Securing a Fair Trial Against International Organisations
A Private International Law Perspective

Gulati, Saptarishi

Awarding institution:
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‘Securing a Fair Trial Against International Organisations: A Private International Law Perspective'

Doctoral Dissertation by

Rishi Gulati

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INTRODUCTION

1 The denial of justice age

A denial of justice is the most common outcome when individuals raise claims against public international organisations (‘IOs’). The victims (including families of the more than 9000 individuals who lost their lives) of cholera introduced in Haiti by United Nations (‘UN’) peacekeepers in 2010 are still awaiting justice. They have not yet had an opportunity to access a court to realise their rights. The victims of the Srebrenica genocide of 1995 for which the UN assumed moral responsibility have not yet been compensated, with no such compensation in sight. When hundreds of Roma suffered serious harm due to lead poisoning caused by the apparent negligence of the UN Mission in Kosovo in placing vulnerable communities next to toxic mines, the UN belatedly set up a Human Rights Advisory Panel; its adverse findings have gone unenforced to this day.

Vulnerable adults and young girls and boys in the poorest of countries have been subjected to unspeakable sexual crimes by elements of the military and civilian components of UN peacekeeping missions. Despite lofty rhetoric and promises of ‘zero tolerance’, justice for those victims continues to be unattainable, for the UN has failed to set up any judicial mechanisms that deliver justice to the victims of peacekeeper abuse. Peacekeeper abuse is not limited to the UN context. As has been chillingly captured in the documentary ‘Cry Freetown’, peacekeepers have sometimes become ‘peacekillers’. In 1998, when peacekeepers belonging to the Economic Community of West African States (‘ECOWAS’) Monitoring Group entered

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1 The phrase ‘denial of justice’ is presently used to refer to circumstances where persons are denied the right to access a court and a fair trial provided for in international human rights law: C Focarelli, ‘Denial of Justice’ in R Wolfrum (ed), Max Planck Encyclopedia of Public International Law (2013), para 2 and 35.
2 See chapter 1, section 4.2.3.
3 See chapter 1, section 3.3.1.
4 See chapter 1, section 4.2.2.
Sierra Leone to restore peace, several civilians were arbitrarily killed, tortured and raped by members of those peacekeeping forces.9 Approximately 20 years have passed, and the victims have not been able to realise justice in any court.10

Outside of the UN and peacekeeping context, individuals harmed by the actions of other IOs also suffer denials of justice. Numerous communities and individuals have lost their land and livelihoods directly as a result of projects financed by multilateral development banks. Effective access to justice for such victims has been so far not been achieved.11 Aside from these well publicised examples that often take the form of mass tort and human rights claims, there is a vast number of other routine disputes arising between IOs and private persons (both natural and legal) where justice is often denied. This is because the legal infrastructure inside the IO is deficient, or more often than not, completely absent.

Such routine disputes do not tend to capture the public’s attention, but they are frequent and significantly affect the day-to-day operations of an IO. Since their inception, the most common form of legal dispute involving IOs relates to claims raised by employees against their employer organisations.12 In the preceding seventy or so years, a sophisticated body of international civil service law, commonly known as ‘international administrative law’ has emerged. Several international administrative tribunals (‘IATs’) have been established to resolve employment claims between IOs and their staff members. Despite the presence of such judicial mechanisms, frequent denials of justice prevail for large sections of the international civil service who do not have access to IATs; and where access exists, some prominent IATs do not render justice in accordance with international fair trial standards.13 Access to justice is even more precarious for claimants when it comes to the pursuit of other claims of a public or administrative law character.

9 See ibid.
10 As disclosure, the author is presently involved in representing nine victims of alleged violations before the Supreme Court of Sierra Leone. The case is pending.
11 See the discussion in chapter 1, section 3.3.2; also see, ‘Are Multilateral Development Banks Respecting the Rights of Indigenous Peoples in Development?’ (EarthRights International, September 13, 2017) <https://earthrights.org/blog/are-multilateral-development-banks-respecting-the-rights-of-indigenous-peoples-in-development/> accessed July 22, 2018; multilateral development banks increasingly impact individual rights due to their development activity, an increasing aspect of their work: see G Fiti-Sinclair, To Reform the World: International Organizations and the Making of Modern States (OUP 2017), 202-35.
12 These matters are discussed in chapter 3.
IOs now exercise what some call ‘international public authority’ as a direct result of which the rights of private parties may be seriously impinged.\textsuperscript{14} International public authority involves IOs exerting powers (traditionally exercised by states) to regulate the actions of individuals or other private entities intruding into various freedoms.\textsuperscript{15} The most prominent example is the much discussed \textit{Kadi} saga involving claims by persons placed on UN Security Council Sanctions Lists resulting in the freezing of assets and other interferences with human rights.\textsuperscript{16} Remarkably, that litigation resulted in courts effectively reviewing the acts of the UN Security Council by invalidating the actions of the European Community implementing Security Council decisions in breach of basic due process standards.\textsuperscript{17} \textit{Kadi} was just the tip of the iceberg. International public authority is in fact exercised by many IOs in different contexts.\textsuperscript{18} This has resulted in the rise of what I call the ‘global administrative law dispute’, a term inspired from the global administrative law movement started at New York University.\textsuperscript{19}

The global administrative law movement provides for a substantial evidence base showing how IOs (and other transnational institutions) exercise public authority and engage in administrative decision making impacting on the rights of private persons.\textsuperscript{20} When this impact is an adverse one, access to justice is brought into sharp focus. Except for marginal efforts to deliver justice in global administrative law disputes through the creation of Ombudsman mechanisms (as has been done in respect of review mechanisms for certain UN Security Council terrorism sanctions decisions);\textsuperscript{21} and a few accountability mechanisms accessible to communities impacted by the

\textsuperscript{14} The international public authority project is being carried out at the Max Planck Institute of Public and International Law. For a background, see Max Planck Institute for Comparative Public Law, “International Public Authority” (\textit{World Court Digest}) <http://www.mpil.de/en/pub/research/areas/public-international-law/ipa.cfm> accessed July 22, 2018.


\textsuperscript{16} See chapter 1, section 4.2.2.


\textsuperscript{18} See chapter 1, section 4.2.2.

\textsuperscript{19} See chapter 1, section 4.2.1. For a background to the global administrative law project, see “Global Administrative Law” (\textit{Institute for International Law and Justice}) <https://www.iilj.org/gal/> accessed July 26, 2018.


\textsuperscript{21} For example, pursuant to the United Nations Security Council Resolution 1904 (6247\textsuperscript{th} meeting, adopted on 17 December 2009) S/RES/1904, the Office of the Ombudsperson of the Al-Qaida Sanctions Committee has been
conduct of multilateral development banks (such as the ones created at the institutions belonging to the World Bank Group); the situation is precarious. Those mechanisms are neither intended to be, nor do they form substitutes to, a judicial mechanism for redress. As a result, there exists no proper judicial protection against IOs in respect of global administrative law disputes. Individuals or entities harmed by the exercise of international public authority consequently suffer regular denials of justice.

What is immediately apparent is that regardless of the subject matter of a dispute or the gravity of harm, the location of the affected party or the identity of the IO, the public visibility of a dispute or its inconspicuousness, we live in a ‘denial of justice age’ when it comes to the individual pursuit of justice against IOs. Bringing this denial of justice age to an end is the main objective of this work. I argue that the victims of IO conduct suffer regular denials of justice due to the exploitation of a prevailing regulatory arbitrage. Fundamentally, this arbitrage results in a situation where the victims of IO conduct slip through real or perceived legal loopholes when seeking to access justice. Unless the exploitation of the arbitrage is tackled, the denial of justice age cannot be brought to an end.

I will suggest a comprehensive, achievable and well balanced regulatory framework to ensure the effective delivery of justice to private persons harmed by IO conduct. The International Law Commission (‘ILC’) adopted the Draft Articles on the Responsibility of International Organizations created at the UN who reviews requests from individuals, groups, undertakings or entities seeking to be removed from the Al-Qaida Sanctions List of the Security Council’s Al-Qaida Sanctions Committee: see <https://www.un.org/sc/suborg/en/home>.

22 For a brief overview of these mechanisms, see ‘Regional Multilateral Development Banks’ (Human Rights & Grievance Mechanisms, November 14, 2014) <https://www.grievancemechanisms.org/grievance-mechanisms/regional-multilateral-development-banks> accessed July 22, 2018; as is evidenced by the discussion in chapter 1, section 3.3.2, these mechanisms are generally weak mechanisms.

23 As the Senior Counsel at the World Bank Group, Edward Chukwuemeke Okeke himself noted in his 2018 monograph, the only judicial protection created at the institutional level for private parties affected by IO conduct ‘are administrative tribunals whose jurisdiction is limited to the adjudication of disputes between international organizations and their personnel’: E Chukwuemeke Okeke, Jurisdictional Immunities of States and International Organizations (OUP 2018), 292.

24 Although used in a different context in this work, the term ‘denial of justice age’ is borrowed from S Montt, State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (Hart Publishing 2012), 16.

25 In this work, private persons include both natural and legal persons. Such persons are also referred to as ‘third parties’, being persons who are not a member of the IO. As employees are not members of the IO as such, I include them in the broad category of private persons: see International Law Association, ‘Berlin Conference’ (2004) Accountability of International Organisations, 18.
Organisations in 2011, and did not address the issue of the rights of private persons vis-à-vis IOs. The ILC left the ‘individual in the cold’. Given the enhanced role that IOs now perform and their correspondingly increased impact on private rights, the current regulatory regime (or lack thereof) governing IOs is not fit for purpose. The framework developed and presented in this work is much needed.

2 Structure of the thesis

The work consists of three main chapters that address how the prevailing regulatory arbitrage is to be managed, and ultimately the denial of justice brought to an end. I proceed in three steps. First, I expose the reasons as to why the regulatory arbitrage prevails and how IOs exploit it. Second, I suggest how to manage the regulatory arbitrage by adopting a private international law (‘PIL’) framework. Finally, I assess the most important component of the arbitrage: the fair trial component. I then conclude this work by showing how we may do away with the arbitrage in the future.

Chapter 1 exposes the regulatory arbitrage: the denial of justice age is made possible due to a prevailing regulatory arbitrage that IOs readily exploit to avoid legal responsibility. I will demonstrate how the law of IO immunities is at the root of such an arbitrage. IO immunities operate before national courts, meaning that prima facie, private parties are unable to sue IOs at the national level. However, as a counterpart to IO immunities, IOs are also placed under obligations to provide access to justice to private parties at the institutional level. Unfortunately for the victims, save for some exceptions (such as the creation of IATs), IOs have failed to perform such an obligation. Where a failure of justice occurs at the institutional level, instinct would say that national jurisdiction ought to be exercised. This is not the case.

