006, para. 100, available at www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf.

136. See, generally, Davidov G. and Langille B. (eds) (2011), *The idea of labour law*.

137. Council of Europe Parliamentary Assembly, Accountability of International Organisations for Human Rights Violations, 17 December 2013, paragraph 17. International organisations may nurture or take advantage of uncertainty regarding the applicable law in order to preserve their freedom of action. A recent Council of Europe report noted that uncertainty with respect to the precise scope of obligations required of international organisations undermines legal certainty – both for the organisations themselves and third parties.

138. Thirlway H. W. A. (1972), *International customary law and codification*, pp. 34-5.

139. If a statute is too vague for the average citizen to understand, the statute is void for vagueness and unenforceable under the US Constitution. See Chemerinsky E. (2011), *Constitutional law: principles and policies*.

doctrine. The US Supreme Court explained that a statute must define the prescribed conduct with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement¹⁴⁰ because arbitrary enforcement violates the principle of equal protection.¹⁴¹ This logic is equally relevant within the context of international administrative law.

Lastly, other disciplines, such as political science or sociology, may marginalise international administrative law in the absence of rules governing the applicable law.¹⁴² Therefore, in response to each of the concerns addressed above, a clarification of the sources of law applicable in international administrative proceedings will make the system more predictable, enhance its legitimacy, and help to strike a balance between the interests of international organisations, their member states and international civil servants.

IV. Sources of law in the practice of international administrative tribunals

In practice, international administrative tribunals rely on several sources, including the employment contract, the internal law of international organisations, and generally recognised principles of international administrative law. International administrative tribunals also sometimes refer to their own internal law and the jurisprudence of other tribunals¹⁴³ and occasionally cite writings of qualified experts.¹⁴⁴

A. The employment contract

Most international organisations hire civil servants through an employment contract or a legal act of the organisation.¹⁴⁵ As a matter of practice, employment contracts and the internal regulations of international organisations contain the most detailed provisions with respect to the rights and obligations of international organisations

140. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). See also Hadfield G. (1994), "Weighing the value of vagueness: an economic perspective on precision in the law", *California Law Review* 82, pp. 541, 542.

141. According to the Fourteenth Amendment to the US Constitution, known as the Equal Protection Clause, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See Schnapper E. (1985), "Affirmative action and the legislative history of the Fourteenth Amendment", *Virginia Law Review* 71, p. 753.

142. Thirlway H. W. A. (1972), see note 112 at p. 227. See also von Bogdandy A., Dann P. and Goldmann M. (2010), *Developing the publicness of public international law: towards a legal framework for global governance activities* (von Bogdandy A. et al. (eds)), arguing that in the absence of legal/illegal dichotomy legal scholarship can be marginalised by other disciplines such as economics, etc.

143. See Hansen P. (2012), "The World Bank Administrative Tribunal's external sources of law: the next chapter (2006-2010)", *The Law and Practice of International Courts and Tribunals* 11, pp. 449, 490 (discussing reliance on the jurisprudence of other tribunals).

144. Most often tribunals quote C. F. Amerasinghe to demonstrate the existence of certain principles of international administrative law.

145. While most international organisations use employment contracts, some international organisations, most notably the European Union, use statutory employment as a primary hiring method for international civil servants. Klabbbers J. (2009), *An introduction to international institutional law*, p. 244.

and their civil servants. In most instances, the employment contract is the primary source of an international organisation's obligations.¹⁴⁶ Very often in practice, however, both the letter of appointment and the letter of acceptance collectively constitute the employment contract rather than any single written document.¹⁴⁷

The World Bank Administrative Tribunal in the *de Merode* case explained, "The [employment letters] may be sine qua non of the relationships, but it remains no more than one of a number of elements which collectively establish the ensemble of conditions of employment operative between the [international organisation] and its staff members."¹⁴⁸ Similarly, the UN Administrative Tribunal has also observed that the relations between the UN and its staff members are not solely contractual in nature, but also involve statutory elements.¹⁴⁹

B. Internal law of international organisations

The internal law of international organisations includes constitutions, procedural rules, decisions, regulations, and other enactments adopted by the organisation.¹⁵⁰ In its judgment in the *de Merode* case, the World Bank Administrative Tribunal held that in order to determine the respective rights and duties of the World Bank and its staff, one must look not only to the Articles of Agreement of the World Bank and its By-Laws, but also "to certain manuals, circulars, notes and statements issued by the management of the [World] Bank as well as to other sources."¹⁵¹

The constituent documents of international organisations also often include international treaties. International administrative tribunals rely upon the constituent treaties of an international organisation as being applicable to the organisation's employment relations.¹⁵²

146. See *Effect of Awards* case, 1954 ICJ. Reports at 53, *Darricades*, ILO Administrative Tribunal Judgment No. 67 (1962); Stievenart, NATO Appeals Board Decision No. 24 (1971) p. 2; *Kaplan*, UNAT Judgment No. 19 (1953), p. 73; *Monshed*, UNAT Judgment No. 273 (1981).

147. See, e.g. para. 440.3 of the World Health Organization Staff Rules, 1 July 2013, available at www.who.int/employment/staff_regulations_rules/EN_staff_regulations_and_staff_rules.pdf.

148. *de Merode and Others v. world Bank*, Decision 1, WBAT 5 June 1981, para. 18.

149. UNAT Judgment No. 4 (1951).

150. Under the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, "Rules of organization" include, in particular, its constituent instruments, relevant decisions, and resolutions and established practice of the organisation, Article 2(j); see also Article 2(b) of Draft Articles on the Responsibility of International Organizations.

151. *de Merode*, para. 18.

152. For example, in *Re Duberg v. UNESCO*, the ILO Administrative Tribunal relied on the Constitution of the United Nations Educational, Scientific and Cultural Organization. *Re Duberg v. UNESCO* (1955) ILO Administrative Tribunal (Judgment 17), para. 2. In the *Howrani* case, the UN Administrative Tribunal applied the UN Charter to a dispute. UNAT Judgment No. 5 (1951), p. 21. In *Duberg*, the ILO Administrative Tribunal explained that the constitution of the United Nations Educational, Scientific, and Cultural Organization is a relevant source of law, as it outlines rules applicable to the organisation's employment relations. *Duberg*, ILOAT Judgment No. 17 (1955), at 255ff. See also *Aicher*, Decision No. 37, 1964 (finding that the Organisation for Economic Co-operation and Development (OECD) Appeals Board must apply the OECD Convention).

Unlike in the context of international administrative tribunals, a hierarchy exists for the application of internal laws of international organisations. Constituent instruments (primary law), often adopted in the form of international treaties, prevail over staff regulations¹⁵³ and staff rules,¹⁵⁴ which in turn trump manuals,¹⁵⁵ circulars, and similar documents (secondary law).¹⁵⁶

The term secondary law refers to all legal enactments of international organisations that are not constituent instruments. One must note, however, that in order for an international administrative tribunal to regard secondary law as a source of law, the secondary law must have a general effect.¹⁵⁷ In other words, while internal law of international organisations has the force of general law for other cases decided by the same tribunal, administrative decisions are only applicable to those individuals whom they address. Secondary law of international organisations remains subordinate to the primary law of international organisations, and in this respect, its relationship with general international law should be similar to the relationship between the internal law of states and general international law.

The power to regulate legal relations between international organisations and their staff through rule making is often delegated from the plenary organ of the organisation to its administration.¹⁵⁸ Additionally, the instruments establishing international administrative tribunals provide the tribunals with the power to make rules concerning their own procedure and internal organisation.¹⁵⁹ Obviously, in the case of a conflict between these two sources, the former instruments override the latter. However, international organisations adopt their internal law on the basis of constituent documents created by states.¹⁶⁰ This suggests that the internal law of international organisations' relevant resolutions, and decisions of the organisation, is entirely distinct from general public international law created by states.¹⁶¹

153. In the UN and its specialised agencies, the Staff Rules define the status of staff while Staff Regulations usually prescribe broader principles.

154. See, e.g. Dupuy R.-J. (1988), *A handbook on international organizations*, p. 234.

155. Although in *Robinson* the UN Secretary-General contended that the Administrative Manual merely constituted a statement of policy without any legal effect whatsoever, the tribunal disagreed, explaining that "the Administrative Manual, being binding upon the Administration and the staff, is a document which the Tribunal must apply under the terms of Article 2 of the Statute", thus clearly regarding it as a source of law. *Robinson*, Judgment No. 15, 1952, 1070 JUNAT, 45-6.

156. Klabbbers J. (2009), *An introduction to international institutional law*, p. 245; Akehurst M. B. (1967), *The law governing employment in international organizations*, pp. 68-9. See also *de Merode*, WBAT Reports (1981), Decision No. 1, at 9-11.

157. Akehurst M. B., *ibid.*, at 71.

158. See, e.g. preamble to Staff Rules and Regulations of European Organization for Nuclear Research, 1 January 2016, available at https://council.web.cern.ch/council/en/governance/TREF-CERN_SRR_en_ed11-2016%20.pdf, preamble to Staff Regulations and Staff Rules of the International Telecommunications Union, edition of 2013, available at www.itu.int/en/careers/Documents/SRR-e.pdf, Staff Regulations of Food and Agriculture Organization of the United Nations, 2000, para. 301.0 (available at www.fao.org/docrep/meeting/X7949e.htm).

159. See, e.g. Article 6 of the Statute of the United Nations Appeals Tribunal, April 2012, available at www.un.org/en/oaj/files/unat/basic/2012-04-11-statute.pdf, Article X of the ILO Administrative Tribunal, 2008, available at www.ilo.org/tribunal/lang--en/index.htm.

160. Shaw M., see note 105 at pp. 1303-6.

161. Sands P. and Klein P. (2009), *Bowett's law of international institutions*, p. 448.

However, as the judges of the ICJ noted, “[T]he fact that an act is done under authority contained in an instrument which is itself a treaty ... does not give the resulting act treaty character.”¹⁶² Rules of international organisations cannot follow the *lex specialis* principle of interpretation of public international law according to which a more specific rule overrides a more general rule¹⁶³ for two reasons. First, this principle can apply only when both the special and the general rule have the same subject matter. Second, a “special rule could not prevail over a general unless the two rules had the same status.”¹⁶⁴

Internal regulations of international organisations certainly do not constitute domestic law of states, but at the same time, such internal regulations do not constitute a source of international law. Sources of international law, as illustrated by Article 38 of the ICJ Statute, usually result only from the interaction of subjects of international law such as conclusion of treaties or state practice which crystallises into international custom.¹⁶⁵ Internal regulations create rights and obligations for international organisations and their employees rather than states and therefore form a separate autonomous legal order from traditional international public law.¹⁶⁶

C. General principles of law

In the *de Merode* judgment, the World Bank Administrative Tribunal, for the first time, extensively discussed the principles of international administrative law. The tribunal explained that in addition to the internal law of the organisation, a wider body of international administrative law remains relevant, specifically noting that “some judgments of administrative tribunals speak of the general principles of international civil service law or of a body of rules applicable to the international civil service.”¹⁶⁷

General principles of international administrative law include principles inherent in any legal order, including domestic law and international relations.¹⁶⁸ For example, general principles of law include principles of interpretation (for example, the spirit and object of written provisions, and the intention of the parties reflected in the “*travaux préparatoires*”), principles concerned with the functioning of the tribunals themselves (for example, the representation of the parties, time limits for bringing claims, and measure of damages), as well as general principles of administrative law (for example, withdrawal of administrative decisions and the principle of equality for

162. Joint Dissenting Opinion in the South-West Africa cases (Preliminary Objections), Judgment of 21 December 1962 ICJ Rep 465, at 491.

163. See Akehurst M. B. (1975), *The hierarchy of the sources of international law*, *British yearbook of international law* 47, p. 273.

164. Statement by Mr Ago, *ILC yearbook 1968*, Vol I, Summary records for the 20th Session, 27 May to 4 August 1968, p. 31 (para. 24).

165. ICJ Statute, Article 38.

166. Amerasinghe C. F. (2005), see note 107, at p. 274.

167. *de Merode*, para. 13.

168. See Schill S. (2010), “International investment law and comparative public law – An introduction”, in *International investment law and comparative public law* (Schill S. (ed.)), p. 28.

officials in the same position).¹⁶⁹ Increasingly, general principles of law include not only relations between states, but also relations between states and private subjects.¹⁷⁰

One must understand that the substance of the “general principles of law recognised by civilized nations” mentioned in Article 38 of the ICJ Statute differs from the general principles of international administrative law.¹⁷¹ By definition, general principles of public international law outlined in Article 38 are those principles recognised in the municipal laws of states.¹⁷² However, general principles of international administrative law develop from the practice of international administrative tribunals.

Some international administrative tribunals recognise general principles of administrative law as implied terms of employment contracts. For example, an ILO Administrative Tribunal in *re Awoyemi* explained, “A firm line of precedent says that the rights under a contract of employment may be express or implied, and include any that flow from general principles of international civil service of human rights.”¹⁷³ Furthermore, as the International Court of Justice explained international organisations, as subjects of international law, are “bound by any obligation upon them under general rules of international law”.¹⁷⁴ As organs of international organisations, international administrative tribunals also have an obligation to follow public international law.

When Article 38 of the Statute of the ICJ was drafted, the drafters intended for the inclusion of general principles of law to avoid a finding of *non liquet* (a situation where there is no applicable law) by the court.¹⁷⁵ Although general principles of law may not always seem specific enough to create concrete rights and obligations, in an international context, such principles may sometimes serve as the only source of law. For example, Article 340 of the Treaty Establishing the European Community prescribes that the liability of the European Community is subject to the “general principles common to the laws of member States”.¹⁷⁶ In this context, general principles of European Union law, such as proportionality, legal certainty, legitimate expectations and equality,¹⁷⁷ fill in the gaps in European Union law, strengthen its coherence and help to avoid the denial of justice.¹⁷⁸

169. For a more detailed discussion of the classification of general principles of law, see Akehurst M. B., note 163, at 72-3.

170. Raimondo F. (2008), *General principles of law in the decisions of international criminal courts and tribunals*.

171. ICJ Statute, Article 38.

172. General principles of law mentioned in Article 38 of the ICJ Statute are unwritten legal norms of wide-ranging character recognised in the municipal laws of the state and that are capable of being transposable at the international level. Pellet A. (2006), “Article 38”, in Zimmermann A. et al. (eds), *The Statute of the International Court of Justice: a commentary*, para. 254.

173. *Re Awoyemi against UNESCO* (1998) ILO Administrative Tribunal (Judgment 1756), Considerations, para. 3.

174. International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt, Advisory Opinion, ICJ Reports 1980, para. 37.

175. Pellet A. (2006), “Article 38”, in Zimmermann A. et al. (eds), *The Statute of the International Court of Justice: a commentary*, para. 246.

176. Article 340, Treaty Establishing the European Community.

177. Craig P. and de Búrca G. (2011), *EU law: text, cases, and materials*, p. 109.

178. Kaczorowska A. (2008), *European Union Law*, p. 231.

An additional example stems from investor–state disputes, which, similar to international administrative law involve private parties (investors) and subjects of international law (states). Tribunals in such disputes often rely on general principles of law, such as good faith, *restitutio in integrum*, an injured person’s duty to mitigate damages, and unjust enrichment.¹⁷⁹ As these and a number of other principles are now widely recognised as general principles of law, they should also serve as a source of law for international administrative tribunals.

Although each tribunal has its own written regulations and rules, a number of general principles of international administrative law have developed over time, such as those relating to discrimination and equality of treatment, procedural and substantive irregularity, and other employment-related issues.¹⁸⁰ International administrative tribunals have also relied on general principles to develop the procedural law of international adjudication,¹⁸¹ to interpret written law as a source of substantive rights and obligations, and to fill lacunae in regulation.¹⁸²

In 1939, the League of Nations Tribunal held that “it is only in the absence of written rules that the Tribunal would be justified in referring to general principles of law.”¹⁸³

Subsequently, the ILO Administrative Tribunal held that general principles of law are subsidiary to internal rules of the ILO.¹⁸⁴ However, the modern trend is to give more weight to general principles of law. Many statutes establishing international

179. See Kryvoi Y. (2008), “Counterclaims in investor-state arbitration”, *Minnesota Journal of International Law* 216, pp. 249-50.

180. It must be noted that administrative tribunals often share judicial personnel. For example, Jan Paulsson serves as Chairman of the Administrative Tribunal of the Organisation for Economic Co-operation and Development, President of the Administrative Tribunal of the EBRD, and as a member of the World Bank Administrative Tribunal.

181. See, e.g. ILO Administrative Tribunal Judgment No. 3182, 114th session, 2013, International Labour Organization (“The discretionary authority of the Director-General in appointment-related matters is not absolute and has to be exercised within the limits set by the Staff Regulations and general principles of law.”); IMFAT Judgment No. 1999-1 *Mr “A” v. International Monetary Fund* (12 August 1999) para. 92 (finding that the tribunal has an obligation to apply generally recognised principles of international administrative law in support of the notion that the Administrative Tribunal must exercise jurisdiction over the applicant’s claim so that it will not escape judicial review). See also WBAT Decision No. 10, 1982 *Jean-Claude Salle v. International Bank for Reconstruction and Development* (concluding that conditions of employment may also derive from various other sources, including general principles of law, as the tribunal has determined in the *de Merode* case (Decision No. 1) (para. 29)).