27 See ibid, DARIO, Art 33(2).
National courts have by and large refused to breach IO immunities even where the ultimate result is a denial of justice. Where IO immunities were always intended to be functionally delimited, they are understood to be *de facto* absolute in most states. A very small number of national courts have exercised jurisdiction over an IO seeking to provide access to court. However, there is little guidance in what precise circumstances will a court actually exercise jurisdiction over an IO, making the state of the law ambiguous, inconsistent and full of gaps. Different jurisdictions take differing approaches on the topic, meaning that there are significant inconsistencies within and across legal orders on when an IO can be made answerable in a national court. Ultimately, such inconsistencies leave the individual claimant in the lurch, never knowing whether national courts will fill the void when IOs fail to live up to their obligations to render justice. Fearing no legal consequences for failing to provide access to justice at the institutional level due to their *de facto* absolute immunities, and taking advantage of the inconsistent and ambiguous approaches to how immunities are applied in different national legal orders, IOs have exploited the prevailing regulatory arbitrage to frustrate access to justice.

Chapter 1 will conclude that addressing the prevailing regulatory arbitrage is perhaps the most important question for the law surrounding IOs today. In too many cases, IOs either refuse to provide a forum for claimants to address their grievances, or when such forums are provided, they are seriously deficient. On the other hand, national courts abdicate and defer decision making, even where it is clear that justice will most likely be denied. To deliver effective justice, greater consistency and better coordination across legal orders is necessary. How to achieve such coordination is the topic tackled in chapter 2.

Chapter 2 suggests a comprehensive and workable framework to *manage the regulatory arbitrage* exposed in chapter 1. Chapter 2 is the engine of the work. I suggest that the ideal vehicle to manage the exploitation of the arbitrage is by adopting a robust PIL framework that can effectively coordinate between the national and the institutional legal orders. Because disputes involving IOs primarily intersect with those two legal orders, the focus must be coordinating between them. I show how such an enhanced coordination can manage the prevailing regulatory arbitrage, prevent its exploitation, and in doing so, secure access to justice without compromising an IO’s independence. As far as I am aware, there are no previous works analysing how PIL specifically can assist in securing access to justice for the victims of institutional action. This work fills this lacuna.
Chapter 2 will not only deal with the theoretical underpinning of how PIL can play a significant role in better coordinating between the national and the IO legal order, it also sets out the mechanics of how such coordination is to be achieved. As to the conceptual framework, I show how PIL, which concerns issues of competence or jurisdiction, choice of law, and the recognition and enforcement of judgments, has great potential to manage a regulatory arbitrage by neatly slicing regulatory authority across legal orders. Moreover, I will also argue that as a tool of coordination, PIL is capable of mediating between the IO and the national legal orders. I take a legal pluralist stance, arguing that the IO and the national legal orders heterarchically co-exist in a hybrid legal space with PIL as the ideal tool to resolve conflicting claims to the exercise of regulatory authority.

How PIL can actually coordinate between the IO and national legal orders is then subjected to a detailed study. This discussion focuses on the mechanics of PIL relating to jurisdiction or competent court, choice of law, and recognition and enforcement of foreign judgments. On matters concerning jurisdiction, IO immunities significantly impact on how and when courts exercise their jurisdiction at the national level. I clarify that immunities only impact on the exercise of national jurisdiction, not its existence. Consequently, relevant national and IO courts (assuming they exist) possess concurrent jurisdiction over claims involving IOs. In terms of which court should actually exercise jurisdiction over IOs, I suggest a fresh approach.

I argue that the question as to which forum should determine claims involving IOs is a question of ‘appropriateness’ of forum. A focus on ‘appropriateness’ of court is capable of taking into account the specific degree of connection a dispute has with a particular legal order. Such a focus properly balances the interests of different legal orders, without compromising on access to justice. It is contended that this nuanced approach is superior to an abstract determination as to when access to justice should trump IO immunities or vice versa, which can be an unsolvable conundrum.

Specifically, I argue that whether or not IO immunities exist, there ought to be a presumption that the IO legal order is the appropriate forum. However, this presumptive appropriateness can be rebutted if the alternative forum is unavailable or inadequate. This language of unavailability or inadequacy reflects the PIL doctrine of forum non conveniens that is applied in several common law states. Courts possessing jurisdiction may nonetheless decline to exercise it because another forum is the ‘appropriate’ forum in the circumstances. But they
might choose to exercise their jurisdiction if the other forum does not provide a fair trial. I will apply this doctrine of *forum non conveniens* to the IO context: where justice cannot be achieved at the institutional level, I will argue that a national court possessing PIL jurisdiction ought to then exercise it as a secondary intervention.

National courts become the ‘appropriate’ court where there is a lack of access to justice and fair trial at the IO level. Where victims face a denial of justice at the alternative forum, jurisdiction at the national level must be exercised. The availability or ‘adequacy’ of a court is to be determined by reference to the standards of the right to a fair trial in international human rights law. Accordingly, the compliance of justice systems with fair trial standards is a pivotal inquiry.

Implementing a jurisdictional scheme where a national court’s secondary intervention is triggered where an alternative forum is unavailable or inadequate can make the cost of exploiting the regulatory arbitrage high enough so that IOs stop exploiting it. If there is a greater probability that national courts will exercise jurisdiction as the more ‘appropriate’ forum where justice is likely to be denied at the IO level, IOs may be willing to provide access to justice. Where they do not do so, a national court will fill the void. Either way, access to justice will be enhanced.

Finally, chapter 2 engages with the PIL components of choice of law and the recognition and enforcement of judgments. PIL’s capacity to slice regulatory authority means that it is capable of allocating it in a way that perceived opposing values can be accommodated to meet the interests of different legal orders. I will show that should a national court need to exercise jurisdiction over an IO as a secondary intervention, choice of law and recognition and enforcement rules can be calibrated to maintain the IO’s independence, at the same time as securing access to justice.

*Chapter 3 assesses the fair trial component in the regulatory arbitrage.* Whether an IO provides a fair trial is the pivotal inquiry for determining which court is to exercise jurisdiction over an IO. This chapter assesses the justice mechanisms available at IOs for victims of institutional action. As Wouters and Odermatt note, ‘the greatest obstacle preventing parties
from challenging acts of IOs is the lack of a legal forum where such disputes may be brought.’

In reality, except for IATs, there exists no judicial mechanisms at the institutional level which
the victims of IO conduct may approach to receive justice.

Specifically, chapter 3 demonstrates how the right to a fair trial applies to courts delivering
justice at the institutional level. Given that IOs are not parties to human rights treaties that
provide for fair trial rights, it is important to establish how and why the right to a fair trial has
now been incorporated into the procedural law applicable to the delivery of justice at the
institutional level. This means that when determining the question of ‘appropriate’ court in
terms of the availability or adequacy of an alternative forum, regardless of which legal order a
court belongs to, international fair trial standards are applicable.

Because the only judicial mechanisms set up by IOs are IATs, chapter 3 selects them for the
purposes of the fair trial assessment. Focusing on the two leading IATs, the United Nations
Dispute and Appeal Tribunals and the Administrative Tribunal of the International Labour
Organisation, I show that to varying degrees, leading IATs are falling short of fair trial
standards. Due to this deficiency, the personal and subject matter jurisdiction of IATs should
not be expanded at this time as some authors have recently suggested.

Chapter 3 concludes that save for very limited exceptions, a national court possessed of
jurisdiction must exercise it over claims raised against IOs in order to end the exploitation of
the prevailing regulatory arbitrage. Where no forum is available at the IO level (which is often
the case), it is the relevant national court that then is the appropriate court to determine the
claim. Further, where alternative forums (IATs) are available, there are often such deficiencies
that a nuanced assessment of adequacy becomes necessary. Ultimately, a secondary
intervention by national courts is the only realistic way to end the denial of justice age when it
comes to the pursuit of justice against IOs.

In the conclusion I argue that the ideal way to end the denial of justice age is for IOs to create
access to justice mechanisms. I outline the role international arbitration can play in this respect.

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The Oxford Handbook of International Organisations (OUP 2016), 1009.
30 C Ferstman, International Organizations and the Fight for Accountability: The Remedies and Reparations Gap
(OUP 2017), 206-9.
However, given the experience thus far, if the denial of justice age is to be brought to an end, the exploitation of the prevailing regulatory arbitrage must cease. A treaty implementing a PIL framework should be adopted to manage the regulatory arbitrage. Doing so will ensure that the interests of each relevant legal order is respected, and that access to justice is realised.
CHAPTER 1: EXPOSING THE REGULATORY ARBITRAGE - THE DENIAL OF JUSTICE IN DISPUTES INVOLVING INTERNATIONAL ORGANISATIONS

1 Introduction

Private parties raise legal claims against IOs at courts or justice mechanisms located in different legal orders attempting to invoke their regulatory authority. The legal orders or systems whose justice mechanisms may be approached are the institutional legal order (the legal system of the IO itself), the national legal order, or very rarely, the general international legal order. All those legal orders co-exist. In claims involving IOs, the regulatory authority of each co-existing legal order can intersect and overlap. Where loopholes across legal orders exist, a regulatory arbitrage is the result.

A regulatory arbitrage exists where the differences or gaps in the laws of distinct legal orders allow an entity or person to ‘circumvent regulatory authority’. A regulatory arbitrage becomes a real problem when gaps in the law can be exploited for iniquitous purposes. In this chapter, I demonstrate that due to loopholes in the laws that govern them, IOs are able to exploit the prevailing regulatory arbitrage to escape their responsibility or liability to private persons for their unlawful conduct, regardless of whether the illegality is sourced in international or national law. When trying to access justice, complainants regularly slip through legal loopholes when invoking the regulatory authority of decision makers located in distinct legal orders. It is the exploitation of this regulatory arbitrage that causes a denial of justice to private persons affected by institutional action.

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1 For a description of the IO legal system, see F Seyersted, Common Law of International Organizations (Martinus Nijhoff 2008), 24; and for the contrasting nature of the general international legal order vis-à-vis the national legal order, see HG Schermers and NM Blokker, International Institutional Law (5th edn, BRILL 2011), section 1340, the authors explain that whereas national legal orders tend to be vertical in nature, the international one is relatively horizontal. The salient characteristics of each of those legal orders are further considered in chapter 2.
2 The ‘notion that several legal orders may coexist is revealed to be a truism’: A Bianchi, International Law Theories: An Inquiry into Different Ways of Thinking (OUP 2016), 228.
4 A person's attempt to impugn an IO’s alleged unlawful conduct, may the conduct be in breach of institutional, national or international law, is referred to as invoking that IO’s responsibility’ or 'liability'. For a discussion of those overlapping concepts, see ILC, ‘Report of the International Law Commission’ (26 April – 3 June and 4 July – 12 August 2011) (63rd session) (‘ILC Report’), paras 3-5.
I first show that as an independent legal actor, it is the IO that is responsible for its actions and omissions as opposed to its member states. That discussion also contextualises the broader institutional setting within which IOs are regulated (2). I then highlight the structural biases built into the regulatory regimes of IOs, the principal one being the doctrine of jurisdictional immunities. The discussion on immunities is subjected to a detailed analysis given its significance to the realisation of justice and its role in propagating the regulatory arbitrage (3). It is then shown how the conflict between access to justice and the doctrine of immunities has been resolved in favour of the latter, with inter and intra-jurisdictional inconsistencies apparent (4). I then briefly highlight that due to certain other biases existing in the general international order, dispute resolution mechanisms provided for by general international law have also failed to effectively deliver justice to the victims of institutional conduct (5). I conclude that the exploitation of regulatory gaps will continue to result in denials of justice unless and until better coordination amongst different justice mechanisms can be successfully achieved (6).

2 The institutional setting – questions of status and personality: locating the proper defendant

The possession of legal personality or status by an IO is of much significance to a private claimant for without it, no suit may be brought against it. Only if an entity possesses legal personality, it can hold rights in its own name, and be a party to a proceeding in its own right.\(^5\) As Kelsen has said, legal personality means ‘the capacity of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law’.\(^6\) This proposition is equally true for IOs that are but one form of an artificial entity.\(^7\)

As the discussion below elucidates, as an independent legal person, it is the IO that is the proper defendant in any claim brought by private claimants alleging harm caused by that IO’s actions or omissions, regardless of whether a cause of action is pursued in domestic or international law,\(^8\) or which particular forum is approached. The proposition that IOs are legal persons and distinct in law from their constituent member states, holding rights and obligations in their own

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\(^8\) A cause of action refers to a bundle of rights resulting from a legal relationship enforceable in the courts: SA Harris, ‘What Is a Cause of Action’ (1928) 16 California Law Review 459, 476. Some common causes of action are in tort or contract.
right, and thus, responsible for their own conduct cannot be doubted. However, with a distinct basis behind an IO’s domestic and international legal personality, and particular consequences flowing from such personalities, it is necessary to further delve into the justifications for the proposition that as a legal person, the IO is and ought to be the proper defendant in any claim impugning its conduct.

2.1 IOs are international legal persons

2.1.1 Some general remarks

An international legal person, a classical example of which is the nation state, is a ‘subject’ of international law that is capable of directly possessing rights and bearing responsibilities on the international legal plane. Now, not only states, but IOs have come to be seen as international legal persons and ‘subjects’ of international law. Thus, while creations of their member states, IOs are independent legal persons possessing a status separate from their constituent members, constituting an independent actor at the international level.

Already in 1949, the International Court of Justice (‘ICJ’) confirmed this proposition in the Reparation case. That case involved the UN’s attempt to seek compensation from Israel for the murder of the United Nations’ Mediator in the Middle East killed by terrorists in territory under the control of the provisional government of Israel. Without international personality,

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9 Amerasinghe (n 7), 67-8. Even authors who submit that member states should be jointly held responsible for institutional conduct where they exercise relevant control over the decision-making (a debate that is in the nature of de lege ferenda) do not propose a direct cause of action against the member state: J d’Aspremont, ‘Abuse of the Legal Personality of International Organizations and the Responsibility of Member States’ (2007) 4 International Organisations Law Review 91, 94.

10 The 'subject' v 'object' dichotomy in international law is a vexed one. According to the positivist view, states are the primary 'subjects' of international law, meaning that they are the central actors in the international legal system, enjoying rights and possessing responsibilities directly on the international plane. On the other hand, individuals and other private persons are mere 'objects' of international law. This positivist view is well reflected in Article 34 of the Statute of the International Court of Justice 33 UNTS 933 ('ICJ Statute') which only gives states standing before that court: see AS Muller, D Raič, JM Thüranszky (eds), The International Court of Justice: Its Future Role After Fifty Years (Martinus Nijhoff 1997), 208. The 'subject' v 'object' distinction is criticised by several prominent authors, see for example, R Higgins, Problems and Process: International Law and How We Use It (OUP 1994), 50. See further the discussion at (5) below on this issue.

11 International organizations 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: Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion) [1980] ICJ Rep 73, 89-90, para 37.


13 For a recent analysis and the facts that gave rise to the Reparation case (n 12), see RA Wessel, 'Reparation case' in C Ryngaert, IF Dekker, RA Wessel and J Wouters (eds), Judicial Decisions on the Law of International Organizations (OUP 2016), 12.
the UN would not have had the legal capacity to advance a claim against Israel in its own right.14 Absent any express provision in the UN Charter15 about its status in international law,16 the question of the organisation’s international personality was contentious.

With certain judges acknowledging the novelty of the situation observing that the ICJ was engaging in an exercise of law creation in light of the exigencies of the times,17 the Court was ready and willing to recognise the UN’s international personality. In reaching its conclusion that the UN was an international legal person, the ICJ inferred the UN’s international personality as an inescapable conclusion. The UN demonstrated a distinct existence in the domestic law of the member-states; entered into treaties in its own right; was charged with tasks on the international plane; and the immunities accorded to the organisation through the *Convention on the Privileges and Immunities of the United Nations 1946*18 (‘General Convention’) created rights and duties between each member state and the UN which could only be explained based on the UN’s international personality.19 The ICJ concluded that ‘[i]n the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane’.20

The practice of the UN, and the functions it was mandated to perform that presumed the existence of international status, sufficiently demonstrated that the UN was not only intended to, but was already exercising the rights and capacities typically exercised by an international person.21 The inference that the UN was an international legal person was thus logical, and the only available conclusion that could possibly have been reached. Although the finding that the

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14 *Reparation case* (n 12), 178.
15 Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (‘UN Charter’).
16 As Schermers and Blokker point out, most international organisations are not granted express international personality in their constituent instruments; Schermers and Blokker (n 1), section 1565.
17 See the Separate Opinion of Judge Alvarez in *Reparation case* (n 12), 190.
19 *Reparation case* (n 12), 178.
21 *Reparation case* (n 12), 177; Klabbers (n 5), 40.
UN was an international person was pragmatic and no doubt correct, its theoretical foundations have remained contentious.

Some commentators suggest that international personality is grounded in the so called ‘will’ theory, meaning that it is the intention of the member states that results in international personality. Others contend that ‘as soon as an entity exists as a matter of law, (i.e., meets the requirements that international law attaches to its establishment) that entity possesses international legal personality.’ According to the second school, personality is then ‘objective’ which is opposable against all other subjects of international law, including both, member and non-member states. An objective view of personality, which now appears to have been endorsed in the commentaries to the International Law Commission’s Draft Articles on the Responsibility of International Organisations 2011 (‘DARIO’), can be sourced in the Reparation case. In answering the question whether the UN’s personality was opposable against Israel, a non-member of the UN at the time, the ICJ said that:

[T]he Court’s opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.

It is uncontroversial that universal organisations such as the UN enjoy objective international personality based on the Reparation case rationale. Subsequent developments and practice also indicate that a liberal view on the acquisition of objective international personality by IOs now ought to be taken. There is little evidence of any barriers in the acceptance of the international personality of IOs in practice, albeit inconclusive academic debates about its basis continue.

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22 For an analysis of the competing theories, see Rama-Montaldo (n 6), 112.
23 See Klabbers (n 5), 47-9. Klabbers suggests a third approach demonstrated by practice, which he claims has ‘shown a more pragmatic approach to questions of international legal personality, perhaps best captured by the phrase ‘presumptive personality’: as soon as an organization performs acts which can only be explained on the basis of international legal personality, such an organization will be presumed to be in possession of international legal personality’.
25 Reparation case (n 12), 189.
26 ILC Report (n 4), para 10; also see, Seyersted (n 1), 43 and 51; Schermers and Blokker (n 1), section 1568; Amerasinghe (n 7), 84 and 87.
27 Amerasinghe (n 7), 87.
It is safe to proceed on the assumption that IOs are international legal persons, and possess objective personality. With the definition provided by the DARIO expressly affirming that an IO possesses ‘international legal personality’, without such personality an entity may even struggle to be characterised as an IO. For present purposes, the real issue is not whether IOs are international legal persons (which they clearly are), but what particular consequences flow from its possession.

2.1.2 The consequences of international personality on choice of defendant

It is important to maintain a conceptual distinction between an IO’s international legal personality and the consequences that flow from it. Of present concern are certain legal capacities that inexorably flow from the presence of international personality. One of those consequences of legal personality, as was stated, according to the Kelsenian theory is the capacity to sue and be sued. Consistently with this theory, the ICJ draws a close link between international personality, and the capacity to raise an international claim to protect the rights held by an organisation as a subject of international law. In the Reparation case, the ICJ said:

[T]he Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international

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28 Article 2(a) of the DARIO (n 24) states “‘international organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.”

29 I use the term ‘rights’ as referring to the substantive right of an international organisation; and capacity as the ability to act in a way that protects its rights. For a description of the terms ‘functions’, ‘powers’, ‘rights’, ‘capacity’ and ‘competence’, terms often used interchangeably, see G Verdirame, The UN and Human Rights: Who Guards the Guardians (CUP 2011), 68-9.

30 See Kelsen (n 6), 329. Other capacities include a circumscribed power to enter into treaties consistently with an organisation’s constituent instruments: see Amerasinghe (n 7), 99; and other authors argue for a broad treaty power: see Klabbers (n 5), 40-1; and Finn Seyersted takes the broadest possible view stating that international organisations possess the "inherent capacity to perform any act of international law which is in a practical position to perform, subject to such negative restrictions which are laid down in its constitution": Seyersted (n 1), 51. Although, strictly speaking, the capacity to enter into treaties does not logically follow from legal personality, the existence of personality means that the treaty making capacity will be exercised in the name of the organisation: see R Higgins, P Webb, D Akande, S Sivakumaran and J Sloan, Oppenheim’s International Law - United Nations vol 1 (OUP 2017), 396.
law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims (emphasis added).31

That IOs are not analogous to states in the extent of their rights is self-evident.32 For different subjects of law to possess differing rights and legal capacities is not unusual. This is the case for domestic legal orders,33 and is equally the case in the international one too.34 The status of an IO must then not be confused with the totality of its rights and capacities, which will differ from organisation to organisation. In this respect, there is some confusion whether the international personality of an IO can be possessed in degrees. This confusion is misplaced.