182. See, e.g. *in re Gubin and Nemo*, ILO Administrative Tribunal Judgment 429 (1980) (“The Tribunal will consider the plea since there is a general principle of law protecting acquired rights, even in the absence of express provision.”); see also ILO Administrative Tribunal Judgment 3156, 2013, International Telecommunication Union (addressing freedom of speech); ILO Administrative Tribunal Judgment 3107 (2012), International Telecommunication Union (recognising a duty to refrain from conduct that may harm the dignity or reputation of staff and former staff members); IMFAT Judgment No. 1997-2, *Ms. “B” v. International Monetary Fund* (23 December 1997) para. 59 (deciding whether a reasonable notice of the particular change in policy would be required); ILO Administrative Tribunal Judgment 3195, 2013 (finding that an administrative error must be rectified).

183. Judgments Nos. 1-3 (*di Palma Castiglione*, etc.), 1929 (translation) (quoted in Akehurst M. B. see note 163, at 80).

184. *Sharma*, Judgment No. 30, 13 July 1957.

administrative tribunals explicitly mention general principles of law, while other remain rather conservative in their use of general principles and rely primarily on procedural rules.¹⁸⁵ But even when statutes of international administrative tribunals do not mention general principles of law, many tribunals nonetheless feel compelled to apply such principles.¹⁸⁶ The legitimacy of general principles as a source of law depends on whether they are “so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organisations.”¹⁸⁷

International administrative tribunals often rely on the jurisprudence of other tribunals to demonstrate that the application of certain general principles is not revolutionary.

Decisions of other tribunals do not themselves constitute a source of law, however, they may serve as evidence of certain general principles. For example, the World Bank Administrative Tribunal applied a decision from the Asian Development Bank Administrative Tribunal and specifically welcomed “the harmony of views of similar international jurisdictions”, noting that the tribunal would “be influenced by persuasive analysis whatever its source.”¹⁸⁸

Additionally, the commentary to the Statute of the International Monetary Fund (IMF) Administrative Tribunal explains that certain general principles of international administrative law are “so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organisations.”¹⁸⁹

The commentary also stated that “reference to recognised principles of international administrative law is intended to limit the powers of the tribunal by making clear that the standards of review applied by the tribunal should not go beyond those applied by other tribunals.”¹⁹⁰ The Asian Development Bank Tribunal further explained that a general principle restrains an international organisation as follows:

Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognised principle, which can be regarded as part

185. Patterson B. D. (2007), “The jurisdiction of discrimination as opposed to simple inequality in the international civil service”, *Georgia Journal of International and Comparative Law* 36, 1, p. 15.

186. See, e.g. ILO Administrative Tribunal Judgment 3203, 115th session, 2013, International Telecommunication Union (“[G]eneral principles ... form part of the law of the international civil service.”) (citing ILO Administrative Tribunal Judgment 1118, under 9). See also ILO Administrative Tribunal Judgment 3058, 112th session, 2012, European Patent Organisation (concluding that the tribunal must apply the relevant rules and regulations and those general principles of law that govern the relationship between international organisations and their staff members).

187. Report of the Executive Board to the Board of Governance of the International Monetary Fund, EBAP/92/147, Attachment II, Oct. 9, 1992, reprinted in 1 *International Mon. Fund Administr. Trib. Rep.’s* 251. STH at page 18 (2000).

188. *Pillarisetty Madhusudan v. International Bank for Reconstruction and Development*, Decision No. 215, para. 25.

189. Commentary to the Statute of the Administrative Tribunal of the International Monetary Fund, see note 159, at p. 18.

190. *Ibid.* p. 17.

of the law, to international organisations. That principle imposes a limitation on the powers of the governing bodies of every international organisation, restraining the unilateral amendment of such terms and conditions.¹⁹¹

Furthermore, the 2004 report of the International Law Association encourages international organisations to consider establishing a common review mechanism of other international administrative tribunal judgments “to achieve the greatest possible consistency of jurisprudence in international administrative law”. The report encourages international administrative tribunals to take account of each other’s decisions in efforts to reduce the risk of incompatible case law.¹⁹²

The ILO Staff Union also insists on the inclusion of generally recognised principles of international administrative law in the Statute of the ILO Administrative Tribunal. While the tribunal explained that it invokes general principles where necessary, it also did not object to the inclusion of the following sentence into the statute: “The Tribunal shall apply the generally recognised principles of international administrative law concerning judicial review of administrative acts.”¹⁹³

However, the statute does not currently reflect this sentence even though over a decade has passed since the ILO Staff Union and the ILO Administrative Tribunal initially reached this general agreement.

D. Other sources of public international law

According to their very nature, international organisations are established by international treaties and governed by international law. As the ICJ once explained, “International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”¹⁹⁴

The Draft Articles on the Responsibility of International Organizations provide that international law governs the action of an international organisation characterised as internationally wrongful.¹⁹⁵ One can draw a distinction between an international organisation that breaches its human rights obligations internationally (for example, the North Atlantic Treaty Organization (NATO) bombings) and an international organisation that breaches its human rights obligations internally (for example, the discrimination of certain employees).

191. *Ferdinand P. Mesch and Robert Y. Siy v. Asian Development Bank* (No. 3) Decision No. 18, 2 ADBAT Rep. 117.

192. *Ibid.*

193. International Labour Office, *Matters relating to the Administrative Tribunal of the ILO*, GB.286/PFA/17/2 2 (2003).

194. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, IJC Reports 73, at 89-90 (paragraph 37).

195. Article 5, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, available at http://legal.un.org/ilc/texts/9_6.shtml.

However, it remains difficult to conceive that international organisations, subjects of international law and created by means of international law, would be designed in such a manner to exclude the application of international law internally. Bound by general international human rights law, an international organisation should be internationally responsible in both scenarios. Yet, for breaking international human rights internally, no instruments similar to the Draft Articles on the Responsibility of International Organizations exist.

In adjudicating disputes, international administrative tribunals primarily refer to international treaties dealing with immunity¹⁹⁶ or the constituent documents establishing the international organisation, and the tribunals apply international law to interpret the internal law of the organisation.¹⁹⁷ However, sometimes tribunals explicitly state that other international conventions do not bind an international organisation. For example, in *Pibouleau* case, the ILO Administrative Tribunal explained that the ILO Maternity Protection Convention and Recommendation does not apply to the World Health Organization. Following the same logic, in a separate case, the ILO Administrative Tribunal refused to apply the European Convention on Human Rights to an international organisation on the grounds that the specific organisation was not bound by the European Convention on Human Rights.¹⁹⁸

Indeed, traditional international treaties create rights and obligations for parties to those treaties – usually states. States then implement the relevant international law outlined in a specific treaty into domestic law, which in turn binds individuals. Employees of international organisations, however, are not states or international organisations (traditional subjects of international law) and therefore cannot be parties to and be bound by international treaties. In this respect, international administrative law resembles the asymmetric nature of international investment law in which bilateral investment treaties create internationally enforceable rights for investors as private actors while also creating obligations for states parties.¹⁹⁹

Nonetheless, tribunals occasionally refer to various international conventions, such as the UN Charter.²⁰⁰ Surprisingly, however, tribunals, including the ILO Administrative Tribunal, do not refer to ILO conventions – the most elaborated source of traditional international labour law.²⁰¹ Although these conventions do not bind international organisations, they may serve as evidence of general principles of law recognised by most countries in the world.

196. *Jurado*, ILOAT Judgment No. 70 (1964).

197. See, e.g. *Stepczynski*, UNAT Judgment No. 64 (1956).

198. *Mr J.M. W. against the EPO* (2003), ILO Administrative Tribunal (Judgment No. 2237), Considerations, para. 11.

199. See *Kryvoi* (2008) op. cit., see note 179 at p. 220.

200. See, e.g. *United Nations Educational, Scientific and Cultural Organization*, Judgment 2740, 9 July 2008, ILO Administrative Tribunal.

201. At the same time, in the *Desgranges* judgment, the ILO Administrative Tribunal recognised the importance of the spirit of ILO instruments. In *re Desgranges*, Judgment No. 11, 12 August 1953 (“[I]t is unthinkable that the International Labour Organisation, which was established to ensure the security of all wage-earners, does not desire to assure that of all its officials, and that the spirit in which the existing legislation should be interpreted is thus quite clear.”).

Lastly, Article 38(d) of the ICJ Statute defines case law and scholarly writings as subsidiary means of international law, sometimes referred to as “the store-house”, from which primary rules of international law can be extracted.²⁰² In other words, case law of other tribunals does not represent an independent source of law,²⁰³ but rather a storage of general principles of international administrative law.

E. The practice of organisations

The practice of organisations constitutes an additional source of legal rights and obligations. The Commentary on the Statute of the IMF Administrative Tribunal, citing the *de Merode* decision of the World Bank Administrative Tribunal, recognises “the administrative practice of the organisation [which] may, in certain circumstances, give rise to legal rights and obligations” as one of two unwritten sources of the IMF’s internal law.²⁰⁴

In another case, the IMF Administrative Tribunal held that it had to analyse the practice of the organisation and certain general principles of law to determine the respective rights and duties of the international organisation and its staff.²⁰⁵ The ILO Administrative Tribunal also followed this approach.²⁰⁶

The practice of international organisations is similar to customary international law in that it can set standards for further organisation practice. One arbitral tribunal noted, “[T]he practice of the organisation may also, in certain circumstances, become part of the conditions of employment.”²⁰⁷ In this case, the tribunal drew a comparison with the ICJ’s decision in the *Asylum Case*, which explained the need for uniform and consistent usage as a prerequisite for the development of international custom.²⁰⁸ It must be noted that practice of international organisations is not identical to customary international law, which derives from interaction between subjects of international law, namely states and international organisations based

202. Pellet A. (2012), “Article 38”, in *The Statute of the International Court of Justice: a commentary*, para. 305 (Zimmermann A. et al. (eds)).

203. *Mr Cv. EBRD*, EBRD Administrative Tribunal Decision No. 01/03 (2003).

204. Report of the Executive Board, p. 18. See also *Ms. “B”, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-2 (23 December 1997), para. 37; see also Judgment No. 1996-1 *Mr M. D’Aoust, Applicant v. International Monetary Fund, Respondent* (2 April 1996).

205. IMFAT Judgment No. 1997-2, *Ms. “B” v. International Monetary Fund* (23 December 1997), para. 59 (considering the question whether reasonable notice of the particular change in policy would nevertheless be required by general principles of law).

206. *Duberg*, etc. ILOAT Judgments Nos. 17-19 and 21 (1955). The ICJ subsequently confirmed this approach. Judgment of the Administrative Tribunal of the ILO upon complaints made against UNESCO, ICJ Reports 1956, p. 91 (ruling that the practice of considering employees hired under only fixed-term contracts for renewal constituted a source of law despite an apparent contradiction to the Staff Regulations).

207. *de Merode*, Decision of the WBAT, No. 1 (1981), para. 61.

208. 1950 ICJ, Reports, p. 277.

on the conviction that such practice reflects a legal obligation.²⁰⁹ In the context of international administrative law the practice derives from interaction between the organisation and its employees, which constitutes a separate source of international administrative law.

F. Municipal law

Municipal law does not usually constitute a source of law applied by international administrative tribunals. However, in some instances, internal law of an organisation may directly incorporate municipal law. For example, the internal law of the international organisation may refer to local laws on social security, taxes,²¹⁰ workers' compensation,²¹¹ or visa issues.²¹² Internal law of international organisations or employment contracts may also contain references to local law.

The ILO Administrative Tribunal explained the application of municipal law as follows:

[T]he Tribunal has never ruled out municipal law a priori.

Although it is ordinarily and essentially competent in a context of international law, it may well have to heed some provisions of municipal law where, as indeed in this case, there is renvoi to such law in a contract of service or in an organisation's rules. Precedent further has it that there may be reference to municipal law for the sake of comparison and so as to educe certain general principles of law that apply to the international civil service.²¹³

Municipal law also helps to define concepts stemming from other legal systems, such as marriage, adoption, divorce or residence,²¹⁴ and as discussed in the ILO Administrative Tribunal's statement above, it may also give rise to general principles of law.

209. Advisory Opinion of the International Court of Justice, Judgments of the Administrative Tribunal of the ILO, ICJ Reports 1956, p. 91. The ICJ noted: "Obviously, the organisation would be discouraged from taking measures favourable to its employees on an ad hoc basis if each time it did so it had to take the risk of initiating a practice which might become legally binding upon it. The integration of practice into the conditions of employment must therefore be limited to that of which there is evidence that it is followed by the organisation in the conviction that it reflects a legal obligation, as was recognised by the International Court of Justice." Advisory Opinion on Judgments of the Administrative Tribunal of the ILO (ICJ Reports 1956, p. 91). See also *Effect of Awards* case, 1954 IJC Reports at p. 91, cited by WBAT Decision No. 1.

210. See, e.g. *J.C. Peter Richardson*, WBAT Decision No. 208 (1999).

211. For example, World Bank Staff Rule 6.11, para. 2.01 provides for the application of the District of Columbia Workers' Compensation Act of 1998. World Bank Staff Manual, available at http://siteresources.worldbank.org/INTSTAFFMANUAL/Resources/StaffManual_WB_web.pdf.

212. See, e.g. *Safari O'Humay*, WBAT Decision No. 140 (1994).

213. In *re Kock, N'Diaye and Silberreiss*, Judgment 1450 (1995).

214. See Morgenstern F. (1969), "The law applicable to international officials", *International and Comparative Law Quarterly* 18, pp. 739, 746-50.

V. Towards normative hierarchy in international administrative law

A. Hierarchy in statutes of international administrative tribunals

Under a hierarchical legal structure, a subordinate norm must yield to a superior norm in the case of a conflict. Domestic legal systems maintain a settled hierarchy of norms with constitutions at the top of the hierarchy. It would be natural for lawyers coming from any jurisdiction to expect a similar hierarchy of norms in the internal order of international organisations.

However, constituent documents of the oldest and largest international administrative tribunals contain no such provisions outlining either the sources of law or the hierarchy between international law and an international organisation's internal law.²¹⁵ Even the Statute of the UN Dispute Tribunal adopted in 2009 merely provides that its judgments "state the reasons, facts and law on which they are based", without providing any guidance on the applicable sources of law.²¹⁶

However, some international organisations do stipulate the applicable sources of law. For example, the Rules of Procedure of the Administrative Tribunal of the European Bank for Reconstruction and Development (EBRD) provide that the tribunal shall base its decisions on "the provisions of the Staff Member's contract of employment, the internal law of the Bank and generally recognized principles of international administrative law".²¹⁷

Moreover, the Statute of the EBRD Administrative Tribunal provides for the supremacy of international law over the internal law of the EBRD by establishing that decisions of the Board of Directors or the Board of Governors should not breach international administrative law.²¹⁸

Unlike the EBRD Administrative Tribunal, however, the Statute of the IMF Administrative Tribunal requires it to "apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts".²¹⁹ It is interesting to note that while the EBRD considers general principles of international administrative law as something separate from its internal

215. Article VI of the Statute of the Administrative Tribunal of the ILO; see also the World Bank Administrative Tribunal; see also the IMF Administrative Tribunal.

216. Article 11, Statute of the United Nations Dispute Tribunal, adopted by the General Assembly by Resolution 63/253 of 24 December 2008, available at www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/253&referer=/english/&Lang=E. The duty to give reasons ensures that the judge knows how to weigh various interests at stake and that the judge uses his powers to achieve a just end. See Kingsbury B., Krisch N. and Stewart R. (2005), "The emergence of global administrative law", *Law and Contemporary Problems* 68, p. 39; see also della Cananea G. (2010), "Maximum standards of procedural justice in administrative adjudication", in *International investment law and comparative public law*, p. 67 (Schill S. (ed.)).

217. Section 3.02, Rules of Procedure of the Administrative Tribunal of the EBRD, available at www.ebrd.com/downloads/integrity/appeals.pdf.

218. Rule 8.03 of the Statute of the EBRD Administrative Tribunal.

219. Article 3 of the Statute of the Administrative Tribunal of the International Monetary Fund, available at www.imf.org/external/imfat/statute.htm.

law, the IMF considers such general principles as a part of its internal law. The official commentary to Article III of the Statute of the IMF Administrative Tribunal sets out a hierarchy of the internal law of the organisation,²²⁰ and its relation to general principles of international administrative law, as follows:

To the extent that a tribunal's decision is dependent on the particular law of the organisation in question (such as the precise language of a staff regulation), the decision would be regarded as specific to the organisation in question and not part of the general principles of international administrative law.²²¹

Furthermore, the official commentary notes that an administrative tribunal applying general principles of international administrative law "cannot derogate from the powers conferred on the organs of the Fund, including the Executive Board, under the Articles of Agreement"²²² In other words, the internal law of the IMF is superior to general principles of international administrative law. Clearly, the statutes of the EBRD and the IMF administrative tribunals follow different approaches towards the hierarchy between international law and the internal law of international organisations.

Several other international administrative tribunals uphold the importance of general principles of international administrative law. On more than one occasion, the World Bank Administrative Tribunal has reviewed the legality of actions taken by the legislative body of the World Bank.²²³

For example, in *de Merode*, the World Bank Administrative Tribunal recognised that the World Bank could not violate the principle of non-retroactivity because of its fundamental nature. Similarly, the Appeals Board of the European Launcher Development Organisation also explained that employment contract provisions could not contradict the general principle of non-discrimination.²²⁴ Therefore, certain general principles, such as non-discrimination and the notion that an organisation cannot reduce one's salary, are generally regarded as fundamental.²²⁵

One ILO Administrative Tribunal decision explained that a right derived "from a general principle ... must be respected even where contrary provisions exist or in the absence of any explicit text"²²⁶ However, some tribunals remain reluctant to nullify internal law enactments on the basis of their conflict with fundamental norms of

220. With respect to formal sources of law, insofar as the Executive Board derives its authority from the Articles of Agreement, the Executive Board's decisions must be consistent with the Articles as a higher authority of law. Likewise, the Executive Board is also bound by resolutions of the Board of Governors as the highest organ of the Fund. Commentary to the Statute of the Administrative Tribunal of the International Monetary Fund, available at www.imf.org/external/imfat/report.htm.