It may be true that some capacities, such as the ability to sue and conversely the invocation of an organisation’s responsibility, are consequences closely linked with status. Without the capacity to raise a claim to protect its rights, the legal status of an entity would be rendered meaningless. It does not, however, follow that status should be equated with capacities. Legal status exists independently of the extent of an organisation’s rights and capacities, and does not exist in degrees. It should be recalled that in the Reparation case, when assessing the UN’s status, the ICJ had remarked that the UN possessed a ‘large measure of international personality’.35 The use of that phrase causes much confusion. Either an entity is a legal person, or not. As a leading treatise, Oppenheim’s International Law - United Nations, observes:

In the Reparation Advisory Opinion, the Court stated that the UN was in possession of a ‘large measure’ of personality. This somewhat curious phrase is best understood as a statement concerning the substantive capacities of the organization, which are limited when compared to those of states and vary in degree considerably when compared with other international organizations, as opposed to international legal personality itself, which is not something that exists in degrees. Similarly, the term ‘functional personality’ that is sometimes used in this context reflects the way that the ‘powers

31 Reparation case (n 12), 179. The ICJ also seem to imply the capacity to raise an international claim by the UN (at page 180).


33 For example, in JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1989] 3 WLR 969, [1990] 81 ILR 670, 698–9; Lord Oliver clarified that status and capacity are distinct concepts (stating that minors possess status but may lack certain capacities), albeit status may be inferred from capacity.

34 As the ICJ noted in the Reparation case (n 12), 178, ‘[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community’.

35 Reparation case (n 12), 179.
which fill, or give substance to, the organization’s personality are limited and determined by the latter’s purposes and functions’.  

The international legal personality of an organisation must not be understood as a vague notion: whether or not an IO is responsible for its internationally wrongful acts need not engage in the nebulous exercise of determining the so-called ‘measure’ of its personality. A defendant organisation cannot avoid its responsibility purporting that its impugned conduct does not fall within the scope of its personality. After all, as the DARIO state in its Article 3, IOs are responsible for their internationally wrongful acts.

As international legal persons, IOs are answerable in law for their own conduct. When a person is seeking a remedy founded in international law for alleged harm done by an IO, it is the organisation, an international person, who is the proper defendant for it is the entity whose responsibility ought to be invoked. Questions of which forum ought to determine a particular claim, ‘standing’, the liability of other international actors (such as states) for their own conduct, are altogether distinct matters.

2.2 IOs and domestic legal personality

2.2.1 The need for domestic personality

Klabbers identifies that IOs need domestic legal personality as a matter of ‘functional necessity’. And as Schermers and Blokker note, without domestic personality, IOs would

36 Higgins, Webb, Akande, Sivakumaran and Sloan (n 30), 396.
37 ILC Report (n 4), para 10; also see the cases of Behrami v France App no 71412/01 (ECtHR, 2 May 2007) and Saramati v France, Germany and Norway App no 78166/01 (ECtHR, 2 May 2007) where the Grand Chamber of the European Court held that the member states of the European Convention could not be impugned for alleged contraventions of the European Convention attributable to the UN, a separate legal person, see paras 133-44 and 15-2, especially para 144 - this however, does not rule out the possibility of a state being responsible for its own contraventions (at para 151); also see, Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece) [2011] ICJ Rep 644, paras 42 and 70. For an academic debate about shared responsibility in international law, and underdeveloped concept, see generally, A Nollkaemper and D Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (SHARES 2011) research paper 03, ACIL 2011-07 <www.sharesproject.nl> accessed 28 May 2018. For an excellent discussion about the DARIO (n 24) including on the problematic debate of ‘attribution’, see D Sarooshi, Responsibility and Remedies for the Actions of International Organizations (Martinus Nijhoff, 2015); also see generally, I Brownlie and M Ragazzi, Responsibility of International Organizations (BRILL 2013).
38 ‘Standing’ means the right or ability of a party to be a party in a legal proceeding. In national law there is a distinction between the capacity to sue generally and the capacity to be a party to a specific proceeding, whereas before international courts, those two things are not always separated: see A Del Vecchio, ‘International Courts and Tribunals, Standing’ in Rüdiger Wolfrum (ed) Max Planck Encyclopedia of Public International Law (2010), paras 1-3.
39 Klabbers (n 5), 44.
simply be unable to do their day-to-day work.\footnote{Schermers and Blokker (n 1), section 1599.} Unlike states, IOs do not possess their own territory, and as a matter of geographical compulsion are located on the territory of nation states, coming into contact with national law. Particularly, IOs need to carry out routine activities, such as entering into contracts (including with parties located outside the territory of the host state), leasing premises, acquire and dispose of movable and immovable property, buy and sell goods, register patents, and resorting to legal action to protect their rights before national courts.\footnote{Whether or not an organisation has the competence to exercise those capacities will depend on its internal law. Domestic personality means that the state may not limit the exercise of an organisation’s legal capacities as a domestic legal person: ibid, section 1599.} The ability to exercise all of the aforementioned capacities require the existence of status at the domestic level.

Recognising the need for domestic legal personality, most constituent instruments of IOs (treaties establishing the organisation as well as headquarters agreements) expressly require member states to grant them legal personality within their domestic legal orders.\footnote{Where express grant is absent, domestic personality will be implied: Amerasinghe (n 7), 69; as Reinisch points out, even where no explicit treaty provision on domestic personality exists, member states tend to recognise the organisation’s domestic personality: A Reinisch, \textit{International Organisations Before National Courts} (CUP 2000), 50.} For example, Article 104 of the UN Charter\footnote{UN Charter (n 15).} provides for domestic personality using a functional necessity rationale. It states that the UN ‘shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes’. Other constituent instruments may use different formulations. For example, the \textit{Articles of Agreement of the International Monetary Fund} and the \textit{Articles of Agreement of the International Bank for Reconstruction and Development} both state that the Fund and the Bank respectively ‘shall possess full juridical personality, and, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings.’\footnote{IMF, ‘Articles of Agreement of the International Monetary Fund’ (April 2016) <http://www.imf.org/External/Pubs/FT/AA/index.htm> (‘IMF Articles of Agreement’), Article IX, section 2; IBRD, ‘IBRD Articles of Agreement’ (16 February 1989) 2 UNTS 134 <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>, (‘IBRD Articles of Agreement’), Article VII, section 2.} Regardless of the formulation used, whether it is in general or specific terms, domestic personality will entitle the organisation to possess the capacities typically exercised
by legal persons in the domestic order of the granting state; and the granting state must not restrict the enjoyment of those capacities.\textsuperscript{45}

\textbf{2.2.2 How domestic personality is acquired}

It is one thing for international law to require that IOs be granted domestic personality, and yet another for that international rule to translate into legal reality at the national level. The basis on which personality is acquired under domestic law differs somewhat. These distinctions are rooted in how international law is received in a particular national legal order. Moreover, because of their work that spans geographical boundaries, IOs will not only come into contact with the national laws of their member states, but also non-member states. It is, therefore, important to set out the basis on which domestic personality will exist/be received in both those contexts.

Regarding member states, generally speaking, it may be assumed that IOs must be granted domestic personality by member states under the constituent instruments of the concerned organisation.\textsuperscript{46} Several states, such as Germany, Netherlands, Belgium, Austria, and the US, who allow for the direct effect of treaties within their national legal orders, recognize the legal personality of the organisation in their legal systems without need for incorporation via domestic law.\textsuperscript{47} Other states, such as the UK, and others belonging to the Commonwealth of Nations (including Australia, Canada and New Zealand), require domestic incorporation before an organisation will be recognised as a legal person.\textsuperscript{48} Vis-à-vis member states, the existence and recognition of domestic legal status, regardless of how it is implemented, is generally not a contentious issue.

But what of non-member states (or potentially member states who may fail to incorporate through national law the domestic personality of IOs when such incorporation may be required) – are they to recognise the domestic personality of organisations that they have not joined? Some see domestic legal personality directly deriving from an organisation’s international

\textsuperscript{45} Amerasinghe (n 7), 77; Schermers and Blokker (n 1), section 1598-9.
\textsuperscript{46} Even where no explicit treaty provision on domestic personality exists, member states tend to recognise the organisation’s domestic personality: Reinisch (n 42), 50.
\textsuperscript{47} Ibid, 48; Amerasinghe (n 7), 70; see for example, Balfour, Guthrie & Co. Ltd et al. v United States et al (1950) USDC ND Cal, 17 ILR 323, 324; a US court affirmed the UN’s capacity to institute legal proceedings in the US based on Article 104 of the UN Charter which - as a treaty ratified by the US - formed ‘part of the supreme law of the land.
\textsuperscript{48} Amerasinghe (n 7), 70; Reinisch (n 42), 49.
status. This view is taken by monist states, such as Belgium, Switzerland and Italy, meaning that the international personhood of an entity directly translates into domestic personhood.\textsuperscript{49} Although this view may be instinctively attractive for its simplicity, it is logically unsound. International and domestic personality are established in distinct ways, produce differing consequences (albeit overlaps are possible), and should not be conflated.\textsuperscript{50}

There are two other ways (both using private international law techniques) in which domestic personality can be upheld in the legal order of a non-member state (or potentially a member state where incorporation has not occurred). In the case of the \textit{Arab Monetary Fund v Hashim and others} (‘AMF case’),\textsuperscript{51} The Arab Monetary Fund (‘AMF’) brought proceedings in the English courts to recover its funds allegedly misappropriated by its former Director General and certain other defendants. Arguing that the AMF could not bring the proceedings in England for they were not incorporated as a legal person in that jurisdiction, the defendants argued that AMF’s claims should be struck out.\textsuperscript{52} Based on international comity and the rules of private international law,\textsuperscript{53} the House of Lords upheld the legal personality of the AMF, with Lord Templeman stating that comity required that the status of an IO incorporated by a foreign state should be recognised by the Courts of the United Kingdom,\textsuperscript{54} explaining:

when sovereign states enter into an agreement by treaty to confer legal personality on an international organisation, the treaty does not create a corporate body. But when the AMF agreement was registered in the UAE by means of Federal Decree No. 35 that registration conferred on the international organisation legal personality and thus created a corporate body which the English courts can and should recognise.\textsuperscript{55}

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\textsuperscript{49} Schermers and Blokker (n 1) section 1595, citing \textit{Branno v Ministry of War} (1955, Giurisprudenza Italiana) 22 ILR 756, 904, where the Italian Court of Cassation derived the legal personality of the North Atlantic Treaty Organisation (‘NATO’) under Italian law from its international personality.
\textsuperscript{50} Reinisch reaches the same conclusion; Reinisch (n 42), 51.
\textsuperscript{51} \textit{Arab Monetary Fund v Hashim and others (No 3)}, [1991] 1 AC 114, [1991] 6 Arab LQ 90.
\textsuperscript{52} See ibid.
\textsuperscript{53} International comity is a doctrine that seeks to sustain mutual respect between distinct national legal orders and help mediate legal relationships between states - it is a somewhat contentious concept further discussed in chapters 3 and 4. For jurisprudence on the concept, see \textit{Belhaj and another v Straw and others} [2017] UKSC 3, [2017] 2 WLR 456 and \textit{Rahmatullah (No 1) v Ministry of Defence and another} [2017] UKSC 1, [2017] UKSC 3, at para 225 (per Lord Sumption); for an analysis of the concept generally, see WS Dodge, ‘International Comity in American Law’ (2015) 115 Columbia Law Review 2071.
\textsuperscript{54} See \textit{Arab Monetary Fund v Hashim and others (No 3)} (n 51) (per Lord Templeman), 92.
\textsuperscript{55} Ibid. As rendered by Lord Templeman, ibid, 7; In a related proceeding, taking a similar position, a US court said: ‘the AMF is a juridical person (a corporation, a persona ficta, an entity capable of legal battle) under United
Relying on the classic rule of PIL that the status of an entity is to be determined by the law of the place where it is incorporated, the domestic personality of the AMF in the UAE meant that English courts were willing to recognise the organisation as a domestic legal person in the UK as well. As Reinisch confirms, the ‘technique of accepting the legal personality of foreign juridical persons is inspired by the provisions of the 1956 Hague Convention on the Recognition of the Legal Personality of Foreign Companies, Associations and Foundations and the 1968 Brussels Convention on the Mutual Recognition of Corporations and Juridical Persons, as well as by domestic private international law/conflict of laws principles’.  

This approach is as much logical as it is sensible: it recognises in law what is factually true. As per the approach taken by Jenks on the issue, IOs do and can act and behave like international body corporates\(^57\) – that is the very reason they are granted domestic personality. On questions of status, there is no functional distinction between IOs and other forms of corporate entities. Reliance on the already existing rules and techniques to coordinate across national legal orders when it comes to the acquisition and recognition of legal personality is perfectly warranted. While the UK courts have used conventional PIL techniques to coordinate the status of international organisations across national legal orders, another way to achieve the same result is to use the same technique in a slightly modified form. Here, private international law tools help coordinate between the national and international legal order. As Amerasinghe puts it:

> The technique is to apply the generally recognized rule of the conflict of laws that the legal status and capacity of a legal person is determined by its ‘personal’ law. The personal law in the case of an international organization is international law. Thus, if it can be established that at international law an organization has personality, then a national court would, by applying its conflict of law principles, recognize the legal personality of the organization.\(^58\)

The use of a PIL lens to play a coordinating role amongst distinct legal orders is permissible and in fact desirable.\(^59\) In the context of the recognition of domestic personality though, it is

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\(^57\) CW Jenks, *The Proper Law of International Organisations* (Stevens & Sons Ltd 1962), 4; where Jenks treats IOs as a form of an international body corporate.

\(^58\) See Amerasinghe (n 7), 70-1, citing *International Tin Council v Amalgamet Inc* (1988) 524 NYS 2d, 971.

\(^59\) See chapter 2 for a detailed discussion on this issue.
important to guard against loosely transposing status from one legal order to another. May this be deriving domestic personality from international personality, or domestic personality from a treaty provision requiring the grant of domestic personality. Regarding the former, the conceptual difficulty with automatically assuming domestic personality based on international personality has already been stated. And deriving domestic legal personality by directly referring to treaty provisions only partially addresses the recognition of status across legal orders. Such an approach will result in the recognition of domestic personality only in monist states, leaving the issue unresolved for others. Particularly, non-member states who are not party to the relevant IO’s constituent instruments cannot be required to grant domestic personality to an IO based on a treaty provision which is not binding on them. In respect of member states, recognising domestic personality directly through a treaty provision does not take into account the circumstances of dualist states where treaties must be incorporated into national law before they can have effect.

To resolve which approach to the recognition of an IO’s domestic status should be preferred is currently unnecessary – the reality is that different states adopt different approaches based on the underlying relationship between international and national law relevant to their particular jurisdictions. Regardless of the specific approach taken, one way or another, an organisation’s domestic personality has been upheld and recognised in member and non-member states alike. As to what flows from such personality is the issue of real significance.

2.2.3 Consequences of domestic personality: the organisation is the proper defendant

The very grant of domestic personality is necessitated to ensure that IOs can exercise the capacity to approach national courts to protect their legal rights: without legal status, it would be impossible for an entity to lodge a claim in its own right. The one crucial capacity that inexorably follows from domestic status is that IOs can advance claims before national courts to protect their rights. The corollary being that it is the IO that should be the proper defendant in claims impugning its conduct for alleged breaches of national law. As Schermers and Blokker state, ‘international organizations are responsible for violations of their obligations and liable for their debts. This is as simple as it is logical: otherwise, the separate legal
personality of the organization, distinct from its member states, would be little more than a fiction."\(^{60}\)

Although certain structural biases are built into the international and national regulatory regimes governing IOs (a matter I will shortly return to), the principle that the organisation is the proper defendant in any claim impugning its conduct continues to be the case. The much discussed House of Lords decision in *Maclaine Watson & Co. Ltd v International Tin Council*\(^{61}\) is most significant, having had an unparalleled impact on the concept of member non-responsibility.\(^{62}\) The International Tin Council (‘ITC’) was an IO mandated to regulate the worldwide production and marketing of tin.\(^{63}\) Following the 1980’s collapse in the price of tin, the ITC became insolvent, accepted that it could not pay its debts,\(^{64}\) and its creditors sought to recover debts owed by the organisation from its member states, arguing that the ITC was tantamount to an unincorporated association and its members were liable for its debts.\(^{65}\) For the ITC’s creditors to succeed on their primary argument, they needed to establish that the ITC was not a distinct legal person and that damages from the ITC’s member states could be recovered. Even though it was the organisation that had entered into the relevant agreements with the creditors.

Regarding the ITC’s personality in English law, of relevance was the *International Tin Council (Immunity and Privileges) Order 1972* made pursuant to the International Organisations Act 1968 of the United Kingdom, which provided that ‘the Council shall have the legal capacities of a body corporate’.\(^{66}\) While that order granted the ITC legal capacities, it did not express state that the organisation possessed legal personality in UK law. Relying on the absence of an express grant, the creditors argued that ‘the Order of 1972 did not incorporate the I.T.C. but only conferred on the I.T.C. the legal capacities of a body corporate. Therefore, it is said, under the laws of the United Kingdom the I.T.C. has no separate existence as a legal entity apart from its members; the contracts concluded in the name of the I.T.C. were contracts by the member

\(^{60}\) Schermers and Blokker (n 1), section 1583.
\(^{62}\) For the significance of this decision, see P Palchetti, *Maclaine Watson & Co. Ltd v International Tin Council 26 October 1989, United Kingdom House of Lords, 81 ILR 670’ in C Ryngaert, IF Dekker, RA Wessel and J Wouters (n 13), 37.
\(^{63}\) *ITC case* (n 61), 672.
\(^{64}\) Ibid, 673 and 691.
\(^{65}\) Ibid.
\(^{66}\) Ibid, 673; International Organisations Act 1968 c48.
 Rejecting this submission, the House of Lords concluded that the ITC was a legal person in UK law for the legal capacities bestowed on it presumed the existence of domestic personality, with Lord Templeman stating that the ITC ‘cannot exercise the capacities of a body corporate and at the same time be treated as if it were an unincorporated association.’\textsuperscript{68}

Of course, had the ITC’s legal personality been precisely incorporated into domestic law, by for example, providing that the ‘ITC is a legal person’, certainty would have been enhanced, and the need for legal acrobatics avoided. Be that as it may, once the domestic personality of the ITC was upheld by the House of Lords, the primary argument put forward by the creditors was bound to fail. The consequences of legal personality of an IO at the national level are no different from the situation at the international level. The IO is responsible for its own actions at the domestic level as well.\textsuperscript{69}

The ITC’s creditors put forward two further subsidiary arguments in support of their claims, on the assumption that legal personality was found to exist. It was argued that the ITC was not a typical corporation, and was analogous to a Scottish partnership, or a société en nom collectif in the law of France, where the members may be held secondarily liable for the acts of the entity.\textsuperscript{70} Avoiding the same error at the national level as was made by the ICJ at the international one, emphasising that legal personality did not exist in ‘gradations’,\textsuperscript{71} the House of Lords rejected the argument that the member states could be held secondarily liable.\textsuperscript{72} Yet another argument put forward by the ITC’s creditors was that there existed a rule of international law that the member states were responsible for the debts of the organisation absent any treaty provision to the contrary. This argument was readily rejected for the court found that no such rule of international law existed, and in any event, the ITC’s constituent instruments did not provide for any such provision.\textsuperscript{73}

\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid, 674 (per Lord Templeman); also see Lord Oliver, ibid, 696-9.
\textsuperscript{69} Judgment of Lord Oliver, ibid, 700; see also the views of Lord Templeman, ibid, 675 and 678.
\textsuperscript{70} ITC case (n 61), 675-6 (per Lord Templeman).
\textsuperscript{71} Ibid, 702 (per Lord Oliver).
\textsuperscript{72} Ibid, 701 (per Lord Oliver).
\textsuperscript{73} Ibid, 707 (per Lord Oliver).
That as domestic legal persons IOs are liable for their own conduct is now well-established. This position has not only been taken by English courts, but by other national courts as well.\textsuperscript{74} A key consequence of possessing domestic legal personality (howsoever acquired) is that an IO can sue in its own right, or be made liable in its own name, where its liability is distinct from that of the organisation’s constituent members.