221. Official Commentary to Article III, www.imf.org/external/imfat/report.htm#commentary_III.

222. *Ibid.*

223. Amerasinghe C. F. (2005), see note 107, at p. 787.

224. Decision No. 6, ELDO Appeals Board (1971).

225. Amerasinghe C. F. (2005), see note 107, at p. 789.

226. Ferrecchia, ILO Administrative Tribunal Judgment No. 203 (1973) (discussing the right to participate in the examination of evidence).

international administrative law.²²⁷ One reason for the reluctance could be that the tribunals want to show respect for the legislative procedures within international organisations. However, other tribunals boldly recognise fundamental norms that international organisations cannot violate,²²⁸ such as non-retroactivity and non-discrimination. The main challenge to moving forward will be to define the aims of such principles, which could prove to be difficult as not all legal systems share the same legal culture and tradition.²²⁹

B. Towards supremacy of international law

Under a legal hierarchy, every action and enactment of the international organisation must respect higher-ranking norms. Article 38 of the ICJ Statute, the most respected list of the sources of international law,²³⁰ provides that international conventions, general principles of law and international customary law serve as primary sources of international law, while judicial decisions and scholarly writings serve as subsidiary means of international law. Despite this articulation, international administrative tribunals never refer to Article 38(1) of the Statute of the ICJ.²³¹

Although Article 103 of the UN Charter explicitly provides that obligations under the Charter shall prevail over any obligations of UN member states,²³² under other international agreements, the ICJ Statute does not establish a hierarchy of sources of international law. The ICJ Statute merely suggests the order in which a tribunal should consider each source: if the solution is found in a treaty, a tribunal should not refer to custom, but if no such custom or treaty exists, then the adjudicator must resort to general principles of law.²³³ This order goes from the most specific rules to the most general, reflects the decreasing ease of proof, and reflects preference for sources in which consent of states is better articulated.²³⁴ The same logic can apply to international administrative law – in the absence of relevant treaties of customary international law, adjudicators should resort to general principles of international administrative law.

According to Hersch Lauterpacht, a specific treaty overrides international customary law and even general principles of law, and it may also depart from a general treaty binding on the parties, subject to certain limitations. Lauterpacht argues that

227. *The development and effectiveness of international administrative law. On the occasion of the thirtieth anniversary of the World Bank Administrative Tribunal*, citing Mullan, UNAT Judgment No. 162 (1972).

228. *Ibid.*, citing the de Merode case on the principle of non-retroactivity.

229. However, the same argument would apply to the force of international law generally, such as the UN Charter, which is primarily based on the Western legal tradition.

230. Malanczuk P. (1997), *Akehurst's modern introduction to international law*, 7th edn, p. 36 (stating that Article 38(1) of the ICJ Statute "is usually accepted as constituting a list of the sources of international law").

231. Amerasinghe C. F. (2005), see note 107 p. 283.

232. Article 103, UN Charter.

233. Pellet A. (2006), "Article 38", in Zimmermann A. et al. (eds), *The Statute of the International Court of Justice: A commentary*, para. 271.

234. Dupuy P.-M., in *Collection of essays by legal advisers*, pp. 377, 381 and 388, available at www.un.org/law/books/CollectionOfEssaysByLegalAdvisers.pdf.

because treaties and custom hold the first place in the hierarchy of international legal sources, they should be interpreted against general principles of law.²³⁵

However, because in most cases treaties and customs result from interaction of states rather than interaction between international organisations and their employees, treaty application in international administrative law is questionable, particularly because international organisations themselves are rarely parties to treaties.

While the supremacy of constituent documents of international organisations over other internal law is widely recognised, this is not the case with the supremacy of general international law over the internal law of international organisations. One author suggests, “[T]he general principles of law yield to the written sources.”²³⁶ On the other hand, others believe that general principles of law usually prevail over a conflicting written internal law of an organisation.²³⁷

Some argue that every internal regulation of an international organisation must conform to general principles of international administrative law and any other applicable norms of general public international law.²³⁸ In other words, the practice of an international organisation cannot override a fundamental general principle of law, such as the prohibition against discrimination.

A number of international legal instruments support the supremacy of international law over the internal law of international organisations. The Vienna Convention on the Law of Treaties provides that “an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.”²³⁹ Further, Article 31(1) of the Draft Articles of Responsibility of International Organizations provides, “[T]he responsible international organisation may not rely on its rules as justification for failure to comply with its obligations.”²⁴⁰ Although these articles do not address an international organisation’s obligations vis-à-vis its employees, but rather deal with traditional subjects of international public law,²⁴¹ no reason exists as to why the same principle cannot apply to

235. *International law: being the collected papers of Hersch Lauterpacht* Lauterpacht H., Lauterpacht E. (eds) (1970), in *International Law: Being the Collected Papers of Hersch Lauterpacht*, Cambridge University Press, Cambridge, pp. 87 and 244., pp. 87 and 244.

236. Schermers H. G. and Blokker, N. M. (2011) *International institutional law: unity within diversity*, p. 390; also Akehurst, see note 90, at p. 80.

237. Amerasinghe C. F. (2005), see note 107, at p. 296.

238. Dupuy R.-J. (1988), *A handbook on international organisations*, p. 245.

239. Article 27 of the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.

240. Article 31(d) of the Draft Articles on Responsibility of International Organizations. This provision mirrors Article 27 of Draft Articles on Responsibility of States for Internationally Wrongful Acts. Draft Articles on Responsibility of States for Internationally Wrongful Acts.

241. According to Article 33 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, the international organisation may owe obligations to one or more states, to one or more organisations, or to the international community as a whole. Draft Articles.

employment relations.²⁴² The main issue in establishing such a hierarchy with respect to international administrative law is deciding which norms occupy the highest hierarchical position.

The ICJ in the *Barcelona Traction* case suggested in a well-known dictum that “basic rights of the human person” create obligations *erga omnes*, which are more important to the international legal order.²⁴³ The case provided several examples of such *erga omnes* rules, including the “protection from slavery and racial discrimination”.²⁴⁴ However, there is no agreement as to which human rights norms are covered by the concept of *jus cogens*. Except for a few cases, such as prohibition of genocide, torture and slavery, it remains difficult to determine which human rights norms meet the threshold of *jus cogens* norms.²⁴⁵

Certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community. These include obligations concerning the protection of basic human rights.²⁴⁶ As treaties attract nearly universal ratification, it is often assumed that the principles they contain have achieved the status of customary international law.²⁴⁷

The 1998 ILO Declaration on Fundamental Principles and Rights at Work provides the most important employment law principles.²⁴⁸ These principles include freedom of association, the effective recognition of the right to collective bargaining, elimination of all forms of forced and compulsory labour, effective abolition of child labour and the elimination of employment discrimination.²⁴⁹ These principles, which nearly all jurisdictions have recognised as fundamental,²⁵⁰ should prevail over conflicting internal law of international organisations.

242. Additionally, drawing an analogy to the hierarchy of rules within European Union law proves useful. The principle of constitutional legality under European Union law establishes that each act attributable to the European Union should not contradict higher-ranking law. Von Bogdandy A. (2012), “Neither an international organization nor a nation state: the EU as a supranational federation”, in *The Oxford handbook of the European Union*, pp. 761, 763 (Jones E., Menon A. and Weatherill S. (eds)). For example, the practice of individual European Union institutions cannot change the primary law of the European Union. Case 68/86, *United Kingdom v. Council of the European Communities* (1988) ECR 855, para. 24.

243. *Barcelona Traction Light and Power Co., Ltd. (New Application) (Belgium v. Spain)*, (1970) ICJ Rep. 4 (Judgment of 5 February). For a discussion of what constitutes fundamental rights under various instruments, see Meron T. (1986), “On a hierarchy of international human rights”, *AJIL* 80, 1, pp. 5-11.

244. *Barcelona Traction* case, *ibid.*, at 32.

245. For a discussion on this topic, see Weil P. (1983), “Towards relative normativity in international law?”, *American Journal of International Law* 77, 3, pp. 413-42.

246. Institut De Droit International, “Obligations *Erga Omnes* in International Law”, Resolution of 27 August 2005, available at www.justitiaetpace.org/idiE/resolutionsE/2005_kra_01_en.pdf.

247. Clapham A. (2006), *Human rights obligations of non-state actors*, p. 100.

248. ILO Declaration on Fundamental Principles and Rights at Work (1988), available at www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

249. ILO, see note 248.

250. ILO, NORMLEX database, Ratification by convention, available at <http://ilo.org>. (The number of ratifications range from the Convention concerning the Prohibition and Immediate Action for the Elimination the Worst Forms of Child Labour 1999 (No. 182) with 178 ratifications to 152 ratifications for the Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87).

A hierarchy of norms of international administrative law, with international law holding the highest hierarchical position, will help to prevent proliferation of poor quality international administrative case law. Furthermore, it will send a message to international organisations that the international community will not tolerate a breach of such rights guaranteed under general international law. An establishment of a hierarchy will thereby help to develop the international administrative legal system.

VI. Conclusion

The current system of international administrative law does not constitute a hierarchically ordered model. Ascertaining the necessary degree of conflict between international and internal law may prove exceedingly difficult, particularly when the superior law, namely general international law, is so amorphous. To remain normative, international administrative law must have a formalised standardisation based on the supremacy of international law.²⁵¹

The current pluralist model of international administrative law fails to offer a degree of legal certainty. Clarifying the relevant sources and setting up a hierarchy between internal and international law could diminish the space available for politics and unlimited discretion.

As a system of law completely detached from a domestic legal system, international administrative law is a purely international creature.

However, not all sources of law applied by international administrative tribunals qualify as international public law in the strict sense of this term. Internal regulations of organisations, decisions of an organisation's highest governing body, as well as an individual's employment contract, clearly give rise to rights and obligations of employees and intergovernmental organisations. However, these do not constitute sources of public international law, and their role should be subordinate to international public law *sensu stricto*, backed by the legitimacy of the international law-making process.

International conventions and customary international law provide the most appropriate means to determine the rights and obligations of subjects of international law, such as states and international organisations. Yet, it is difficult to locate the rights and obligations of employees in these instruments, which actors in the public international legal system create through interaction. Although international organisations are rarely parties to international treaties related to human rights and labour standards, they may be bound by the general principles of law articulated in them. General principles of law play an important role as a source of law both for employees and for international organisations. Similarly, decisions of other tribunals and the teachings of the most highly qualified scholars of the various nations should serve as subsidiary means to determine rules of law.

Rules of international public law, including procedural and substantive general principles of international law, should prevail over any conflicting internal law of

251. D'Aspremont J. (2011), *Formalism and the sources of international law*, p. 30.

international organisations. While some international organisations explicitly recognise this hierarchy in their statutes, others remain reluctant to do so. Administrative tribunals have started to recognise this principle in their jurisprudence, albeit without any reference to the theory of public international law.

Therefore, an established hierarchy of sources will make international administrative law more coherent and predictable, and will ensure greater procedural equality between international organisations and international civil servants.

To achieve this hierarchy, administrative tribunals can clarify the sources of law applicable to disputes and outline the normative hierarchy. International organisations should also consider following the example of the EBRD Administrative Tribunal, which defined the sources of applicable law and established supremacy of international administrative law over conflicting internal law of the organisation.²⁵² Finally, the International Law Commission could codify general principles of international administrative law, similar to the Draft Articles on the Responsibility of International Organizations, as this will explicitly establish the supremacy of such principles over the internal law of international organisations.

CHRISTOS VASSILOPOULOS, ADVISER TO THE CENTRAL BANK OF LUXEMBOURG, JUDGE OF THE NATO ADMINISTRATIVE TRIBUNAL

I should like to begin by thanking the Chair, Mr ROZAKIS, and Mr Sergio SANSOTTA for organising this panel. I am going to speak in French about the same subject as before, but from a different point of view, to look at the specific characteristics of the European civil service, in particular with regard to the European Central Bank (ECB) and national central banks. I propose considering the links which exist between the European/international civil service and national law.

First of all, it should be noted that, within the EU, there are civil service regulations which apply to all European civil servants, except those at the ECB and the European Investment Bank (EIB), who are covered by separate rules when it comes to staff disputes.

What are the reasons for this difference or this dual approach? What justifies it?

In the case of financial and monetary institutions, it is customary for them to have specific regulations on staff disputes, for several reasons. Firstly, because sensitive issues are involved, in particular on account of the need to observe professional secrecy in the banking sector. Secondly, there is a requirement of independence, which is now enshrined in the treaties (Article 130, Treaty on the Functioning of the European Union (TFEU)) and which applies to the operation of the ECB and also concerns staff members.

In a case brought before it in 2003 concerning the scope of the principle of the independence of the ECB, the Court of Justice of the European Union provided clarification on that independence, which is established as a principle in the treaties

252. See Statute of the EBRD Administrative Tribunal.

(Case C-11/00). In that case, the court essentially ruled that no matter how broadly the principle could be applied, the ECB was an integral part of the EU.

As an independent financial institution, however, since being set up under the Maastricht Treaty, the ECB has had its own specific statute which applies to the management of its staff. This is nothing new for financial and monetary institutions. The same applies to the EIB.

In the ECB's case, this specific characteristic also consists in the fact that jurisdiction for disputes concerning its staff remains with the European courts (currently the Civil Service Tribunal, CST). The same applies to the EIB.

However, it should be noted that in the case of the European Stability Mechanism (ESM), the relevant treaty authors chose to assign disputes concerning its staff to a specific administrative tribunal, rather than the Court of Justice through the CST.

As a result, whereas it had previously been agreed at European level to ensure a uniform level of interpretation by having the same court rule on staff disputes, the establishment of the ESM Administrative Tribunal was a break with that practice.

This approach has ultimately been overtaken by the events in recent years in connection with the Economic and Monetary Union (EMU) insofar as the ECB and national central banks now form a grouping known as the "European System of Central Banks – ESCB". Under this system, staff members of the central bank are EU officials and are therefore subject to European civil service rules, whereas the staff of national central banks are not EU officials and are subject to their national regulations or, where applicable, ordinary national law. There is therefore a further very clear fragmentation in the rules applicable to the staff members involved in the ESCB.

The same official working for the ECB or for a national central bank performs the same duties. Whereas in the case of ECB staff, any disputes are a matter for the CST and the Court of Justice of the EU, at national level, in the case of national central bank staff, jurisdiction over labour disputes lies with national courts.

A fresh difficulty currently therefore arises in the context of EMU because, for the first time, there is also fragmentation in terms of the law applicable in relation to the court with jurisdiction over disputes that on the face of it concern the same issues.

With regard to European law, national courts can always apply to the Court of Justice of the EU for preliminary rulings on validity or interpretation.

However, the real problem stems from the discrepancy between the situation at national level and that at European level in the context of the Economic and Monetary Union. This is even clearer in disputes involving officials arising in connection with relations between the ECB and national central banks because of the role played by the latter in banking supervision.

The ECB may, for instance, ask national central banks to adopt certain decisions. The same staff have to apply them but, in applying these rules, the staff are not subject to European civil service rules but to the national rules of the national central bank to which they belong.

This is a new problem which is bound to be the subject of discussion in future.

I should like now to continue with the example of liability. This is an important issue which has been dealt with at length in the case law of the Court of Justice of the EU and also the CST. Under EU law, the rules on liability are very strict. At national level other rules apply and, for instance, there are limitations on liability, which is a “novel” concept for the time being in terms of the case law of the court and the tribunal.

In practical terms, at European level, there are specific rules which apply to staff taking part in monitoring and supervisory tasks, for instance; at national level, there are other rules, which clearly are consistently at odds with the rules of European law. At present, these two bodies of law exist side by side; however, we are confronted with the question of this fragmentation of the law and how to implement a new system.

Sooner or later, it will no longer be acceptable for things to progress in this way, in other words, for national law to develop alongside European law, whereas European law originally involved the idea of a degree of unification, as desired by all the member states and the stakeholders concerned.

I will not go into the questions concerning codes of conduct in greater detail. There are national codes of conduct and there are also European rules. There are discrepancies insofar as different points of view are taken regarding the same individuals, depending on whether the courts are national or European, and rights and obligations are not the same. It is therefore inevitable that, at some point, the issue of the consistency of the applicable rules is going to arise from an overall viewpoint.

Who should rule on these issues? The European courts? That would seem to be logical.

In conclusion and regarding the specific case of EMU, the question is what interaction there will be between the respective legal orders applicable to national central bank staff when they act in the context both of their national duties and of their European duties (Eurosystem and supervision), taking account of the fact that the courts with jurisdiction over these staff are – or sometimes are – not European courts.

Those were the points which I wished to make with my presentation. Thank you very much.

I shall be glad to take part in the discussion.

DISCUSSION AND CONCLUSIONS: SESSION 5

Linda TAYLOR

I now call upon our panellists for some preliminary reactions to kick off what will then be an open floor discussion. I will start with Celia.

Celia GOLDMAN

Thank you very much. I think my comments will respond mostly to Jörg’s presentation, and a very fascinating presentation by Christos, but perhaps due to my role on the ESM Tribunal I should refrain from considering some of those interesting topics. I think that here I can have a kind of cultural point going on starting with the early

cases we were looking at: the Marlon case in the UN former Administrative Tribunal and the Council of Europe appeals for a case that I presented.

So I think that... I have to say that I take some issue with both the description and the prescription because I think that the description is not entirely consistent with my own experience with international administrative law, especially through my involvement as a registrar at the ESM Administrative Tribunal; I think it is, particularly in that statute, it is very clear that the internal law includes general principles moreover because the IMF Administrative Tribunal clearly has jurisdiction to consider challenges to staff rules; frequently in the position of testing the written law against higher norms. So I think that the issue of normative hierarchy is pretty clear in the IMF Tribunal and the piece of the commentary that you cited, I have always understood to be and it absolutely explains that the third sentence of Article 3 is a reference to a separation of powers and I think the tribunal has understood it. I can't really speak for the tribunal, but having worked with them, my feeling is that if you look at the tribunal's jurisprudence you will see that probably the only significance of the third sentence of Article 3 is that when adjudicating a challenge to a regulatory decision the tribunal would be looking only at the legality of that decision and not the wisdom of that decision. So I do think that the IMF Tribunal does apply a pretty strong normative hierarchy in favour of testing the written law against higher norms.

Then again, on your prescription that there should be more of a normative hierarchy, I think again, I hope that my presentation demonstrated some of the reasons why a very rigid normative hierarchy might not really promote legitimacy, which might be better promoted by recognition of the different actors in the system; so that indeed on the question for example of same-sex partnerships, there may be a good argument for suggesting that the difference between member states and between different cultures in the world might be an appropriate consideration for administrative tribunals to take into account.

Yaraslau KRYVOI

Thank you. It's very good to hear your insight. There's interpretation and I'm a complete outsider so I just look at the text and make my own conclusions. I think in my view that just strengthens the point that we need to list the sources and at least to give some guidance about what happens if there is a contradiction, and preferably that guidance should be understood even by non-lawyers because now we lawyers cannot even come to one reading and so I think there is room for improvement. But other than that it's very interesting and thank you, I don't have any further comments.

Christos VASSILOPOULOS

Just to add that in the Protocol of the Statute of the ECB and in the Protocol of the Statute of the European Investment Bank, there is a specific provision concerning the hierarchy of the rules; this is certainly the point but the other point is the practice, and in particular how the Court of Justice and the competent judge of the Tribunal de la fonction publique focus on this. In theory we have in all the statutes the appropriate provisions concerning the hierarchy of law, the compliance with international requirements, the international principles of law – this is ascertained

– but the question is the practice and how the court, the competent judicial authority, views the meaning of the rules contained in the statutes.

Linda TAYLOR

Thank you. The floor is now open for any questions and comments and interventions.

Dražen PETROVIĆ

Good morning everyone and thank you Linda. My name is Mr Dražen PETROVIĆ, I'm Registrar of the ILO Administrative Tribunal.

I have a couple of questions for Doctor KRYVOI because I was intrigued by his presentation and I share the concerns of Celia. If you have a statute that provides what is applicable law, how you would see this hierarchy, what would you do as other sources of law? You quoted the Vienna Convention, but do you take into account Article 5 of the same convention that became customary law in short, without prejudice to the rules of the organisation? This right shall apply, but without prejudice to the rules of the organisation. This is exactly our case.

And I would like to add some caution about application of ILO instruments. The same people who adopted conventions and recommendations of the ILO are adopting and supervising it, meaning basically the ILO governing body is reviewing the Statute of the ILO Administrative Tribunal and is adopting Staff Regulations of the ILO and there is no reference to those instruments in the other two. So that can be their only four fundamental principles and rights at work and they come from the declaration of 1998. So I would be cautious just saying all administrative tribunals should refer to ILO instruments because that's the top in the world of work. Those are not general principles, those are treaties; and unratified treaties in our theory become recommendations to the member states, so it is a recommendation to ILO itself if it wants to adopt and apparently it's not buying it. So that's why maybe the ILO tribunal is not quoting ILO conventions. Well, at least that's how I understood it.

I think on the relationship between national law and a law of international organisations, as you rightly pointed out, tribunals apply law. So they will be influenced by national law to the extent that organisations are influenced by national law. The more organisations regulate something autonomously, the more they will be able to oppose those rules to the national law. Recently there was a case before ILOAT – I think the last session – where there was a conflict between the status of national and international civil servants and it involved the question of entry visas and stay permits and basically Dutch authorities just said: "This person is a Dutch national, she just goes to a national system and gets everything." Well, it happened to be an official of an international organisation so she went to international organisation and said: "Protect me; I'm your official and you have a headquarters agreement and it is said that they have to issue a stay permit to me that is totally separate from national ID" and the tribunal said: "Well, sorry organisation, you have to implement this headquarters agreement. Your duty is to protect the special status even of a national of the host country and try make the case to the host country authorities." They basically said: you can't just convey messages from the Ministry of Foreign Affairs saying that's how they interpret our headquarters agreement – by the way, the tribunal ventured into interpreting that headquarters agreement, but that's a side issue – and said: "it's a probable interpretation, the Dutch

authorities are wrong so you have to insist on your status of official because it is special status compared to other nationals". Thank you.

Laurent GERMOND

Thank you. I represent the European Patent Office. Two comments:

With regard to this relationship between written law and general principles as interpreted by the judge following the presentation of the second speaker this morning, my first comment relates to a factual situation. I believe that we have to draw a very clear distinction between those courts whose jurisdiction is recognised by a single organisation and jurisdictions or tribunals whose jurisdiction has been recognised by several if not dozens of international organisations.

Mr KRYVOI started by mentioning the UN Dispute Tribunal and then went on to mention very different administrative tribunals and of course, when the judge rules on a case, he knows that his decision will only have effects on the parties. Of course, when the judge rules on the case he/she bases himself/herself on the contractual and statutory provisions which are applicable but when various international organisations recognise the jurisdiction an attempt was being made to have a consistent case law and that's where principles of law have a major role to play and we need to underscore that. You will better understand case law of some jurisdictions bearing that in mind.

Second comment on the hierarchy of contractual provisions and general principles: here I would make a clear distinction between three categories of situation. In the first category, the judge may invoke general principles of law when there are no rules, no statutory rules or when the rules are faulty. The general principles come to supplement those rules. There you don't have a question of hierarchy as there is nothing. The judge will say the law by referring to general principles.

Second category of situation: the situation where the rule is difficult to understand. The rule has been written down but it's difficult to find your way around it, so either you use general principles of law to interpret the rule or try and extract some elements from the rule in the light of these general principles; and from that point of view again there is no hierarchy so to speak. The general principles come again to supplement the rule.

On the other hand, it happens sometimes that the judge feels that the rule is not the adequate rule; it goes against certain principles. And that's where the issue of hierarchy really arises and from what I understand from the case law of the ILO, the Administrative Tribunal said that sometimes general principles have more importance than the written rules but not always.

By way of conclusion, I would like to refer to Professor Condak who, on the issue of general principles, used to say that they are there to avoid a case being dismissed on the basis of a rule that would be overly confident.

Anne-Marie THEVENOT-WERNER

Anne-Marie THEVENOT-WERNER, from the University Panthéon-Assas, Paris. I have quite a short question for our panellists. I would like to know if in international

administrative law or more specifically the law of international public service, if there is such a thing as international public-service law in their eyes because some speakers think there is no such things. I would like to get your confirmation or get your clear view on this and if indeed there is such a thing, is that a whole new area of law, quite unconnected with anything else or is it a sub-branch of international law? Thank you very much.

Christos VASSILOPOULOS

To address the question that's just been asked, I would like to take it from somewhat of a different angle. I'm French, like you, so no offence intended but we always try to get things properly labelled and to say that is international administrative law and short of this on that condition it is no longer international administrative law, it's civil service litigation; it's a very French cut-and-dried approach to the law. Well, there's nothing wrong with it. I mean, I fully subscribe to it but I think that this is a thing of the past; what was first termed "international administrative law" in the immediate aftermath of the Second World War, well, we've moved on and what was considered as international administrative law 50 years ago or even administrative law in that period has changed a great deal. You can't always apply the same principles everywhere. There are such things as general principles, but I think that this is very much a thing of the past, as I was saying, and the administrative law of international public service, so civil service, has changed a great deal over the last 50 years. In this regard, what has also moulded the law is changes in the monetary union, which has developed rules of its own, based on the French administrative legal doctrine. The procedural language is French and people write in French, they follow the French way of reasoning, French doctrine, French concepts which are not necessarily to be found in the Anglo-American world. So all of this has changed a great deal, the EU has played a key role and the law has undeniably changed at all levels and the law of the international civil service has also been affected by those changes. So, yes, I believe there is such a thing as the administrative law of the international civil service. However, it has changed a great deal since the aftermath of the Second World War. So this is what I would have to reply.

Celia GOLDMAN

Yes, I think there is such a thing as international civil service law but it doesn't exist in itself, it comes from somewhere, the underlying concepts I think they are in the landscape of employment law as usually, the employment relationship and the legal controversies that arise from that are something that's usually played out on the landscape of national law. And in international organisations where you have member states with many different legal traditions I think you see a tension between an administrative law concept, which is based on a review of abuse of discretion versus a labour law concept, which is based on a rights-based approach to the employment relationship. I think all of these factors interplay with one another; I think this is why there is, as the title of our conference today is "the common focus", but I'm not sure whether this should instead have been "the diversity of the administrative tribunals". I think we should be careful not to assume there is one international civil service law but that it is a very, very heterogeneous situation.

Yaraslau KRYVOI

Thank you for the very interesting thought-provoking questions.

I will first deal with the ILO questions. When I was writing my paper, I was actually thinking that I was doing something good for the ILO. I was thinking: "Look, I'm promoting ILO conventions, recommendations; now everyone will be citing those conventions and recommendations: the justice at the workplace will flourish, and so on." And then I submitted my article to the *International Labour Review* and I got rather negative comments from the anonymous reviewers, saying "How can you teach us? We know what we are doing. Have you ever dealt with even one case? How can you write this sort of thing?" So then I had to go to the United States to publish my article, which appeared in a US law review. So I think that's an interesting continuation of this – me promoting the ILO convention despite other views.

First, on the issue of fundamental rights and the principles, you have certainly the decoration list, the most important ones, and at least those should be treated as co-principles by all tribunals in my view. And when I'm talking about the hierarchy, I'm not suggesting that the hierarchy should be dominant or that the treaty should prevail over customary law and in this situation, with regard to the practice of international organisations, at least we should agree that there are certain core principles which should prevail over any contradicting written rules. So that's the starting point. And I think it has already been implemented by some tribunals in their statutes. I gave an example of the EBRD tribunal, so the first established to say: yes we are always adhering to these core principles as a matter of principle and then to decide what those principles are. And I think not much has been done in trying to understand which principles apply for all tribunals, which principles are very specific to one particular organisation, and so hence my suggestions that there must be some sort of study or working group or task force, whatever you call it, to try to systematise it and to understand what are the most important principles. And maybe, I haven't really thought about it before, but how about the ILO becoming a party to the ILO conventions? It sounds like an interesting concept to me, probably worth writing another article about.

Special rules and general rules of law: so yes, there is a principle that if the rule is more specific, then it should apply rather than the general principle. But this rule applies only if the two rules have the same statute; so let's say one principle is more general and one principle is more specific than you applied. If you have different levels, so if one is on the level of international law and the other is on the level of international law of an organisation then I think there is not that much room for an application of this approach. I will talk later about what makes international administrative law different and this is why it is different; it's quite distinct from usual public international law on the one hand. On the other hand, it shares a lot in common but let me talk about it in a moment.

So the question about whether there is actually a need to have a hierarchy if in some places general principles of law are just filling the gap and other principles are clarifying, and only in some situations can they basically be used as something which supersedes or prevails over conflicting rules. I completely agree with you: in the first situation, when there is no gap and you apply principles before something that is difficult to understand, then you just use this principle to interpret. So the

difficult one is the one where the tribunals see a general principle of law which clearly contradicts a written regulation; and here it's a very tricky situation because I'm now writing an article about fairness in international administrative law and it's very similar. So sometimes the tribunals use fairness to fill the gap; sometimes they use it to interpret something; and then finally sometimes they use fairness to override a principle of written law. And if we agree that there is a hierarchy, that if there is a general principle of law which contradicts the internal principle of law, then in my view the general principle of law should prevail. And it's different when you are thinking for example not about general principles of law but equity. So let's say: can the tribunals use equity to override conflicting rules of internal law? And here my answer is no. So only if it's a generally recognised established principle of international administrative law, only then can you say that it prevails.

On the question of whether international administrative law actually exists or not, I think it does exist and it's quite distinct from both international public law, obviously from normal employment law and in my article on the source of international administrative law I compare international administrative law with other areas where you have private actors on the one hand and public actors on the other hand and international human rights law is one example. Before going into academia I was practising investor–state arbitration where we were confronting states on behalf of investors. So it's rather a similar situation in a way because states have their own set of rules and obligations as subjects of international public law while individuals do not have the same set of rules, rights and obligations because they are private individuals.

And then, as regards how to manage these peculiarities in practice, it is precisely the subject of my articles. What really makes international administrative law different – and this is my last point – is that there is very little interaction with domestic legal systems because if you think about international law of human rights you usually first have to go to domestic courts, you have to exhaust remedies; only then you can go to the European Court of Human Rights for example or to similar bodies. Then similarly within investor–state arbitration, first you have to use domestic courts, exhaust local remedies, then you go to an international tribunal, then you have to enforce the award, which also brings you back into the realm of domestic law. Within international administrative law it's different: you are very much detached from any domestic laws with the exception of those situations when you apply domestic law.

Linda TAYLOR

I would first of all like to thank the audience for your comments and interventions and invite you to join me in thanking our three speakers.

Session 6

Discretionary power and its review before tribunals in the various fields of human resources management

LAKSHMI SWAMINATHAN, PRESIDENT OF THE ADMINISTRATIVE TRIBUNAL OF THE ASIAN DEVELOPMENT BANK

Ladies and gentlemen, before I start this session, I would like to express my heartfelt thanks and congratulations to the Secretary General of the Council of Europe and Mr Sergio SANSOTTA for the excellent hospitality and other arrangements they have made to spread knowledge to all of us in this conference. This has been a wonderful experience for all of us. I am particularly happy to be here from the Asian Development Bank Administrative Tribunal, which I think will be noticed more and more in this field. We also have many of the general laws, rules and practices that are applicable to administrative tribunals of the World Bank, IMF, ILO, etc.

Now, on this topic of “Discretionary power and its review before tribunals in the various fields of human resources management”, I would like to make a few introductory remarks and then pass you over to my colleagues who will present the examples of such abuse. The human resources of any international organisation are the asset/treasure of that organisation. The use of discretionary power by the management will come in right from the date of recruitment of an employee, through his career up to the time of retirement, what I call “from R to R”, that is from recruitment to retirement.

There are certain discretionary powers that are exercised by the management, for example: how many members of the staff they would like to have; what qualifications they should have, whether they should have a PhD in chemistry or finance or whatever other qualification; is required for a particular division, what salary they are going to fix for a particular grade; the other benefits they are going to give and so on.

These are more in the nature of policy decisions and the Administrative Tribunal normally will not interfere in that exercise by way of judicial review. However, the tribunal will exercise its powers to review the discretionary power exercised by the management to see that it has been done in a proper manner; for example that it is reasonable, fair, not discriminatory and is in consonance with other general principles which we have been talking about for the last couple of days.

In addition to recruitment, there will be the question of a probationary period, that is generally of one year. Then there is the fixed-term contract, which may or may not be renewed, subject to satisfactory work and conduct. The discretion exercised by the supervisor to review the work of the staff is exercised according to the rules and orders of the organisation and these are usually given in detailed provisions. I mean in the ADB, it's all laid down in the administrative orders, circulars, and regulations and any exercise of discretion with which the staff are adversely affected can be challenged before the Administrative Tribunal of the ADB.

However, the tribunal will not substitute its discretion for that of the management in assessing the performance of the staff member concerned in the multinational organisation, except when discretion has been improperly exercised contrary to the rules or the due process of law has not been followed. The discretionary power exercised by the seniors over the staff is something which is governed by the staff rules. This could affect the promotion of the staff and can also be challenged by an aggrieved employee before the tribunal.

Then we come to another topic – disciplinary procedures and measures where the discretion to be exercised by the supervisors or the senior staff are also laid down. The tribunal will look into these proceedings to see for example whether the penalties imposed on the employee are proportionate, the due process of law and procedures have been followed and are within the time limit. If the tribunal finds that the discretion has not been exercised totally in accordance with the rules and regulations, then the tribunal can set aside the impugned order or order specific performance of the obligation and award some compensation, which you could say is equitable.

Then the staff may be denied retiral benefits or there may be a delay in giving retirement benefits, for whatever reason. Every time there is discretion being exercised by the bank's management, from the time of appointment to the time of retirement; thereafter also regarding any benefits that may accrue from the organisation. However, for example, if the international organisation decides to give certain educational or health benefits they may do so in a manner to suit their budget or the policy they wish to adopt. The tribunal will interfere in these cases only if the decision is unreasonable or it is discriminatory or some provision is changed retrospectively so as to adversely affect an employee.

We are going to look into that aspect of a staff member's journey in an international organisation, just like in domestic jurisdictions, where someone in the organisation is constantly exercising his discretion, which is inevitable. They have to do it for better human resources management. Only when the discretionary power is alleged to have been exercised wrongly or illegally or improperly, which adversely affects a staff member, and it is challenged, may the matter come to the administrative tribunal for a decision.

With this short introduction, I would like to now introduce the panel members. We have in reverse order, Mr Piotr GLONEK who is the Vice-President of the Staff Committee and of the General Assembly of the European Parliament. He has been in charge of a number of trade-union associations. He has extensive experience in various internal committees like the promotions committee, the reports committee and the committee on professional incompetence, which will relate to promotions and everybody looks forward to a promotion. I thank you for being here.