2.3 A concluding comment on legal status

An IO will possess both international and domestic legal personality. Such a status, in addition to creating capacities at the international and domestic levels, also creates burdens. One key consequence of legal personhood is that an IO is responsible for its own actions and omissions. As the law stands today, member states are not held secondarily or concurrently liable for the conduct of an IO. Consequently, a complainant who seeks to impugn the actions of an IO must raise a claim against the organisation itself when seeking a remedy for harm arising out of its conduct. Whether or not a complainant can actually do so is a matter substantially impacted by the procedural bar of jurisdictional immunities.\textsuperscript{75}

3 The structural bias of jurisdictional immunities

The possession of legal personality means that, in principle, IOs can be sued in national courts. An explicit structural bias into the regulatory regimes governing IOs prevents private persons from doing so. How institutional immunities are implemented and interpreted constitutes the key reason for the existence of the regulatory arbitrage that is exploited by organisations to deny justice. Given its significance, it is necessary to understand how the law on immunities has evolved, and the reasons for the regulatory arbitrage. I begin by clarifying the functional rationale behind granting immunities to IOs (3.1-3.2). It is then shown how the concept of ‘functional immunities’ has amounted to \textit{de facto} absolute immunities (3.3). I go on to show that the tension between access to justice and international immunities have been resolved in

\textsuperscript{74} Also see the decision of the Swiss Federal Tribunal in \textit{Westland Helicopters (Arbitral Award)} (1988) 28 ILM 687, 691; where it was said that the organisation possessed ‘total juridical independence’ and its members could not be secondarily liable (discussed above in Amerasinghe (n 7), 276).

\textsuperscript{75} C Wickremasinghe, ‘Immunity from jurisdiction, international organizations — Relationship between international and domestic law’ in Rüdiger Wolfrum (ed) \textit{Max Planck Encyclopedia of Public International Law} (OUP 2013), para 4: ‘The immunities of international organizations required under relevant treaty provisions usually operate as a simple bar to the jurisdiction of the national courts, which may in other respects be competent to hear the complaint.’
favour of the latter to the detriment of the former (4). I will conclude that without enhanced
coordination across legal orders the arbitrage in the law will continued to be exploited for
iniquitous purposes.

3.1 The concept of ‘functionalism’

To understand what functional immunities were intended to mean, it is necessary to briefly
comprehend the concept of ‘functionalism’ first. States establish IOs to secure international
cooperation to resolve and pursue various purposes for which such cooperation is considered
necessary. The underpinning of IOs is the theory of ‘functionalism’. Klabbers traced the origin
and development of the concept as follows:

[T]he term ‘function’ [can be traced] back to the late 19th century writings of Georg
Jellinek who … attributed a [in German] Verwaltungszweck to some kinds of
cooperation between states. This was picked up by several others, most notably by Paul
Reinsch. … For Reinsch, the outstanding characteristic of organizations was that they
were assigned a function and, employing a fairly narrow definition of organization, he
could confidently view those functions as emanations of the common good. Hence,
function and moral appeal went hand in hand, culminating in Nagendra Singh’s classic
1950s claim that international organizations were considered to contribute to the
‘salvation of mankind’. 76

Similarly, the ILC Special Rapporteur on the topic of relations between states and international
organisations observed:

The ‘functional’ sector of international organization is that part of the mass of organized
international activities which relates directly to economic, social, technical, and
humanitarian matters. … Functional activities are immediately and explicitly concerned
with such values as prosperity, welfare, social justice and the ‘good life’… 77

<https://www.ejiltalk.org/the-transformation-of-international-organizations-law/> accessed 3 June 2018; see also
for a detailed discussion, J Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations
‘Functionalism’ clearly assumes both moral and legal dimensions. While a discussion about its moral dimension remains outside the scope of this work, in its legal sense, ‘functionalism’ can be concretised. From the perspective of legal analysis, when understanding ‘functionalism’, it is useful to start with the assumption that every IO is created on a ‘functional’ basis - of course different organisations are ascribed different functions. For instance, the UN’s functions are of a general nature, such as to perform tasks aiming to maintain international peace and security, and on occasions even to perform state like functions.\textsuperscript{78} International Financial Institutions that include multilateral development banks (‘MDBs’), are specifically charged with maintaining international economic and financial stability (as is the mandate of the International Monetary Fund (‘IMF’) and other regional monetary organisations such as the European Stability Mechanism, AMF, African Monetary Fund and the Latin American Reserve Fund); and pursuing development activity, as is the mandate of the global and regional MDBs (such as the World Bank (consisting of the International Bank for Reconstruction and Development (‘IBRD’), International Development Association (‘IDA’), Multilateral Investment Guarantee Agency (‘MIGA’) and International Finance Corporation (‘IFC’)),\textsuperscript{79} European Investment Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Central American Bank for Economic Integration, African Development Bank, Asian Development Bank, Asian Infrastructure Investment Bank, the New Development Bank and the Islamic Development Bank).\textsuperscript{80} Other organisations may be set up to undertake highly

\textsuperscript{78} See UN Charter (n 15), articles 1 (1-4), 7, 10, 11, 13, 14, 16, 17, 22, 24, 41 and 42.

\textsuperscript{79} The World Bank Group consists of five distinct institutions, with each performing a specified mandate. In addition to the ones already stated, the World Bank Group also includes the International Centre for the Settlement of Investment Disputes, commonly known as ICSID: see World Bank Group, ‘Who We Are’ (World Bank) <https://www.worldbank.org/en/who-we-are> accessed 3 June 2018.

\textsuperscript{80} A good example of the functions of an MDB is provided by Article 2 of the ADB, ‘Agreement Establishing the Asian Development Bank’ (opened for signature 4 December 1965, entered into force 22 August 1966), which provides: ‘To fulfil its purpose, the Bank shall have the following functions: (i) to promote investment in the region of public and private capital for development purposes; (ii) to utilize the resources at its disposal for financing development of the developing member countries in the region...; (iii) to meet requests from members in the region to assist them in the coordination of their development policies and plans with a view to achieving better utilization of their resources, making their economies more complementary, and promoting the orderly expansion of their foreign trade... (iv) to provide technical assistance for the preparation, financing and execution of development projects...; (v) to co-operate, in such manner as the Bank may deem appropriate, within the terms of this Agreement, with the United Nations, its organs and subsidiary bodies ... and with public international organizations and other international institutions, as well as national entities whether public or private, which are concerned with the investment of development funds in the region, and to interest such institutions and entities in new opportunities for investment and assistance; and (vi) to undertake such other activities and provide such other services as may advance its purpose’. For an overview of how the MDBs operate in the market place, see R Faure, A Prizzon and A Rogerson, ‘Multilateral development banks: a short guide’ (Overseas Development Institute, 12 December 2015) < https://www.odi.org/publications/10160-multilateral-development-banks-short-guide> accessed 3 June 2018.
technical or specialised worked (as is the case with the mandate of several Specialized Agencies of the UN).\textsuperscript{81}

Despite their distinctive goals, what is common to all international institutions is that they have been created to achieve certain purposes and have been assigned corresponding functions to achieve them – without a functional imperative, there would be no need for IOs. Given the breadth of functions that IOs now perform, from the highly general to the very specific, it comes as no surprise that the concept of functionalism can cause confusion and controversy. As was noted by Leonardo Diaz Gonzalez, the ILC Special Rapporteur on the relationship between states and international organisations, it is not possible to enumerate a neat list of the functions engaged in by IOs generally, as different organisations are set up to achieve differing goals and possess correspondingly distinct functions.\textsuperscript{82} The challenge of neatly prescribing the functions of all organisations does not however mean that the concept of ‘functionalism’ has no work to do. What is often of concern in practice is not a determination of the aggregate functions of all the IOs combined (of course an impossible undertaking); but a focus on the functions of individual organisations in a given context.

To appreciate ‘functionalism’ in a nuanced way, several closely connected concepts need to be comprehended, i.e., each organisation’s constituent instrument sets out its purposes and goals. To pursue those purposes, each organisation is granted a ‘competence’, which is the sum total of its ‘functions’, being the ‘activities assigned to an international organisation by its constituent instrument as required for the fulfilment of the purposes of the organisation’.\textsuperscript{83} Moreover, to fulfil its functions, IOs must have powers,\textsuperscript{84} being ‘the ability to alter legal rights and duties of other persons, or legal relations generally.’\textsuperscript{85} The powers of an IO can be express

\textsuperscript{81} Examples of UN Specialized Agencies include the International Labour Organization, Food and Agriculture Organization, World Health Organization, World Bank, International Monetary Fund, International Telecommunication Union, World Meteorological Organization, World Intellectual Property Organization, International Atomic Energy Agency, and the International Criminal Court. For a list of the Specialized Agencies of the UN, see ‘Directory of United Nations System Organizations’ (Crisis, post-crisis and transition countries | United Nations System Chief Executives Board for Coordination) <https://www.unsystem.org/members/specialized-agencies> accessed 4 June 2018. Note, MFIs and MDBs can also constitute a Specialized Agency. While the UN Specialized Agencies have been brought into relationship with the UN through special arrangements, hundreds of other organisations performing work in discrete subject matters exist today.


\textsuperscript{83} Verdirame (n 29), 68-9.

\textsuperscript{84} For a description of the nature of an IO’s powers, see generally Klabbers (n 5), 53-71.

\textsuperscript{85} Verdirame (n 29), 68-89
or implied, and are delimited by the ‘principle of speciality’. As the ICJ said in its *Nuclear Weapons Advisory Opinion*, '[i]nternational organizations are governed by the “principle of speciality.” … [T]hey are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'.

86 There exists an interlinkage between an organisation’s purposes or aims, ascribed functions, and powers. Without any purpose, it would be impossible to ascribe to an organisation a function, and without any powers, those functions (and ultimately purposes), cannot be achieved. While those linkages are obvious, it is important to maintain a conceptual distinction between those concepts going forward. Sticking to ‘functionalism’ for the moment, as was said, the content and scope of the functions of IOs would differ from organisation to organisation. How can we then determine an organisation’s functions? That task is to be undertaken by referring to its constituent instruments; and on occasions, when new functions are undertaken, an organisation’s subsequent practice becomes relevant. Such an undertaking may be arduous, but must be embarked upon when questions about the functional scope of an IO’s activity arise. In that regard, one sphere where the determination of an organisation’s functions is or should become especially relevant is where issues about the jurisdictional immunity of IO’s are raised for such immunities are also rooted in the ‘functionalist’ theory.