The second person who is presenting a discussion paper in this session is Ms Virginia MELGAR. She is wearing several hats, among which she is a member and President of the European Stability Mechanism Administrative Tribunal at Luxembourg, where she has been since 2014. I find there is a very interesting provision in that organisation where she is not only the President of ESMAT, but also acts as the registrar. For the present, suffice it to say that she is highly qualified in various subjects. I would like to highlight some of them: she graduated in law from the University of Paris; then in criminal sciences from the Institute of Criminology, Paris; she's been a magistrate at the Ministry of Justice, Criminal Division; and is an expert of the Legal Service of the European Commission; Lawyer at the Legal Service of the Office for Harmonisation in the Internal Market,²⁵³ Alicante; Deputy Director of the General Affairs and External Relations Department and many, many more organisations. I welcome to for this session.

The third speaker is Mr Jörg POLAKIEWICZ. He has been the Director of Legal Advice and Public International Law of the Council of Europe since October 2013. He joined the Council of Europe in 1993, working on constitutional reform in eastern and central Europe with the European Commission for Democracy through Law (the Venice Commission) and subsequently in the Council of Europe's Legal Service and Human Rights Law and Policy Division. He's an author of a number of books including *Treaty-making in the Council of Europe* – which published it in 1999 and *Obligations of states arising from the judgments of the European Court of Human Rights*, which was published in German in 1993.

May I now call upon Mr Jörg POLAKIEWICZ to please present his paper.

JÖRG POLAKIEWICZ, COUNCIL OF EUROPE LEGAL ADVISER

I would like to begin by thanking the organisers, particularly Mr SANSOTTA, for the outstanding organisation of this colloquy. My only regret is that I was not able to join you for the other sessions.

The theme of this working session is the exercise of discretionary power and the role of international administrative tribunals. In the course of my talk, I would like to suggest a few lines of enquiry, beginning with the concept of discretionary power and judicial review, before giving some examples taken from recent case law and drawing some conclusions.

253. On 23 March 2016, OHIM became the Office of the European Union for Intellectual Property (EUIPO).

Recognition of the administration's discretionary power derives mostly from practical considerations. For instance, in the area of staff management, the administration's discretionary power is vitally important insofar as it is perfectly appropriate for the administration to be able to act freely in certain circumstances.

In principle, the administration is best placed to assess situations connected with staff management and take the necessary measures or decisions. In this area, the exercise of discretionary power by the administration is linked to issues of expediency and it is not necessarily the judge's role to substitute his or her assessment for that of the administration.

To begin with, it should be pointed out that the Council of Europe is primarily a standard-setting organisation and while the Administrative Tribunal is celebrating its 50th anniversary this year, it could also celebrate – although it is less usual to do so – the 35th anniversary of a recommendation on the exercise of discretionary powers, which the Committee of Ministers of the Council of Europe adopted in 1980. Recommendation No. R (80) 2 of 11 March 1980 concerning the exercise of discretionary powers by administrative authorities defines discretionary power as a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose, from among several legally admissible decisions, the one which it finds to be the most appropriate. This definition therefore already comprises the concepts of legality and appropriateness but also the idea that it is the administrative authorities which must adopt the solution they consider to be most appropriate and it is not for the tribunal to substitute its own assessment of the interests at stake for that of the administrative authorities.

It is interesting to note that at the time, the experts did not reach any agreement on the exact delimitation of discretion on the one hand and legality and appropriateness on the other, especially in view of the divergence of European legal systems. In Europe, legal systems differ from one another with the result that legal concepts also differ. Even today, 35 years later, we have not really succeeded in harmonising the law and legal systems in the administrative law field.

What do international administrative tribunals like ours do? What law and what concepts do they refer to? As a German pleading before this tribunal, I have the impression that French law most clearly has the greatest impact, if only in terms of the concepts deployed. For instance, it is impossible to translate the French term "*détournement de pouvoir*" (meaning improper exercise of authority) into German, as this concept is quite specific to French law. For even if it can be translated technically, does the translation convey enough of the same meaning to be accurate? In Italian the expression "*traduttore – traditore*" is used to reflect the fact that all translation comprises a degree of inaccuracy; even if there are possible translations, they do not necessarily refer to the same concept; or even if we use the same concept, such as "*Verhältnismäßigkeit*" in German for "*proportionnalité*" in French, it is not the same thing when the German judge applies it as it is when the French one does, as the results will not necessarily be the same.

From my experience, I would say that it is mostly French law which, in some ways, provides the bulk of the tribunal's case law and forms the basis for its concepts. If we look at French law, the discretionary power granted can range from a simple

review of the external legality of the decisions taken – assessing what the competent authority is, whether there has been an abuse of authority or procedure or whether the interpretation of the facts on which a discretionary decision was based has not resulted in manifestly unreasonable conclusions – to an almost complete examination of the merits in some cases. My difficulty as the Organisation's legal adviser and as a litigant before the tribunal is that it is not always possible to know what approach it will adopt in a given case because it often uses the same concepts in its general submissions but afterwards, when it examines the case on the merits, I often have the impression that on some occasions it carries out a somewhat formal review, while on others, it goes much more into the substance. However, we never know in advance in what cases the tribunal will look thoroughly into the merits and in what cases it will confine itself to an examination which I would not call superficial but one in which it focuses only on certain aspects, especially the procedure followed, but fails to look into the substance of the decision in which discretionary powers were exercised.

In giving you a few examples, I am not going to cite decisions as I heeded the words of the Data Protection Commissioner yesterday when she said that we should not cite names. Therefore, since I myself am very much in favour of protecting personal data and privacy, I will simply give the numbers and dates of the decisions in question.

Firstly, in my view, if there is one area in which discretionary power must be properly supervised, it is that of staff promotion, on which there is a long list of decisions by the tribunal.

In this connection, the tribunal has a quite clear and well-established body of case law. By way of example I would cite the decision of 27 January 1997:

The Administrative Tribunal points out that in staff management matters the Secretary General, who holds the authority to make appointments (Article 36 c of the Statute of the Council of Europe and Article 11 of the Staff Regulations), has wide ranging discretionary powers under which he is qualified to ascertain and assess the Organisation's operational needs and the staff's professional abilities. However those discretionary powers must always be lawfully exercised. It nevertheless has a duty to verify whether the disputed decision was taken in accordance with the Organisation's regulations and with general principles of law, to which the legal systems of international organisations are subject. Indeed, it is for the Tribunal to which an appeal against an administrative decision taken under discretionary powers is made, to examine, not only whether the decision was taken by a competent body and meets the formal requirements but also whether the procedure was correctly followed and, from the standpoint of the Organisation's own rules, whether the administrative authority's appraisal took into account all the relevant facts, whether any incorrect conclusions were drawn from the file and whether there was any misuse of powers.

However, the tribunal does acknowledge that the Secretary General has a subsequent discretionary power to appoint the most deserving candidate bearing in mind all the criteria to be taken into consideration.

Other rulings, in my opinion, go much further, particularly a decision of 2009 (Appeal No. 413/2008). In this case, a permanent staff member of the Council of Europe employed as a translator disputed a decision not to be allowed to take part in the

examinations in an external competition for the recruitment of A1/A2-grade administrators on the ground that she did not have sufficient professional experience. According to the Directorate of Human Resources (DHR), the appellant had mainly gained her experience in the field of translation and did not have “sufficiently long experience, at the requisite level, in the legal field”.

In its arguments, the tribunal reiterated the Secretary General’s discretionary power in respect of recruitment and his power “to familiarise himself with and assess the requirements of the service and the professional aptitudes of candidates for a vacant post” (section 50) and pointed out that, in the event of a challenge, “the assessment of an international court [could not] take precedence over that of the Administration” (section 51). However, despite these considerations, the tribunal examined the candidate’s profile and asked for the decision to exclude the appellant from the written examinations to be annulled, having concluded that the Appointments Board “did not take proper account either of the appellant’s experience as a lawyer prior to joining the Organisation or of her experience working as a translator for the Organisation” (section 52).

The other example which I would like to cite – and it is a highly topical issue – is a decision of 30 January 2015 on the aptitude tests used during a special evaluation procedure (specifically, an internal procedure enabling category L and B staff to apply for category A posts or positions).

In this process, the DHR made use of eliminatory verbal, numerical and logical reasoning tests. In the case before the tribunal, a candidate who was excluded from the procedure following her failure in two of these tests lodged an appeal. The main issue at stake in the case therefore was the limits of the discretionary powers of the administration or, ultimately, the Secretary General on the matter. The appellant did not dispute the principle of holding such tests but simply the relevance of the questions put.

The tribunal considered that it had jurisdiction to assess the relevance of the questions, as the limits of the Secretary General’s discretion could be established “bearing in mind what the aim of the special procedure is. Its aim is not to recruit or promote staff but to give the staff in categories B and L who are ultimately selected the possibility of taking part in subsequent internal competitions held to fill vacant posts or positions in category A”.

The tribunal concluded as follows (sections 55-57): “After examining a sample of the tests in question, the Tribunal draws the conclusion that they were not suited to the aim pursued by the special procedure.” It emphasised that these tests are followed by written papers whose aim is “to ascertain the actual ability of candidates to perform category A functions at the Council of Europe”. “Therefore, when choosing the type of tests which the appellant was required to sit, the Secretary General exceeded the limits of his discretionary power”.

In this case, it would seem therefore that the judges did look at the tests personally and there was an assessment on the merits. This was no doubt necessary given that the tests raised questions. On the one hand, it was beneficial for the administration to use these tests as it was essential to find ways of eliminating some candidates

who would not be invited to the following stages of the competition. Not everyone could be admitted to these tests as some account had to be taken of the costs of such competitions. These aptitude tests had the advantage of being more objective than “dissertation” type written tests because they gave reliable indications on the candidates’ performance and were scientifically recognised and used by many international organisations.

On the other hand, the tribunal had good reason, in my view, to be cautious as it had to be recognised that there was a need to match the tests to the profiles being sought, which implies that one might have numerical tests for financial profiles but not necessarily for legal experts.

In conclusion, the tribunal issued a major warning, requiring the administration to tailor the tests more to the needs of the competition in question. However, if we adopt the viewpoint of comparative law, the question does arise as to whether a French court, for example, would have gone so far into assessing the relevance of the questions in the aptitude tests. This is a question that can be raised.

I would like to conclude by raising an issue which tribunals are increasingly facing, which is the problem of the non-renewal of fixed-term and contemporary contracts. At the Council of Europe, the Staff Regulations provide for indefinite-term contracts (CDIs) but in practice they no longer exist as there is presently a freeze on such contracts, which is currently planned to last until 2018 because of the particularly difficult economic situation in Europe. Our member states no longer have the necessary resources, and the budgets of international organisations have not been increasing, in fact quite the opposite as we have even had to cut around 20 posts and positions this year.

On the other hand, at the Council of Europe, there has been quite a major increase in fixed-term and temporary contracts, particularly in connection with co-operation projects, which are on the increase. These are mainly projects financed by the European Union or other donors for work in the field. The current trend is for the Council to prepare fewer conventions but to send more people into the field to help countries such as Ukraine (yesterday, for example, the Secretary General announced an action plan to help Ukraine reform its criminal justice system). All of these projects are run using fixed-term contracts. At most international organisations, it is possible to award an uninterrupted series of temporary contracts without the holders acquiring any right to a CDI, in contrast with the domestic law situation in most member states.

This situation would be illegal for instance in Germany and in other European countries. However, administrative tribunals do accept it and there is good reason for this: if the rule were applied that a fixed-term contract (CDD) inevitably entitles the holder to a CDI, we would have to forget the system of competitive examinations, which provides access to CDIs. This would result in the *de facto* establishment of another category of persons entitled to CDIs, who could access them directly, none of which is provided for in the Staff Regulations.

Accordingly, on the question of the renewal of temporary contracts, the following principles emerge from the tribunal’s case law (see Appeals Nos. 256/1999, *Grassi v. Secretary General*, decision of 7 June 2000, paragraph 27; 308/2002, *Levy v. Secretary General*, decision of 28 March 2003, paragraph 27):

The Tribunal takes the view that, despite the case law of other international administrative tribunals ... temporary staff do not have the right to automatic renewal of their contract. Granting such a right would, ultimately, create in practice a new "category of permanent staff" at the Council of Europe in addition to the body of permanent staff provided for by the staff regulations. Having regard to the fact, which cannot be disputed today, that the recruitment of temporary staff meets less pressing requirements than that of permanent staff, accepting the creation of a category of temporary staff placed on a permanent footing would be tantamount to distorting the rules on the recruitment of permanent staff, which, under Article 14, paragraph 1 (f), of the Staff Regulations, must be carried out in accordance with the selection procedure provided for by the Regulations on Appointments (Appendix II to the Staff Regulations) to fulfil the purposes and aims of the Organisation clearly and efficiently, as provided for by the Statute of the Council of Europe.

An interesting question arises concerning the exercise of discretionary powers in relation to the non-renewal of these contracts. Put simply, it might be considered that once a CDD is over, the person concerned will automatically leave the Organisation. And in this case, there is no need to raise the issue of discretionary powers. However, the situation is not as simple as this because, according to the decisions of many international administrative tribunals, the decision whether or not to renew a contract lies at the discretion of the authority entitled to make the appointment. The same applies to any decision to convert a fixed-term appointment into a permanent one.

Even if it is accepted that a CDD ends automatically on expiry, non-renewal must therefore be regarded as a distinct administrative decision, capable of being contested in a tribunal, which will examine the conditions under which the decision was taken in each specific case.

The question is raised again therefore as to how far the judge's supervision extends in relation to the requirements and needs of the administration. Before concluding therefore, I would like to give you the example of our Organisation, which has laid down rules on this question.

Under the new contractual policy, the possibility that CDDs may be renewed has been provided for, by adding a new Article 20, paragraph 5, to the Regulations on Appointments:

[The two-year fixed-term contract] may be extended or renewed one or more times, each time for a maximum period of five years. When deciding whether a fixed-term contract shall be prolonged or not, the Secretary General shall take at least three criteria into account: the need of the Organisation in terms of competencies, secured funding and satisfactory performance of the staff member. The Secretary General may determine the application of these criteria and add additional criteria in a Rule.

The rule in question has not yet been adopted but already, bearing in mind the three criteria mentioned, it would be interesting to see how far our tribunal goes in assessing the Organisation's needs, particularly in terms of competencies and the availability of funding because, on the face of it, these are quite clearly matters which it is for the administration to decide upon.

In conclusion, I find it particularly interesting that our Administrative Tribunal's main source of inspiration is French law, but this often gives rise to unpredictable

interpretations and outcomes. This is a genuine problem, both for the administration and for the legal adviser, because although the tribunal adopts the same types of wording, its examination can go into some considerable detail or remain a purely “formal” review (not going into the merits).

The difference, however, is that in French law, we have a body of case law which has been built up over more than a hundred years, and the possible scenarios are very clear, being divided into a minimum review, an ordinary review and an in-depth review. For a French court therefore the situations are fairly predictable. For example, it will apply an in-depth review in a case of expropriation but only a minimum one when the merits of candidates have been assessed by a board of examiners. At the Council of Europe, on the other hand, I have the impression that these categories have not been so clearly established in the case law of the tribunal. Accordingly, I cannot but call on our tribunal to exercise a degree of rigour when reviewing the Secretary General’s discretionary powers.

VIRGINIA MELGAR, PRESIDENT OF THE ADMINISTRATIVE TRIBUNAL OF THE EUROPEAN STABILITY MECHANISM

First of all, I will *not* thank Sergio for my being here today because, as you will have seen in the programme, I was not meant to be here. Louise OTIS, who is Chair of the Administrative Tribunal of the Organisation for Economic Co-operation and Development (OECD) and of the Appeals Tribunal of the Organisation Internationale de la Francophonie (OIF), was due to speak at this session, but she is unable to be here with us for the colloquy. So I have been asked to stand in for her at short notice and to illustrate and give some examples of discretionary power. In making this presentation, I have a language issue as is often the case in Europe: in my tribunal, English is the working language, but I am a French judge and I am in France, so I have chosen to speak in French.

I wish to illustrate the exercise of discretionary power and, above all, the reviews which we as tribunals must perform – thank you for the perfect introduction – and the various degrees of review. For practical purposes, I am going to present two examples: one from the ILOAT because it is an international body that delivers many judgments, which are very general, and because of its broad jurisdiction, and then a judgment by the EU Civil Service Tribunal, which is perhaps also my way of paying tribute to their work.

The first example is ILOAT Judgment No. 2762 of 9 July 2008. I am going to abide by each tribunal’s rules on anonymity, so in this case I will use the initials like the ILOAT does.

I will give the name as published in the second case, in keeping with the practice of the Civil Service Tribunal, namely *Hristov v. European Commission and European Medicines Agency*, judgment F-2/12 of 13 November 2014.

Let us begin with the ILOAT judgment. Before you scrutinise the first point of the judgment, I wanted to explain the background: the organisation concerned is the European Patent Office. The period is 2006-07, a new president has taken office and

he recruits his wife. A complainant, who is a member of the EPO Staff Committee, brings an action criticising the manner in which that individual, the wife of the president, was recruited. I found this judgment very interesting because, as we have just heard, in matters of recruitment and selection in general and especially when there is a selection procedure involving a board, there is very broad discretionary power, and I believe that we might find a relatively harmonised approach here; it really is the exercise of discretionary power. So what has to be examined? It has to be ensured that some minimum rules are complied with. From the complainant's point of view, there had been pressure to recruit the individual concerned; the list of suitable candidates had been manipulated; the post had been tailor-made, etc.; so there had been a number of anomalies which had led to the president's wife being appointed on a B-grade post in charge of co-operation and national offices.

Firstly, regarding point 17 of my PowerPoint presentation, the tribunal reiterates that, given the nature of an organisation's decision to make an appointment, the tribunal will only intervene if the decision was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority – your favourite concept – and/or if clearly mistaken conclusions were drawn from the evidence. And, very importantly, throughout its existence, the ILOAT has consistently held that the tribunal will not substitute its assessment for that of the organisation.