3.2 The immunities of IOs – protecting ‘functional independence’

If an IO is to be effective, it must have autonomy to pursue its functions, that is without interference from its member states, including its host state where an organisation may be headquartered or otherwise located. National courts, which are only but one arm of a state’s governmental authorities, can also potentially intrude into an organisation’s functioning by subjecting it to a state’s adjudicative (and potentially enforcement) jurisdiction. It is to exclude the possibility of such interference that IOs are granted jurisdictional immunities before national courts. In an early work, Jenks said that ‘international immunities are the legal device through which international action escapes national control’, advancing three key justifications to argue why such national control is undesirable:

86 *Nuclear Weapons Advisory Opinion* (n 32), 78, para 25.
87 Higgins, Webb, Akande, Sivakumaran and Sloan (n 30), section 16.20.
(i) that international institutions should have a status which protects them against control or interference by any one government in the performance of functions for the effective discharge of which they are responsible to democratically constituted international bodies in which all the nations concerned are represented; (2) that no country should derive any national financial advantage by levying fiscal charges on common international funds; and (3) [an international organisation], should as a collective of States Members, be accorded the facilities for the conduct of its official business customarily extended to each other by its individual member States.89

It is then predominantly to protect what is commonly referred to as an IO’s ‘functional independence’, that through their constituent instruments (treaty law) IOs are granted jurisdictional immunities before national courts. It was always the intention that IOs only possess an immunity that is strictly necessary for the performance of its functions.90 Clarifying an IO’s treaty based immunity underpinned by this very ‘functionalist’ rationale,91 the Supreme Court of Canada neatly captured the basis and need for institutional immunities in the following terms:

International organizations derive their existence from treaties, and the same holds true for their rights to immunities. … [An international] organization must operate on the territory of a foreign state and through individuals who have nationality and is therefore vulnerable to interference, since it possesses neither territory nor a population of its own…This reality makes immunity essential to the efficient and independent functioning of international organizations. It also shapes the immunities and privileges that are granted to international organizations.92

While IO immunities are shaped through the lens of ‘functionalism’, some commentators have said that what is actually within the scope of ‘functionality’ is left without specific guidance, rendering the concept vague. Reinisch notes ‘[m]ost constituent instruments of international

organizations generally provide for ‘functional immunities’. Hardly any such instrument explains what is meant by the term immunity ‘necessary for the functioning’ of an international organization’. According to this author, the aforementioned criticism may be misplaced. As has already been stated, the logical way to determine the scope of functional immunities would and should be to refer to the functions of an organisation provided for in its constituent instruments, and then assess whether the determination of the claim in question will intrude into that functional space.

Yet again, other commentators have cast doubt whether this latter undertaking can be achieved. Klabbers says ‘[o]ften enough, constituent documents may refer to a variety of goals or purposes (some of them perhaps conflicting), and there might be a discrepancy between the formal task of an institution and the reasons for its creation’. That view disregards the conceptual distinction between the goals or purposes of an organisation and its assigned functions. As has been alluded to, these are different things. What should be relevant to determine the functional scope of an organisation’s activity is not its broad goals, aims or purposes, but an analysis of the particular functions it has been tasked with, albeit in the case of some organisations (such as the UN) they may be wide-ranging. Determining the assigned functions of an organisation, such as the UN’s peacekeeping role (developed by virtue of the UN’s practice); the lending activity of MDBs; or specialised activity undertaken by other organisations; by no means should constitute an indeterminate exercise. Be that as it may, significant confusion persists in practice because the treaty provisions on immunities lack clarity; and such a lack of clarity has been resolved in favour of the organisation’s immunities. The result is that the concept of ‘functional immunity’ now generally amounts to de facto absolute immunity.

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94 EJIL Foreword (n 76), 25-6.

95 N Blokker, ‘International Organizations: the Untouchables?’ (2013) 10 International Organizations Law Review 2, 259-75, 275; as Blokker argues: ‘ultimately, ‘functional necessity’ is not only the raison d’etre of the immunity rules of international organizations, but also the rationale of an adequate accountability regime.’
3.3 Why ‘functional immunities’ of IOs are treated as de facto absolute – the problem of the regulatory arbitrage

The regulatory regimes governing the immunities of the more than 500 IOs now existing can differ, albeit similarities would exist. IOs are geographically dispersed in terms of which country they may be headquartered or otherwise located in, and are subject to a varied network of legal regulation, the content of which can only be determined by reference to the specific treaty regimes, underpinned by how that regime may be domestically implemented. Considering the entire network of legal regulation concerning the rules on immunities on every single organisation and performing a comprehensive comparative law analysis is beyond the scope of this chapter. Despite that obvious challenge of scale, the state of the law can be effectively appraised by considering the treaty regimes and subject matters that have given rise to most of the jurisprudence on the issue.

Following a brief analysis of the key jurisprudence that highlights the conundrum that is IO immunity, I show that regardless of the subject matter of the dispute, or the identity of the defendant organisation, due to a prevailing regulatory arbitrage, the concept of ‘functionalism’ has not been material to determine the scope of immunities in most part. I divide the discussion into three subsections: the immunities regimes and jurisprudence of the UN (which has given rise to much litigation due to the UN’s enhanced peacekeeping function) (3.3.1); that of the MDBs for they impact private rights more than ever before due to their development activity (3.3.2); and employment jurisprudence involving numerous organisations as such disputes arise in equal measure regardless of the identity of the organisation (3.3.3).

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96 For an excellent history of the evolution of IO immunities, see ibid, 259-75.
97 Jenks (n 88), 3-4; Higgins, Webb, Akande, Sivakumaran and Sloan (n 30), section 16.1.
98 For detailed studies, see A Reinisch (ed), The Privileges and Immunities of International Organizations in Domestic Courts (OUP 2013); for an early authoritative text, see, Jenks (n 88); and for an analysis of comparative jurisprudence on IO immunities in national courts, see, A Reinisch, Challenging Acts of International Organizations Before National Courts (OUP 2010); also see, N Blokker and N Schrijver, Immunity of International Organizations (Brill 2015), C Ryngaert, ‘The Immunity of International Organizations Before Domestic Courts: Recent Trends’ (2010) 7 International Organizations Law Review 121, 125. For a functionalist perspective, see PHF Bekker, The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities (Brill 1994); for a global constitutional perspective on IO immunities, see A Peters, E Lagrange, S Oeter and C Tomuschat, Immunities in the Age of Global Constitutionalism (BRILL, 2015), 285-354; for a recent discussion, see P Schmitt, Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations (Edward Elgar Publishing 2017), 224-327.
99 See Chapter 3.
3.3.1 The UN regime – a manifest regulatory arbitrage

The UN’s highly influential immunities regime provided for in the UN Charter and the General Convention is the regulatory framework forming a blueprint for numerous other immunities regimes (including the Specialized Agencies Convention).100 Providing for immunities on a ‘functional’ basis, Article 105(1) of the UN Charter enshrines the basic rule that ‘[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.’ The General Convention goes on to provide in its Article II, section 2 that ‘[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.’

There is an obvious tension between the wording of Article 105(1) of the UN Charter and Article 2, section 2 of the General Convention. While the UN Charter provision grants immunities to the UN in ‘functional’ terms, on its face, Article 2, section 2 of the General Convention grants immunity in absolute terms.101 This inconsistency has caused a regulatory arbitrage that is a significant reason why the ‘functional’ standard of immunities applying to IOs generally, and the UN specifically, has been equated with a de facto absolute standard.102

100 The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (n 18), commonly known as the General Convention, establishes the immunity regime for the United Nations, being a treaty that is widely ratified: as of the date of writing, the General Convention has 162 State Parties, see, United Nations Treaty Collection, ‘UN, United Nations, UN Treaties, Treaties’ (<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&lang=en>) accessed 20 June 2018. The General Convention not only contains provisions that form the core international law rules governing the immunity regime for several other organisations, but also formed the basis for other significant treaty regimes, chief amongst them being the Specialised Agencies Convention (opened for signature 21 November 1947, entered into force 2 December 1948) 33 UNTS 261 (the ‘Specialized Agencies Convention’). The Specialized Agencies Convention has 127 State Parties, and applies to several IOs such as the ILO, FAO, UNESCO, IMF, etc.: see, United Nations Treaty Collection, ‘UN, United Nations, UN Treaties, Treaties’ (<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2&chapter=3&lang=en>) accessed 20 June 2016; for an early work on this convention, see, K Ahluwalia, The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations (Martinus Nijhoff 1964); also see Gulati (n 18); A Reinsch, ‘Introduction’ in A Reinsch and P Bachmayer (eds), The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies. A Commentary. (OUP 2016), 3, paras 5-6; where it is noted that: ‘Most other international organizations have followed the UN’s ... immunities paradigm. The constituent agreements of the World Health Organization, the Organization of American States, the World Trade Organization are just some examples.’

101 No substantial discussion was undertaken regarding Article II Section 2 of the General Convention (n 18) at the time of its negotiation. Instead, the prefatory discussions focused mostly on the immunities of officials. For a background, see, AJ Miller, ‘The Privileges and Immunities of the United Nations’, (2009) 6 International Organizations Law Review 7, 17-8.

102 Reinsch (n 93), 73.
The inconsistency in the rules on immunities have entrenched the institutional bias of immunities to the extreme. A prominent and disturbing example is provided by the challenge to the UN’s immunities before Dutch courts arising out of the genocide in Srebrenica committed in 1995, demonstrating a failure of the international community to collectively prevent one of the gravest violations of human rights since the Second World War.\footnote{See, Stichting Mothers of Srebrenica v The Netherlands App no 65542/12 (ECtHR, 11 June 2013) (‘Srebrenica case’), para 20.} Through its Resolution 743 (1992) of 21 February 1992, the UN Security Council established a United Nations Protection Force (‘UNPROFOR’) as ‘an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis’.\footnote{Ibid, para 7.} On 16 April 1993, the Security Council adopted Resolution 819 (1993) mandating that ‘all parties and others concerned treat [the eastern Bosnian town of] Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act’.\footnote{Ibid, para 15.} On 10 July 1995 the VRS, a force comprising mostly of Serb forces,\footnote{Also known as the Army of the Republika Srpska or the Bosnian Serb Army. The VRS was mostly comprised of Serbs: ibid, para 8.} attacked the Srebrenica ‘safe area’ with overwhelming force. Despite requests made by the Dutch commander on the ground asking ‘his United Nations superiors for air support’ no such support was forthcoming.\footnote{Ibid, para 17.} Consequently, ‘Bosniac men who had fallen into the hands of the VRS were separated from the women and children and killed. Some succeeded in reaching safety...It is now generally accepted as fact that upwards of 7,000, perhaps as many as 8,000 Bosniac men and boys died in this operation at the hands of the VRS and of Serb paramilitary forces.’\footnote{Ibid, para 19. Also see, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep < http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf> accessed 20 June 2018, 43.} In 2007, 10 women whose family members died in the genocide as well as a Dutch association representing 6000 survivors (Mothers of Srebrenica) filed a civil action before the District Court of The Hague seeking compensation from the UN.\footnote{See, Stichting Mothers of Srebrenica and Others v Netherlands and United Nations (10 July 2018, Dutch Court of Appeal) LJN: BD6796.}

103 See, Stichting Mothers of Srebrenica v The Netherlands App no 65542/12 (ECtHR, 11 June 2013) (‘Srebrenica case’), para 20.
104 Ibid, para 7.
105 Ibid, para 15.
the enclave had fallen to the VRS, to protect the non combatants present." Particularly, the civil aspects of the claims were founded in contract and tort, with the plaintiffs alleging that:

[F]irstly, that the United Nations … had entered into an agreement with the inhabitants of the Srebrenica enclave (including the applicants) to protect them inside the Srebrenica “safe area” in exchange for the disarmament of the ARBH forces present, which agreement the United Nations and the State of the Netherlands had failed to honour; and secondly, that the Netherlands State, with the connivance of the United Nations, had committed a tort (onrechtmatige daad) against them by sending insufficiently armed, poorly trained and ill-prepared troops to Bosnia and Herzegovina and failing to provide them with the necessary air support.