You referred beforehand to a judgment of the Administrative Tribunal of the Council of Europe; I believe we can find many similar examples. There was a board, there were assessments of the merits of the candidates, so, at a minimum, what had to be reviewed were any abuses of authority, breaches of procedure or the like.

The tribunal then made a whole series of findings, as set out in the various points, and checked whether the anomalies alleged by the complainant actually took place. Very interestingly, in the first phase – and you know that the ILOAT serves as the second instance – the Internal Appeals Committee had heard the members of the Selection Board in camera and concluded by a majority that there had been no breach of procedure, but there was a minority view. And the minority also referred to anomalies.

The tribunal noted, firstly, that the "knowledge of two working languages necessary" in the original vacancy notice had changed to "French and English essential". What a coincidence! The candidate spoke both. Then, usually, a list of all the suitable candidates is published. Yet there was another suitable candidate, but she was no longer on the list. What a coincidence! A number of details were then reviewed: the fact that the president had more or less publicly stated that he was going to recruit his wife; the way that the candidate's work experience was made to match the technical descriptions of the post to be filled, etc. Then, in point 27, the tribunal concluded that there was nothing wrong with recruiting friends, lovers, wives, husbands, daughters or sisters, there were no rules against it. And I believe that it was right to say so. But in that case the organisation must have procedures in place precisely to prevent criticisms being made; there must be procedures to ensure transparency and integrity, etc., especially since candidates at the European Patent Office are asked are you the brother, the son, the sister, etc.? Do you have relatives here? So there is a concern for transparency and lawfulness all the same.

However, the tribunal also said, that is all very well, but if there are no such procedures? There is a presumption of irregularity or perhaps of bad faith. And I find that concept most interesting. It was not a matter of abuse or misuse of authority, but of bad faith. It is a concept which is also found in other areas of law. So the tribunal concluded that, since rules ensuring integrity did not exist and since there was a lack of transparency, not much was needed to knock down the presumption of regularity and conclude that there was a problem. And that is what it did: it concluded that, in isolation, the various anomalies did not have any effect but, taken together and combined with the lack of a specific rule, this all demonstrated that there had been bad faith. And Mrs P's appointment was annulled. As she had already been in post for three years, the complainant and the interveners were awarded moral damages in an amount equivalent to one euro per staff member and the complainant was awarded costs in the amount of €1 000.

I now come to the second case, which is just as interesting. It concerns another legal system which we already discussed a little yesterday and a recent judgment. This involved the selection of the director of the European Medicines Agency based in London, which is a very important body because it has the task of authorising the sale of medicines throughout the European Union. In this case, we are not dealing with the selection of a B-grade staff member responsible for co-operation with national patent offices but with that of the executive director of the agency, with everything which that implies in terms of political discussions, compromises and checks on scientific abilities because it is a scientific agency and also in terms of quality of management of human and budgetary resources, etc. It is an agency which handles a very large budget.

As usual, shortlisting was conducted by a pre-selection panel. That is a procedure which we are familiar with in all EU agencies. The panel comprises a number of individuals from the agency and the decision is then taken by the management board, which is usually made up of representatives of EU member states.

The pre-selection panel performs initial screening; then the decision is taken by the management board. The pre-selection panel assesses the candidates and interviews them; it goes through the CVs and then assesses the candidates to shortlist those who are suitable. The shortlist is submitted with the assessments to the management board for decision. The applicant, Mr Hristov, who I believe is Bulgarian, was not included on the final shortlist. He then applied to the tribunal alleging that there had been a problem with the composition of the pre-selection panel because it had included individuals who subsequently were going to vote; in other words, some of the member states' representatives on the management board had been appointed to the pre-selection panel and questions could therefore be asked about possible conflicts of interest and breaches of management's duty of impartiality, etc. He accordingly applied for the appointment to be annulled on the grounds that there had been a conflict of interests.

There are interesting points here where the tribunal reiterated that, with regard to competitions, selection boards enjoy wide discretion. We are therefore dealing with your scenario of a really minimum degree of review. It is the competition selection board which decides on the tests and checks the conditions, etc. However, this

wide discretion is counterbalanced by the need for strict compliance with the rules governing the organisation of the procedure. We are told that the criterion of the independence of the members of a competition selection board is absolutely vital. So the tribunal must review whether or not they are independent. In stating that conflicts of interest must be avoided and the duty of impartiality complied with, the tribunal referred to Article 41 of the Charter of Fundamental Rights, which lays down the right to good administration. That is reflected in a higher rule that was mentioned this morning (the hierarchy of norms), which is set out in the Fundamental Charter.

The task of the judge is therefore to see whether, as claimed by the applicant, the duty of impartiality had been breached and there had been a failure to avoid conflicts of interest. This means assessing whether the minimum rules for a selection board had been complied with. The tribunal concluded in the negative because there were individuals who had in-depth knowledge of the candidates and who probably had favourable or unfavourable views after the interviews and when they had voted as members of the management board their opinions had been distorted; they had no longer been impartial because they had already met the candidates and compared their merits. Their decision was therefore annulled and the post was published again for consideration by a new board.

Those were the points I wanted to make. I am sure there will be comments. Thank you.

PIOTR GLONEK, VICE-PRESIDENT OF THE STAFF COMMITTEE AND OF THE GENERAL ASSEMBLY, EUROPEAN PARLIAMENT

Ladies and gentlemen,

I would like to thank Sergio most sincerely for the flawless manner in which he has organised this colloquy. When I first came up with the title for my presentation, "The vicissitudes of discretionary power", I little suspected that this issue was going to affect me so personally. As a European Parliament official, I am required to obtain permission before engaging in an outside activity, including conferences such as this one, under Article 12b of the Staff Regulations, Articles 11, 81 and 127 of the Conditions of Employment of other servants and under Chapter 1 of the Code of Conduct; I duly applied and was assured that permission would be granted. The only trouble is, the permission would not be granted until 30 March and, since you were not about to wait until 30 March for me to obtain consent, I have come along anyway, on the strength of a clause which reads "Permission shall be refused only if the activity or assignment in question is such as to interfere with the performance of the official's duties or is incompatible with the interests of the institution". I am confident that that is not the case. I have absolutely no intention of portraying the European Parliament in a negative light. But if obtaining this permission were to prove problematic, I like to think I could turn to you for help.

I am speaking to you today in a personal capacity, based on my own experience in various internal bodies of the European Parliament, but since these bodies differ from institution to institution, I will also be speaking under the supervision of my colleagues on the Staff Committees of the European Commission and the Council in particular.

I myself am not a lawyer. I am a linguist, with a linguist's love of dictionaries. I have therefore taken the liberty of consulting a number of dictionaries, both general and legal, in search of definitions, simply to find out what discretionary power is. The first definition I came across dates from 1690 and goes as follows: discretionary = subject to someone else's control. Other definitions have emerged throughout history, but the meaning has remained essentially unchanged. Among these later definitions we find: left to someone's judgment; left to someone's discretion; available for use in the desired manner; power to do or not to do something. You can also find other definitions, however, such as: optional, subjective and even arbitrary.

And that brings me to the reason why we, as staff representatives, have reservations about the abolition of the Civil Service Tribunal which was mentioned yesterday. It is true that the costs involved in bringing a case before this court are sometimes very high, especially for staff recruited in 2004 with the reform which saw a substantial reduction in salaries, and in particular now with the new reform introducing category SC which, as you may not be aware, introduces salaries equivalent to the national subsistence level in Luxembourg. It is also true that this possibility of applying to a specialised court was in many cases a remedy for individuals who felt they had been adversely affected by the very vicissitudes of discretionary power that I am referring to.

The fear is that we will find ourselves in front of judges who have no specialist knowledge of the Staff Regulations, and, most worryingly, very likely at the back of the queue, behind competition cases such as Microsoft, Google or others.

One of the first detailed recommendations of the Committee of Ministers which you mentioned and which I have here dates from 1980 and stretches to around two pages: the subject matter was discretionary power. Since then, much has changed and according to my calculations, since 2010 there have been 141 European Union Civil Service Tribunal rulings which mention, either explicitly or implicitly, discretionary power or what is referred to as "a wide margin of appreciation".

What are the most common causes of complaint? Often, the cases brought by staff have to do with promotions, or rather failure to secure promotion. At the European Parliament, we have a reports committee which receives large numbers of applications from colleagues complaining either about the content of their annual appraisal report or about the procedure as such. This is mainly the result of two Civil Service Tribunal rulings which I wished to mention: firstly, the judgment of 11 February 2009 in *Schönberger v. European Parliament*, case F-7/08, in particular paragraph 42, which stipulates that in decisions concerning the award of merit points, the administration enjoys a large measure of discretion.

Then, in a judgment handed down on 8 October 2008 in *Barbin v. European Parliament*, case F-44/07 – in particular paragraphs 52 and 53 – the tribunal found that the presence of even slightly negative comments was sufficient as a dominant factor in assessing the official's merits and to justify awarding a single merit point. In the European Parliament, it is a single merit point but some institutions award half-points, it being understood that for staff, a merit point means that the person is deserving or that they have "performed satisfactorily" as we say now. Unfortunately, that is not quite the case when it comes to promotion, however.

Another common cause for complaint is mobility, which is compulsory in the European Parliament for administrative officers who have been in the job for more than seven years. There have also been complaints about burnout, although this has still not been clearly defined by the medical profession and, as a result, the issue tends to be neglected or even completely overlooked by the authorities. Another issue, particularly in recent times, is moral or sexual harassment.

As regards recent case law concerning moral harassment, I would like to highlight five rulings which, in my view, are of fundamental importance:

Firstly, the judgment of 11 July 2013 in case F-46/11, *Tzirani v. European Commission*, in which the tribunal was ordered to pay compensation for having failed to complete the administrative investigation within a reasonable period.

The judgment of 12 December 2013 in case F-129/12, *CH v. European Parliament*, in which the applicant was awarded €50 000 in compensation for non-material damage and the decision by an MEP to dismiss her was overturned. A first!

The judgment of 23 October 2013 in case F-39/12, *BQ v. Court of Auditors*, where the Court of Auditors was ordered to pay just under €1 000.

The judgment on appeal of 16 September 2013 in case T-264/11, *De Nicola v. European Investment Bank*, in which the general court quashed the Civil Service Tribunal judgment rejecting Mr De Nicola's claims that he had been harassed.

And lastly, the judgment of 14 May 2014 in case F-11/13, *Nicola Delcroix v. European External Action Service*, in which the tribunal set aside the decision to transfer Mr Delcroix from his post as head of delegation in Djibouti to Brussels.

It has to be recognised, therefore, that most of these judgments are in favour of the applicants, which is particularly important for us because, unlike the Commission, most institutions today have neither a network of confidential counsellors nor an in-house mediator. Sometimes, too, the internal committee against harassment – and not the “harassment committee” as it is often referred to – simply arrives at a finding of “personality clash” or cultural differences. To my mind, these cultural differences are too often overlooked in the exercise of discretionary power. It is as though we have forgotten that in most cases, the staff in question have been uprooted, have no family to fall back on and are having to cope with local attitudes that are in many cases different from their own, none of which makes everyday life any easier.

And that brings me lastly to a theoretical, philosophical issue, namely whether discretionary power can be subject to the supervision of the European Ombudsman. Logically, discretionary power vested in a public authority cannot be called into question as long as it is exercised properly. The public authority is fully entitled to choose from among a number of alternative solutions according to its own priorities and goals, whether political or other. That said, it is important to remember that this discretionary power is not the same thing as dictatorship and that the general principles of law must be strictly observed. It was recently recognised, therefore, that the European Ombudsman can speak out in cases of abuse of power, arbitrary or discriminatory solutions and in cases where there have been manifest irregularities.

To conclude, discretionary power is not typically arbitrary if, and only if, it is in accordance with ethical, moral and rational considerations. I would nevertheless like to point out that, in a context where it is being exercised according to political imperatives, the authorities would seem to have a vested interest, for the sake of social harmony, in conducting as wide-ranging a consultation as possible with staff representatives.

If we still have a few minutes left, I would like, before ending, if my colleagues on the other staff committees will allow me, to read you a statement that has not yet been adopted by all staff committees but which will no doubt be adopted very soon, concerning the abolition of the Civil Service Tribunal. An issue that is close to our hearts, for the reasons I have just explained.

This statement reads as follows:

The Court of Justice recently put forward a proposal to reorganise the European Union courts which is currently being considered under the ordinary legislative procedure. The Staff Committees wish to express their strong opposition to this reform which would lead to the abolition of the European Union Civil Service Tribunal, for the following reasons: in 2000, before the Treaty of Nice was even signed, paving the way for the creation of specialised courts, the Member States invited the Court of Justice and the Commission to prepare as swiftly as possible a draft decision establishing a tribunal to hear disputes between European civil servants and their institution. Adopted in 2004 by the Council, following approval by the Court of Justice, the decision establishing the Civil Service Tribunal (CST) stated that establishment of a specific judicial panel to exercise jurisdiction in European civil service disputes would improve the operation of the Community courts system.

In 2011, faced with the growing volume of cases coming before the General Court and sometimes very lengthy processing times, the Court of Justice asked the EU legislator for 12 additional judges for the General Court. The Commission, the Parliament and the Council agreed in principle, but differences of opinion between Member States as to how these judges should be appointed put paid to the plan. The Court then sought to get round the difficulty by proposing that the number of judges at the General Court be gradually doubled, from 28 to 56, while at the same time incorporating the CST into the General Court. In short, the CST would cease to exist.

In the opinion of the staff committee, this move is extremely questionable. Firstly, it would bring civil service disputes under the jurisdiction of the General Court, without any legal basis for doing so, since Article 257 of the Treaty provides for the establishment but not the abolition of a specialised court. Secondly, instead of doubling the number of General Court judges, which would be very costly in the medium term, it would be more rational, in terms of ensuring the proper administration of justice, to confirm the decision to opt for decentralisation by creating, for example, a new court specialising in trademark law, while at the same time increasing the number of *référéndaires* in the General Court's existing cabinets.

In addition, the CST's case-law has seen some progress in favour of civil servants and staff. It is difficult not to see the current move as an attempt to reverse those gains, in that in future, civil service cases would be pushed to the back of the queue, behind, for example, competition cases which (as I just mentioned) are seen as being more prestigious. It is unlikely, moreover, that the General Court judges would be specialists in civil service law or labour law, unlike the judges of the CST. Lastly, appeals, which would in future be exclusively a matter for the General Court, would be dealt with in a perfunctory manner, with greater use being made of orders, screening, etc.

To conclude, the Staff Committee believes that creating a supersized court is not the answer to an ever growing caseload. The quest for efficiency and a well-run justice system should, on the contrary, lead the legislator to introduce new specialised courts and to increase the staff of the existing courts.

Thank you very much.

DISCUSSION AND CONCLUSIONS: SESSION 6

Lakshmi SWAMINATHAN

Thank you very much Mr Piotr GLONEK for this exposition that you have given. I would just like to briefly mention one point on the points that have been raised by the speakers. In the first instance, as I understood Mr POLAKIEWICZ saying that due to financial restraints the organisation sometimes resorts to short-term contracts to be renewed and renewed every three years, one year, whatever. I'm not sure whether in the case that you mentioned the party was entitled to certain benefits unless he had so many years' service; for example, educational benefits or health benefits.

Now, in this connection, it came to my mind that there is a judgment of the Asian Development Bank Administrative Tribunal wherein the organisation had employed a local Filipino staff member for more than 20 years – 22 to 25 years – on a yearly basis, thereby depriving him of some of the benefits that the organisation had to give; and when he was about to retire, he realised that he didn't have retirement benefits because his contract had been only renewed from year to year. And the tribunal said: well, you can't do that and they took the decision in favour of the applicant, the staff member, saying that: well, he has actually put in about 22 or 25 years so whatever benefits he was entitled to, as a permanent staff member of the ADB, he should be able to get. And you know, these short-term contracts, he was renewed every year, after review, but the tribunal, I think, took a very humanitarian and a proper, and in my opinion a legal view of the matter and said that that kind of ad hoc contract is not permissible under law.

I have also a small point on Virginia's example on the facts about the case where the president's wife was appointed. Here again, I would like to point out that in the Asian Development Bank there is a regulation specifically barring the husband or wife or the immediate relations (the son and daughter) from being appointed in the Asian Development Bank, on the staff. And I think that's a very salutary provision. So now the Asian Development Bank clearly has this policy: they do not want to encourage the wives and the sons and daughters to be given any extra and the relatives cannot push the case. And I think that's a very good provision in the Asian Development Bank and that could be noted and maybe the other organisations can follow some of these positions. This is a provision in the rules itself; the earlier position I said was what the tribunal held.

And the point that Piotr had mentioned on discretionary power: of course it cannot be exercised too widely and we are talking about discretionary power in a multinational organisation. So there are always ethical and other conflicts (cultures or the colour of the skin and so many things). And here again I would like to point out a very salutary provision which I have found in the Asian Development Bank

regulations which says that there cannot be any discrimination on the grounds of gender, the cultural background or the ethnic background of a person; and I think it is very correct to see that the organisation has definitely recognised the fact that a person coming from a different country – I mean there are 67 countries who are member states in the Asian Development Bank and the staff could be from any one of them; 67 countries, so the differences in approach are therefore inevitable and here again, the bank is very vigilant I must say on the exercise of this power and so is the tribunal; if cases come to us on the question that... I mean we know how to look at it from a judicial point of view, but certainly there is a provision that any power to be exercised in the case of the report writing, maybe it's the language problem though English is the language used in the Asian Development Bank. However, I mean there will be differences in ethics and moral and other cultural differences but I think that's well recognised in the Asian Development Bank and I think that's something one has to recognise in any international organisation because you are certainly dealing with people who come from totally different backgrounds – from both developed countries and developing countries and very well-developed countries. So I think this is something we have to keep in view: to be practical on the subject.

And in the ADB, there is this provision where if someone has taken a position against X from a different cultural background and if that it is found to be in a retaliatory position that person himself can be charged, I mean there is an internal mechanism where the department investigates if there is a complaint by this person, for example if she had been given a poor report on her performance before promotion only because this person comes from such and such country and her supervisor is from some other country. So they can take care of the rules and regulations. And in the present complaints they do make an investigation and if they find there is something, then the senior supervisor is brought to justice, which, I think, is a good provision; I mean it should become normal. I mean that some of the provisions perhaps in other organisations would also be taken into account. Thank you very much.

Now I open the floor for discussion. Yes, please.

Michael KEMÉNY

My name is Michael KEMÉNY; I'm a member of the Central Staff Committee of the European Patent Office.

To my knowledge, quite some years ago, the EPO did have a provision that spouses/siblings would not be recruited. However, it is inherent in international organisations that staff, in particular staff who have just been recruited, spend a lot of time with each other and very, very often staff who are not married find their future spouses at their place of employment. Now it is of course difficult to forbid colleagues to get married; and then you would have the situation that there are spouses at the place of employment. And it would also not be quite fair to allow marriages at the place of employment but to forbid the recruitment of spouses. And this is why the office has departed from the provisions which you have suggested and allowed that spouses/siblings may be recruited, but indeed we would like to know about this at the moment of recruitment. It is clear from the service regulations that spouses/siblings shall not serve in the same unit and they shall certainly not have some hierarchical relationship. This would be entirely inappropriate of course and this is being taken

care of at the level of service regulations. But otherwise it doesn't appear to be quite clear why there should be, in the light of all that I have just pointed out, a regulation which actually forbids the recruitment of spouses and siblings. Thank you.

Lakshmi SWAMINATHAN

Sorry, it's not forbidden but it says in the case that Virginia mentioned, the person who is already an officer should not actively support and the rules should not be twisted in a way to bring in his daughter or son or wife. But if they are independently qualified I think there would be no objection. The person who is already working in the bank should not actively sponsor and push the immediate family in to the same organisation. Yes, please.

Virginia MELGAR

Yes you are right. I think the most challenging thing is to regulate on reports which are not public or don't go through marriage. I think for me these are the most dangerous ones because they are hidden.

No, I think you have to have a sort of conflict of interest guidance or recommendations. I think there is no problem when you are... I don't know... some of our international organisations are in very difficult places where you have small organisations – you cannot avoid that. Conflict of interest should be taken into account and people should be transparent about that. I'm not against this, and we have such a situation in the office in Alicante, of course this happened because people tend to live among themselves and it's natural; if someone is competent, why are you not going to recruit them? I also understand that. It's discrimination on the other side. But provided that there are conflict of interest rules and ethical rules that people declare that they have a problem and then you can recuse yourself from a case or you can say: no, I cannot go to this post because my wife or my husband is already an official.

That has to be transparent. That's my only concern. And then we can control, if all the rules were in place, exactly as the ILOAT did. Yes, do you have some rules that govern this potential conflict of interest? No you haven't? Then I have a presumption that there is something wrong. So the burden of proof is on the administration to show: well, I have my ethical code; people sign a conflict of interest; they can recuse themselves; I have a complete set of rules and recommendations. Then, well, love happens everywhere. We cannot regulate that!

Horstpeter KREPPEL

I'm judge at the Civil Service Tribunal. Thank you very much Mr POLAKIEWICZ that you mentioned so openly and frankly the problem of fixed-term contracts.

I would just like to make two comments on that: firstly, within the Commission you have a project to increase the number of fixed-term contracts up to 60% of the entire workforce over the years – which I think is a kind of attack because the effect is that fixed-term contract people would not be able to be members like the others – officially yes, but they are afraid of becoming trade union members or taking an official position because they know that if they do that their contract will not be prolonged. This is one comment.

The second comment is, coming back to the main topic: *pouvoir discrétionnaire*. We accept to some extent the *pouvoir discrétionnaire* also in fixed-term contract questions but we tried to convince the Commission that, before they do not renew a contract, they have to look if there is another possibility to employ that person; and I think this would be covered by the principle of proportionality: if there are several solutions which are all legal the administration should use its discretion to use that solution which least negatively affects the person and in that case, where there is an open position, a DG was looking for somebody, an announcement, they are looking for candidates and there would be mobility given to those people who are already in the institution; but when we finally decided that the non-renewal of that fixed-term contract was illegal because it had not checked that possibility, the internal court quashed our argument. And the general court so far, I must say this, with very, very few exceptions, whenever we started to advance a little bit towards the protection of the employees, they quashed our sentences – no matter in what area; we are really dissatisfied with the jurisprudence although I can understand why the comité du personnel would like to keep us but look at the jurisprudence of the internal court: personally, I think we are better off with the Court of Justice as our cour de cassation or cour de pourvoi. Thank you very much.

Jörg POLAKIEWICZ

I agree with your view and it is very interesting, the application of this new provision which will be given also in the Council of Europe to this because it is clear when you have persons in the organisation who have proven their competences, I think the organisation has a duty at least to look whether they can be employed elsewhere. Of course, then will come again the issue of how far this will be scrutinised by the tribunal.

But just one point: I think this was very interesting, your examples from Asia were very interesting; in the past, it was usually Europe that sort of showed the way; now Europe is in deep crisis; Asia is probably rising – many people say and maybe we should also look more the other way around. For example, as a legal advisor in the Council of Europe, I think that there is one thing that is quite horrendous and should never be allowed because it is even worse than CDD contracts – the use of consultants – and it is not rare. To give you a real example, we met with Kimberly Prost, who is the UN Ombudsperson, on a very sensitive issue (human rights respect in targeted sanctions). She is not an institution, she is employed as a consultant, her staff has no security, is not part of UN staff. I mean, I was really shocked when I heard that such an important position in the UN system apparently has no guarantees. So it's not an easy situation.

Lakshmi SWAMINATHAN

As they say: now the globe is shrinking and we have to learn from each other. Thank you very much. I think I will have to conclude the session.

Conclusions

CHRISTOS ROZAKIS, CHAIR OF THE ADMINISTRATIVE TRIBUNAL OF THE COUNCIL OF EUROPE

We are approaching the end of this international colloquy, and I must admit that although I am not responsible for the organisation of this event, and because of that, I can see that there was successful organisation due to the efforts of Sergio SANSOTTA and his associates.

We have covered a lot of subjects and we show that there is a disparity of approaches, of practices in international organisations but also convergences, as was mentioned during the round table. I'm going to give the floor to Mr Hans Van der WERF, Secretary General of the Central Commission for the Navigation of the Rhine, and then to Mr GROEPPER who is Chairman of the Appeals Board of the European Space Agency (ESA) and Chairman of the Appeals Board of EUMETSAT to present conclusions. Finally, Mr Jean WALINE, Judge of the Administrative Tribunal of the Council of Europe, will sum up and suggest future actions.

HANS VAN DER WERF, SECRETARY GENERAL OF THE CENTRAL COMMISSION FOR THE NAVIGATION OF THE RHINE

Thank you very much. If you would allow me a point-blank reply at the end of this colloquy, I have to say that my feelings are somewhat ambivalent insofar as the reason I am here is, of course, the fact that the Central Commission has accepted the jurisdiction of the Administrative Tribunal of the Council of Europe.

In this connection, we could consider ourselves the child or the youngest member of this body, since it is the first time that the tribunal will be part of our internal procedures. On the other hand, it has to be said that we regard ourselves as the oldest international organisation. We are celebrating our bicentenary this year, as the Commission was set up by the 1815 Vienna Congress.

We have seized this opportunity to look back on the Central Commission's history and have found that disputes between staff members and the institution date back to the 19th century. We have identified cases of staff members complaining that there were no provisions on pensions for them during the Commission's first 50 years. Our accepting the tribunal's jurisdiction is therefore all the more important in that we have to go back quite a long time in looking for means of settling disagreements between the institution and its staff.

However, the restructuring process in our organisation made it necessary to revive the appeals procedure which was in a deep slumber like Sleeping Beauty. And the princess who played the part of the prince here is Anne-Marie THEVENOT-WERNER, who proposed that our organisation accept the jurisdiction of the Administrative Tribunal of the Council of Europe, thereby introducing this vital element into our internal structure.

Allow me to conclude with these few words, while thanking the authorities at the Council of Europe and the Administrative Tribunal both for the very warm welcome we have received and for the promptness in reaching the necessary agreements.

MICHAEL GROEPPER, CHAIRMAN OF THE APPEALS BOARD OF THE EUROPEAN SPACE AGENCY (ESA) AND CHAIRMAN OF THE APPEALS BOARD OF EUMETSAT

1. Administrative tribunals are vital for maintaining morale and harmony within international organisations. If they did not exist, we would have to invent them. They and they alone are capable of delivering equal justice for all of an international organisation's staff – including retirees – wherever they are located. If a national court had, for example, the right to exercise jurisdiction in such an organisation, it would be impossible to ensure consistent interpretation of its rules across all the member states of the organisation. Another body – like the European Court of Justice – would then need to be brought in, to which the national courts would have to refer in order to obtain a uniform interpretation. The current arrangement, whereby international organisations have opted to set up administrative tribunals within the organisations themselves, is infinitely preferable and far more effective.

It is important, therefore, that international tribunals be made up of members whose professional competence is beyond all doubt. Particularly as the tribunal is usually the only authority staff can turn to.

Judges are neither gods nor kings, but rather service providers. Independence of the judiciary is a vital tool of our trade and not a matter of personal glory.

The primary purpose of administrative tribunals in international organisations is to protect the rights of the organisation's staff. It therefore falls to the judge to redress, as far as possible, the inequality of arms between the staff member and the administration. The judge himself or herself must seek out the basic facts of the case to be considered, without being bound by the rules of civil proceedings, which start from the premise that the opposing parties are equal. While respecting the adversarial principle, the administrative judge is called upon to ease the sometimes excessively onerous procedural burden on the staff member. That staff member should be in safe hands, even if he or she is not represented by a highly skilled lawyer.

In most administrative tribunals, only the organisation's decisions are susceptible to challenge and capable of being submitted to the tribunal for examination. It is important to be clear, therefore, what constitutes a decision. Various attempts have been made to come up with a definition. According to one, fairly broad proposition, any statement by the organisation which is intended to be received by the staff member and the purpose of which is to change, increase, reduce, consolidate,

confirm or deny or otherwise affect his or her legal position is deemed to be a decision that is open to challenge.

Administrative tribunals have been described as having a “watchdog” function, serving as a model for the protection of staff’s individual rights. Another speaker mentioned the system of checks and balances. These comparisons and traditional associations clearly show the importance of the role of administrative tribunals, which are rooted in a longstanding legal tradition.

The idea that members of administrative tribunals are paid and, in some respects, managed by the same people who, in proceedings, represent the administration, does not seem to unduly bother either judges or staff. One trade-union representative suggested that such problems were purely academic.

2. A number of recent judgments have led national courts to renew their scrutiny of the issue of immunity as it applies to administrative tribunals in international organisations. Among ourselves, I think I am correct in saying that we are of one mind regarding the need for such immunity. But we must always bear in mind that this immunity is liable to be jeopardised if there are major shortcomings in terms of access to tribunals and the equitable delivery of justice, especially where fundamental rights are concerned. Such shortcomings raise the question of whether perhaps a denial of justice might be said to exist. As President Dean SPIELMANN has pointed out, the level of fundamental rights protection afforded by international tribunals must not be lower than that afforded by the national courts.

There is no denying the virtues of fundamental rights any more. Even if the statutes and procedural rules drawn up by the various organisations do not mention them, fundamental rights must be considered to be part of the rules of all international organisations. The members of these organisations are capable of availing themselves of them and no tribunal can take refuge in the fact that the internal rules of the organisation contain no allusion to fundamental rights.

Yesterday’s discussion touched on several methods of achieving this goal which, as far as I can see and as Judge EBRAHIM-CARSTENS clearly demonstrated, is not in any dispute. One approach which strikes me as workable rests on the contention that all the member states of an international organisation have also signed up to one or more international conventions guaranteeing fundamental rights and have undertaken to observe and uphold these rights in their national legislation. Consequently, so the argument goes, it is hardly likely that the states would have wanted to deny those rights when they set up the international organisation. Consequently, the argument continues, the rights are implicit in the statutes of the organisation itself, even if those statutes make no mention of them. Another, less sophisticated view holds that fundamental rights are quite simply part of international administrative law. Both solutions avoid the difficulties created by the – admittedly rather charming – suggestion that international organisations should be allowed to accede to international conventions.

The fundamental rights in question are in any case relatively few in number and include, for example, gender equality, the right to an independent and impartial judge, the right to a hearing, transparent proceedings, reasoned decisions, effective protection of rights, etc.

3. Since international organisations' administrative tribunals are the only courts to which the staff of these organisations can turn, the rules governing access to tribunals (that is to say, the rules on admissibility) need to be interpreted in a way that is more broad than narrow. The aim is to allow access, not to hamper it. The formalities, time frames and other rules should serve to weed out pointless and trivial cases, without discouraging serious applicants from seeking and obtaining a fair trial.

We have heard alarming reports about large numbers of staff being unable to afford the significant costs involved in hiring legal counsel. Various ways of overcoming this problem have been described, one of which strikes me as particularly promising, albeit costly, and involves having persons within the organisation itself offer this legal service to their fellow staff members. Yesterday, we may not have found the right solution, but we all have a responsibility to reflect on this issue. Lack of funds must not be a bar to justice.

My own personal feeling is that widespread use of the doctrine of *ex-officio* investigations is the principal and best method, and an effective one besides. The judges themselves must continue to seek out the facts until they are in possession of all the evidence needed to arrive at a satisfactory solution to the case.

Anonymity in decisions is, in a sense, contrary to the principle of transparency. But, as Ms SOUHRADA-KIRCHMAYER, the Council of Europe's Data Protection Commissioner, clearly demonstrated, modern electronic search tools make it imperative that tribunals lean towards anonymity. I did not hear many howls of protest when one speaker suggested that anonymity should be the rule, and disclosure the exception.

The conciliation and mediation measures advocated by our colleague Horstpeter KREPPEL have attracted both support and criticism. One argument was that the deadlines imposed by the rules of procedure continue to advance relentlessly. It is surely not inconceivable however, that a staff member who was prepared to settle a case amicably could comply with the time limits simply by sending a letter that met the procedural requirements. The issue is a wide-ranging one, though, and worth discussing in greater depth, possibly at another colloquy. Personally, I do not think there are many judges who would object to an arrangement that relieved them of the burden of adjudicating on a dispute and drafting a judgment.

4. Where the tribunal's procedural rules do not afford it any means of ordering provisional, suspensive measures (stay of execution, etc.), each administration should be prepared to itself adopt measures that have the same effect, should the tribunal so request. Otherwise, the tribunal should consider itself able to order such measures, drawing on the rules of procedure as they apply to the main case. If the tribunal has the right to remove measures in full, it must also (*argumentum a maiore*) be capable of imposing provisional measures that are less serious and more limited in scope. And if the tribunal has the right to order the organisation to compensate the staff member, it also has the right to impose provisional measures designed to diminish the damage or loss, or prevent it from increasing. As has been pointed out, this is an inherent power of administrative tribunals. Yesterday's contribution showed the basic conditions that must be met before deploying such weaponry, not least: clearly defined jurisdiction, probable cause, risk of irreparable damage and urgency.

There should be no need to introduce rules to make tribunals' decisions effective. An international organisation is not some private individual looking to wriggle out of his or her obligations, thus creating the need for enforcement measures. It should be absolutely clear that the tribunal's decision is to be respected and implemented without any objections or reservations. Obviously, that requires that the judgment itself be clear, unconditional and unambiguous.

It is true that tribunals cannot prevent the administration from adopting measures which fundamentally contradict a judgment, e.g. by changing a rule. This is only natural, however. As judges, we expect the administration to react, both on an individual level, through its conduct towards the staff member following the judgment, and on a more general level. We do not complain if this reaction is not to our liking. There is no reason to seek a further remedy if it does not suit us. Even the great constitutional courts have to put up with reactions such as these on the part of governments.

Even if the judgment is fully complied with, the staff member who won his or her case may not emerge unscathed. Special care must be taken to ensure that there are no direct or indirect reprisals, and often the best solution is an internal transfer. All this underscores the importance of having internal review rules, which obviate the need to bring an action against the organisation of which the individual concerned is and wishes to remain a loyal member.

The fact that, in most international organisations' rules, there is no appeal against decisions handed down by the tribunal means the latter has an even greater responsibility to get it right the first time.

Likewise, it is particularly important to establish, within the administration, a system of review capable of eliminating any manifest errors on the part of the administration and of satisfying any justified requests the staff member may make. Ideally, of course, this internal review will be conducted via a commission whose members enjoy a degree of independence and discretion similar to that enjoyed by the administration. But even if no such commission exists, an internal review, provided it is seriously intended to provide redress to staff members in cases where the administration is in the wrong, can play an important role in strengthening staff members' legal position and improving morale at work, not to mention acting as a filter for the tribunal.

5. In my view, the notion of international civil service law is difficult to pin down. The multinational make-up of the tribunals, however, is an invitation to draw on national law and to capitalise on the fact that each member is thoroughly acquainted with the law as it stands in their own country. In this way, the full wealth of national legal treasures can be harnessed for the benefit of all.

Certainly, international rules perform a useful function if there is a gap in the organisation's own internal rules. They can then fill that gap. But there are also situations where there is genuine conflict and these cases are the most interesting.

Typically in international administrative law, judges find themselves faced with the problem of conflicting norms and where they rank in the hierarchy. What to do when there is a conflict between internal rules and international rules? There are no easy answers but this colloquy has shown us some promising attempts to address these questions.

6. It seems to me that it is possible to come to an agreement, among all the tribunals, on where the limits of discretionary power lie and the ways in which they should be examined and monitored by tribunals. The French and German administrative tribunals have, for example, developed, throughout their long history of jurisprudence, some sensitive and useful criteria. The issue is one of tremendous importance because with most measures taken in the field of human resources, there is some margin of discretion.

JEAN WALINE, JUDGE OF THE ADMINISTRATIVE TRIBUNAL OF THE COUNCIL OF EUROPE

Chair,

Ladies and gentlemen,

Since, unless I am mistaken, I am the last speaker at this fine colloquy, I should like to be the spokesperson on all our behalves and thank the chair, Mr ROZAKIS, for the great idea of holding the event. However, I should also and, above all, like to express our thanks and admiration to our friend, Sergio SANSOTTA, for organising it so successfully. He offers a perfect illustration of the old saying, “where there’s a will, there’s a way”; and has demonstrated that he has the faith which, as is well known, can move mountains ... and also administrative tribunals!

Thanks to you, the Administrative Tribunal of the Council of Europe has had the most splendid anniversary. On behalf of my colleagues, I should like to thank you most warmly.

But an anniversary is, above all, an opportunity to look back at one’s past and learn from it, while also thinking about the future. It is from this dual viewpoint that I should like now to go over some of the main themes which we have discussed.

I. We started by considering “the role and importance of administrative tribunals in international organisations”

Admittedly, there was no real suspense about the answer which we were going to give to that apparent question.

In my view, the importance of administrative tribunals in international organisations stems quite simply from the fact that they are absolutely vital, for two sets of reasons.

- ▶ Firstly, because they are essential for ensuring the rule of law within international organisations. The organisations are governed by various texts concerning, for instance, the way they are organised, their powers and the employment conditions and status of their staff. Naturally, somebody is needed to make sure that these are complied with and, where necessary, to impose penalties for non-compliance. That can only be done through administrative tribunals.
- ▶ Secondly, international organisations employ large numbers of international civil servants. Provision therefore has to be made for dealing with the labour disputes which inevitably occur. The organisations’ immunity from

jurisdiction prevents such disputes being heard by the national courts of the host countries. They can therefore only be dealt with by their own administrative tribunals.

I just mentioned the texts governing international organisations. In this connection, there is a major problem which we have not considered in our discussions, namely comparison of the regulations governing the individual administrative tribunals. Here, contrary to an old saying, comparison does prove something. Like all jurists, I know what great insights comparative law can provide. I would therefore like a systematic, comparative study to be conducted of the regulations that govern the procedure followed before each administrative tribunal or the status of each one of them. As an academic, I believe that could be done through dissertations or doctoral theses.

II. Fundamental rights and international organisations

It is here that there could be the greatest disparity between administrative tribunals, depending, if I may say so, on the continent where they sit.

From this point of view, European tribunals are privileged because they have at their disposal that veritable bible formed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, not forgetting the European Social Charter, which has been presented to us very clearly and at great length.

Of course, reference could also be made, for instance, to the Inter-American Charter or some texts concerning Africa, but they are not necessarily so exhaustive.

Fortunately, however, there is also a substantial body of rules shared by all administrative tribunals, both in terms of what comes under international custom and of what are known as the general principles of the law recognised by civilised nations.

Here again I should like an exhaustive study to be conducted of all the fundamental rights implemented by the tribunals, with indications of the relevant sources.

III. The third theme combined a whole series of issues which are very important in practice: access to tribunals, anonymity, friendly settlements and costs

As a preliminary remark, I would say that, for my part, I have always set great store by the question of preventing litigation.

Here I start out from the belief that any application to a tribunal is an admission of failure, as it means the parties have been unable to reach agreement about a major issue between them.

The relations between international organisations and their staff should be governed by the principle of good faith (indeed, all our legal systems are based on it). When there are legal proceedings, this means that the administration and the staff member are in disagreement about a specific issue. The natural response of a staff member of good faith should be to engage in discussions with the administration, which is also supposed to be of good faith, so as to persuade it that his or her point of view is

correct or have the administration show where he or she is mistaken. It is only when this dialogue comes to naught that the staff member should resign him- or herself to referring the matter to a tribunal. Above all, it should be remembered that a poor settlement is better than good proceedings. The utmost effort must therefore be made to reach a friendly settlement. In my view, administrative complaints should accordingly be made compulsory before any proceedings. But that means putting in place a genuine non-litigious administrative procedure offering real guarantees of proper examination of the complaint. Consideration must also be given, of course, to the system of mediation or of arbitration.

- ▶ Our discussions have shown that much progress still has to be made in terms of *access to tribunals*. I admit I was stupefied by what was said about the number of people who do not have access to international administrative tribunals and, in particular, by the figures given for UN staff. Access to tribunals absolutely must be extended, whether for temporary staff, consultants or pensioners, without, however, forgetting the issue of collective redress.

In short, we must give effect to the requirement set out so clearly in Article 6 of the European Convention, namely ensuring that every staff member is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal.

- ▶ *Anonymity*: this issue was of concern to all the speakers, and very divergent points of view were expressed.

In my view, a distinction must first be made between the applicant and the other individuals mentioned in the decision. In the case of the applicant, I am, in principle, against anonymity: making an appeal is not, after all, some shameful disease and in France, for instance, all the names of the applicants (several hundred) are listed in the Report of the Conseil d'Etat. As far as the applicant is concerned, anonymity can be justified solely by truly exceptional circumstances. However, it is necessary to be very careful regarding publications, and a distinction should probably be made between hard copies and online versions. I believe anonymity is absolutely vital in the latter case.

- ▶ I have saved the best bit for last: *costs*. I am astounded by the sums which can sometimes be demanded. In my view, the issue of justice being free of charge is vital. What is the use of having a right if I cannot exercise it for financial reasons? It is vital for proceedings before administrative tribunals to be free of charge, which also means introducing a system of fines for abusive applications so as to avoid any abuse of the right to bring proceedings. At the very least, if proceedings cannot be free of charge, an effective system of legal aid needs to be arranged, which would raise the issue of knowing how to fund it.

IV. Effectiveness of decisions: before, after

Before addressing these issues, I note that one important question has scarcely been mentioned, namely the advisory role of our administrative tribunals. I would like it to be properly implemented, and not only so as to avoid certain proceedings.

- ▶ *Before*: the issue of stays of execution and interim measures is obviously important but does not seem to pose serious problems.

With regard to stays of execution, I would refer to the French system of urgent applications for suspension (*référé-suspension*). These are dealt with by a single judge under a very swift procedure, and two conditions must be met: urgency and serious doubts about the lawfulness of the impugned decision.

- ▶ *After*: it should never be forgotten that the award of damages is only a second-best solution and everything must be done to avoid having to have recourse to it. Much thought must go into introducing measures to compel the administration to enforce decisions. Examples include making it possible to hold personally liable those who refuse to enforce decisions or to oblige the organisation's accountant to take the requisite action.

In connection with the effectiveness of decisions, reference may be made to the issue of appeals to a higher body. In domestic law, that is a key safeguard enjoyed by individuals. We have seen that practices here vary greatly from one organisation to the next. There are cases – in particular, the Council of Europe – where it is hard to see how an appeals procedure of this kind could be introduced. There has been discussion of an appeals body that would be common to all administrative tribunals and would, of course, have the great advantage of ensuring harmonisation of the applicable law. While it is always possible to dream of an ideal system, implementation would not be easy, so we should leave that problem to our grandchildren!

V. The specific nature of international civil service law

The discussions concerning this theme brought us back to the old issue of conflicting norms. In my view, we should also add the question – which is important in practice – of dissenting opinions in our decisions.

VI. Discretionary power and its review

This is a problem which we all come up against very often. There is no need here to repeat that discretionary power absolutely does not mean arbitrary power. Administering often involves choosing between several decisions which comply with the law. It is up to the administration to assess whether the relevant decision is appropriate and, at least in theory, tribunals assess lawfulness rather than appropriateness, even though that distinction is easier to set out than to apply. However, the distinction between the active administrative body and tribunals or courts is vital: the latter must not substitute their decisions for those of the administrative bodies. In my view, the right principle here is imposing sanctions in respect of manifest errors of assessment.

On Wednesday, at the meeting of the registrars and then of the members of administrative tribunals, the question of the establishment of an association bringing together all the administrative tribunals of international organisations was raised. To be euphemistic, the least that can be said is that the idea did not meet with enthusiasm. Upon reflection, I can understand that. What matters first of all is holding meetings, getting to know one another and exchanging views about the problems facing us. But genius is patience. To quote an aphorism by a former French

president, time should be allowed to do its work. We should not therefore start with the institutionalisation of our relations; that can only be the culmination of a lengthy process of practical contacts.

It remains to be seen whether this colloquy will be a one-off event or will be followed by others. Naturally, the latter option is what I would prefer. I hope that what we have experienced in Strasbourg will make us want to start over again – in other words, carry forward the discussions which we have only just started. My wish therefore is that, next year, another administrative tribunal takes up the baton, without even needing to use the pretext of a round-figure anniversary.

In concluding my remarks which have been much too long, I therefore hope I can look forward to seeing you again.

MEETING OF THE COLLOQUY PARTICIPANTS WITH TWO JUDGES OF THE EUROPEAN COURT OF HUMAN RIGHTS

In the afternoon of 20 March 2015, the colloquy participants visited the European Court of Human Rights and met with judges Paul Mahoney²⁵⁴ and Guido Raimondi.²⁵⁵

During this meeting the two judges talked about their experience in the fields of human rights and the international civil service, as well as the links between these two areas.

They also answered questions.

This meeting highlighted the importance assumed by human rights in international civil service disputes.

Their presentations complemented the statement made by Mr Dean Spielmann, President of the Court at the time, during the colloquy on 19 March (session two).

254. A judge since 2012, Mr Mahoney is a former Registrar of the Court (2001-2005), as well as former Head of the Establishment Division of the Council of Europe, former President of the European Union Civil Service Tribunal (2005-2011) and former President of the Appeals Board of the European Space Agency (2011-2012).

255. Vice-President of the Court at the time of the meeting and now President, Judge Raimondi is a judge of the Italian Court of Cassation who also held office as Co-Agent for the Italian Government before the Court, in addition to his functions as Legal Adviser and Director of the Office of Legal Services at the International Labour Office.

Programme

Thursday 19 March 2015

8:30 to 9:10 a.m.: Registration

9:10 to 9:40 a.m.: Opening ceremony

Opening addresses:

- ▶ Mr Christos ROZAKIS, Chair of the Administrative Tribunal of the Council of Europe
- ▶ Mr Thorbjørn JAGLAND, Secretary General of the Council of Europe
- ▶ Mr Ali BAHADIR, Member of the Staff Committee of the Council of Europe

9:40 to 11:10 a.m.:

SESSION 1: The role and importance of administrative tribunals in international organisations

Moderator: Mr Thomas LAKER, Judge and former President of the United Nations Dispute Tribunal (Geneva)

Speakers:

- ▶ Ms Catherine O'REGAN, President of the IMF Administrative Tribunal
- ▶ Mr Andrzej ANTOSZKIEWICZ, Deputy Director and OSCE Ethics Co-ordinator, Department of Human Resources, Organization for Security and Co-operation in Europe
- ▶ Mr Ali BAHADIR, Lawyer at the Registry of the European Court of Human Rights, Head of the Staff Committee's Working Group on "staff regulations and legal issues" of the Council of Europe

Discussion

11:10 to 11:30 a.m.: coffee break

11:30 a.m. to 1 p.m.:

SESSION 2: Fundamental rights and international organisations: subjective rights and procedural safeguards

Moderator: Mr Giorgio MALINVERNI, Deputy Chair of the Administrative Tribunal of the Council of Europe, former Judge of the European Court of Human Rights

Speakers:

- ▶ Mr Dean SPIELMANN, President of the European Court of Human Rights
- ▶ Mr Giuseppe PALMISANO, President of the European Committee of Social Rights, Council of Europe
- ▶ Ms Memooda EBRAHIM-CARSTENS, President of the United Nations Dispute Tribunal

Discussion

1 to 2:30 p.m.: **LUNCH BREAK**

2:30 to 4 p.m.:

SESSION 3: Factors affecting the exercise of the right to appeal: access *ratione personae*, anonymity, mediation/conciliation, costs and legal aid

Moderator: Ms Inés WEINBERG de ROCA, Second Vice-President of the United Nations Appeals Tribunal

Speakers:

- ▶ **Access *ratione personae* / anonymity:** Ms Magali ROJAS DELGADO, President of the Administrative Tribunal of the Organization of American States
- ▶ **Mediation / conciliation / friendly settlement of disputes:** Mr Horstpeter KREPPEL, Judge of the European Union Civil Service Tribunal
- ▶ **Costs and legal aid:** Mr Vinod BOOLELL, Judge of the United Nations Dispute Tribunal (Nairobi)

Discussion

4 to 4:30 p.m.: coffee break

4:30 to 6 p.m.:

SESSION 4: Effectiveness of decisions before judgment (stays of execution) and after judgment (enforcement measures) – Appeals system

Moderator: Mr Chris de COOKER, President of the NATO Administrative Tribunal

Speakers:

- ▶ Ms Anne-Marie THEVENOT-WERNER, Doctor at the University of Paris 1, Panthéon-Sorbonne, Lecturer in public law
- ▶ Mr Yves RENOUF, Legal Counsel for the Administration, World Trade Organization
- ▶ Mr Alex HAINES, Barrister, Bretton Woods Law

Discussion

6 to 7 p.m.:

Reception given by Mr Thorbjørn JAGLAND, Secretary General of the Council of Europe

Friday 20 March 2015

9 to 10:30 a.m.:

SESSION 5: The specific nature of international civil service law when compared with national law

Moderator: Ms Linda TAYLOR, Executive Director, Office of Administration of Justice, United Nations

Speakers:

- ▶ Ms Celia GOLDMAN, Registrar of the IMF Administrative Tribunal and Judge of the Administrative Tribunal of the European Stability Mechanism
- ▶ Mr Yaraslau KRYVOI, Associate Professor, School of Law, University of West London
- ▶ Mr Christos VASSILOPOULOS, Adviser to the Central Bank of Luxembourg, Judge of the NATO Administrative Tribunal

Discussion

10:30 to 11 a.m.: coffee break

11 a.m. to 12:30 p.m.:

SESSION 6: Discretionary power and its review before tribunals in the various fields of human resources management

Moderator: Ms Lakshmi SWAMINATHAN, President of the Administrative Tribunal of the Asian Development Bank

Speakers:

- ▶ Mr Jörg POLAKIEWICZ, Council of Europe Legal Adviser
- ▶ Ms Virginia MELGAR, President of the Administrative Tribunal of the European Stability Mechanism
- ▶ Mr Piotr GLONEK, Vice-President of the Staff Committee and of the General Assembly, European Parliament

Discussion

12:30 to 1 p.m.:

CONCLUSIONS

- ▶ Hans van der WERF, Secretary General of the Central Commission for the Navigation of the Rhine
- ▶ Mr Michael GROEPPER, Chairman of the Appeals Board of the European Space Agency (ESA) and Chairman of the Appeals Board of EUMETSAT
- ▶ Mr Jean WALINE, Judge of the Administrative Tribunal of the Council of Europe

1 to 2:30 p.m.: **LUNCH BREAK**

AFTERNOON (3-4 p.m.):

Visit to the European Court of Human Rights and meeting and discussion with judges Paul MAHONEY²⁵⁶ and Guido RAIMONDI.²⁵⁷

256. A judge since 2012, Mr Mahoney is a former Registrar of the Court (2001-2005), as well as former Head of the Establishment Division of the Council of Europe, former President of the European Union Civil Service Tribunal (2005-2011) and former President of the Appeals Board of the European Space Agency (2011-2012).

257. Vice-President of the Court at the time of the meeting and now President, Judge Raimondi is a judge of the Italian Court of Cassation who also held office as Co-Agent for the Italian Government before the Court, in addition to his functions as Legal Adviser and Director of the Office of Legal Services at the International Labour Office.

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To mark the 50th anniversary of its establishment, the Administrative Tribunal of the Council of Europe organised an international colloquy on 19 and 20 March 2015 at the Palais de l'Europe. The colloquy, entitled "Common Focus and Autonomy of International Administrative Tribunals", was devoted to different aspects of the activity of international administrative tribunals.

It brought together some 200 participants, including judges and former judges, registrars, researchers and persons appearing before the administrative tribunals of international organisations based in Europe and worldwide.

The Secretary General of the Council of Europe, Thorbjørn Jagland, spoke at the opening of the colloquy, as well as Christos Rozakis, Chair of the Administrative Tribunal, and Ali Bahadir, representative of the Staff Committee.

The colloquy was preceded, on 18 March, by a meeting of international administrative tribunals, following up on the meeting held in Washington on 3 April 2014 at the headquarters of the International Monetary Fund. This in camera meeting enabled judges and the registry staff of about 20 administrative tribunals of international organisations to address various issues, including their collaboration.

A common search interface project to facilitate research in databases of the various administrative tribunals, conducted in collaboration with the Council of Europe Directorate of Information Technology, was also examined during this meeting, as well as projects proposed by other tribunals in order to encourage and strengthen co-operation between the administrative tribunals of international organisations.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.