Relying on Article 2, section 2 of the General Convention, and without conducting a detailed analysis, the Dutch courts found that the UN’s immunities were far-reaching – effectively, the UN was found to be absolutely immune from the jurisdiction of Dutch courts. The Applicants then approached the European Court of Human Rights (‘European Court’), arguing amongst other things that the UN’s ‘functional immunity’ was not so broad as to entitle it to immunity where it failed to perform its mandate. In deciding against the Applicants, the European Court said:

[S]ince operations established by United Nations Security Council resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such

110 Srebrenica case (n 103), para 54.
111 Ibid, para 55.
112 See, Stichting Mothers of Srebrenica and Others v Netherlands and United Nations (13 April 2012, Supreme Court of the Netherlands) LfN: BW1999; ILDC 1760. See especially, Srebrenica case (n 103), para 79. where the ECtHR quoting from the judgment of the Court of Appeal in Stichting Mothers of Srebrenica and Others v Netherlands and United Nations (30 March 2010, Appeal Court of The Hague) LfN: BL8979, stated that Article 2, section II of the General Convention (n 18), in light of its object and purpose was to be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ (Article 31 of the Vienna Convention of the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 ILM 679 (‘Vienna Convention’)), and also in the light of Article 105 of the Charter of the United Nations (n 15), the Court of Appeal found that no other construction could be placed on that provision than that ‘the most far-reaching immunity [had] been granted to the United Nations’.
operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including with the effective conduct of its operations…

The European Court’s reasoning is typical of the attitude of national and regional human rights courts who are generally unwilling to question how a particular ascribed ‘function’ is performed by an organisation. This is the case even where it is uncontroversial that the civil claims made by the plaintiffs had a very good basis in the Dutch law of tort and contract; where grave violations are evident; and the organisation itself accepts its ‘fundamental mistakes’ that led to the harm complaint about. It is undeniable that the seemingly absolutist wording of Article 2, section 2 of the General Convention has prompted courts to avoid conducting a rigorous analysis of whether exercising jurisdiction over a claim will actually intrude into the IO’s functional autonomy.

This absolutist immunity is now so ingrained that even in the most obvious of cases where there is no risk of intrusion into the organisation’s functional independence, plaintiffs are reluctant to argue for limiting an IO’s immunities on the basis of ‘functionality’. In a much discussed claim concerning a typical private law wrong relating to the introduction of cholera in Haiti that has killed in excess of 9,000 Haitians so far, for which the responsibility of the UN is now manifest, the plaintiffs did not even attempt to argue for limiting the UN’s

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113 Srebrenica case (n 103), paras 152-4.
115 Srebrenica case (n 103), para 127, citing Report of the Secretary-General pursuant to General Assembly Resolution 53/35’(15 November 1999) UN Doc A/54/549, para 501.
116 See for example, Manderlier v Belgium State and UN (15 September 1969, Brussels Appeal Court) 69 ILR 139; (1969) UN Juridical Yearbook, 236-7; where certain individuals brought claims against the UN in Belgian courts for damage to persons and property caused by the UN Force in the Congo, an appeals court upheld the UN’s immunities in absolute terms; those claims were ultimately settled through a lump sum payment. See further the discussion at 5.2 below.
117 See A Cravioto, CF Lanata, DS Lantagne and GB Nair, ‘Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti’ (2011) <www.un.org/News/dh/infocus/ひaiti/UN-cholera-report-final.pdf> accessed 6 June 2018; a good description is contained in R Freedman, ‘UN immunity or impunity? A human rights based challenge’ (2014) 25 European Journal of International Law 1, 239-54, 240: ‘The UN's independent panel of four experts found that cholera strains from Nepal and from Haiti were a ‘perfect match’. The panel's findings set out how the cholera spread and infected at the rate that it did, owing to poor waste management from the MINUSTAH camp that spread into a tributary of the Artibonite River, Haiti's longest and most important river'; for the harm caused, see for example: M Brice, ‘Cholera Blamed on U.N. Peacekeepers Surges in Haiti as
immunities on a functional basis. Instead the plaintiffs chose to rely on an alternative argument contending that immunities must be breached where access to justice is denied (see 4 below). The UN’s regulatory regime on immunities is inherently inconsistent creating a regulatory arbitrage. This arbitrage has meant that what was always envisaged to be limited ‘functional immunities’ as prescribed in Article 105(1) of the UN Charter, is in practice *de facto* absolute. The result being that even in cases of grave violations where the organisation accepts its significant failures, national courts summarily uphold the UN’s immunities. The same outcome has been reached with respect to the immunities of the other principal category of IOs that significantly impact individual rights, the MDBs.

3.3.2 MDB immunities – the arbitrage compounded

MDB immunities are provided for slightly differently when compared to the UN’s regime. MDBs perform inherently commercial functions, such as providing loans sourced through market mechanisms to states and private enterprise to build or fund infrastructure projects, such as the building of roads, bridges, dams, hospitals and power plants. Bearing their obviously commercial functions in mind, it was considered necessary that not only immunity be provided in ‘functional’ terms, but there be included an additional express provision in an MDB’s constituent treaty to allow private claimants to sue the organisation. The idea is that if private persons cannot sue the MDB to recover for harm, they would be unlikely to do business with the MDBs, and this would impede the functioning of the concerned institution. The treaty provisions on MDB immunities have proven to confound.

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118 For a recent study on the work of the various MDBs, especially of the newly created Asia Infrastructure Investment Bank, see generally, P Quayle and X Gao (eds), ‘Good Governance and Modern International Financial Institutions’ (2018) AIIB Yearbook of International Law.

119 See for example the IBRD Articles of Agreement (n 44) which state in Article VII Section 3 that ‘actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.’

120 *Mendaro v World Bank* (D.C. Cir. 1983) 717 F.2d 610, 618; also see *Osseiran v Int’l Fin Corp* (DC Cir 2009) 552 F.3d 836, where the court in holding that the IFC’s immunities were waived, said: 'Both Mendaro and Atkinson stated that immunity from suits based on commercial transactions with the outside world can hinder an organization's ability to do business in the market place.
As the most prominent global MDB, the institutions within the World Bank (including the IFC) are based in the US, the key jurisprudence on MDB immunities emanates from US courts. Certain recent jurisprudence involving the IFC is significant to understand the conundrum of MDB immunities and the arbitrage it creates. The IFC provides loans to private corporations to build infrastructure in developing countries.\(^\text{121}\) Article VI, section 1 of the IFC’s Articles of Agreement\(^\text{122}\) grants immunities in classical functional terms stating that ‘[t]o enable the Corporation to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Corporation in the territories of each member.’ Article VI, section 3 entitled ‘Position of the Corporation with Regard to Judicial Process’ provides for an express waiver, stating:

> Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities.

On its face, the express waiver to the IFC’s immunity is most broad, even incorporating a waiver from execution. According to the plain meaning of the words, the functional immunities of the IFC, and by analogy other MDBs, will have little work to do for any claimant (except a member of the MDB) could pursue a claim against it. Giving effect to the ordinary meaning of the express waiver provision renders the ‘functional immunities’ of the MDB nugatory for it would potentially never apply. Indeed, courts have referred to such treaty language as ‘somewhat clumsy and inartfully drafted’.\(^\text{123}\) To deal with this regulatory puzzle, courts have employed unsatisfactory ways of addressing the issue, upholding IO immunities even where claims are \textit{prima facie} meritorious, and fault on part of the organisation immediately apparent.

The ongoing litigation in the case of \textit{Jam et al v International Finance Corporation}\(^\text{124}\) (‘Jam’) involved a loan of USD 450 million to Coastal Gujarat Power Limited (‘CGPL’) by the IFC.

\(^{123}\) \textit{Mendaro v World Bank} (n 120).
The loan was towards the construction of the coal-fired Tata Mundra Power Plant in India (‘the Plant’). The plaintiffs, a group of Indian nationals, who live, fish and farm within proximity of the Plant allege that the main legacy of the Plant has been ‘environmental and social harm—to the marine ecosystem, to the quality of the air, to plaintiffs’ health, and to their way of life’.

After their demonstrably meritorious pleas for justice went unresolved at the IFC despite the significant failings pointed to by the IFC’s own accountability mechanism, the Compliance Advisor Ombudsman (‘CAO’), plaintiffs resorted to the national courts, contending that the IFC was liable for the injuries caused by failing to comply with its own policies and standards, and failing to enforce the terms of its loan agreement with the CGPL. The plaintiffs sought equitable relief, or alternatively, compensatory and punitive damages before the US District Court for the District of Columbia. More specifically, the plaintiffs contended that ‘the irresponsible and negligent conduct of the International Finance Corporation in appraising, financing, advising, supervising and monitoring its significant loan to enable the development of the Tata Mundra Project in Gujarat, India’ caused them injury. The plaintiffs pursued claims in ‘negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract’.

The IFC asserted its immunities before US courts which have been given effect through the US International Organisations Immunities Act 1945 (‘IOIA’) in that country. The decision in Jam show why MDB immunities are seriously confounding. This is due not only to the arbitrage of the treaty-based immunities regime; but the structural deficits in the IOIA itself.

a) Erroneous equation of international organisations and state immunity in the IOIA

In cases against MDBs generally, and in Jam specifically, one significant issue concerns the interpretation of the IOIA in terms of the standard and scope of immunities that applies to IOs such as the IFC. The issue became relevant as the IOIA grants IOs subject to that legislative

125 Jam First Instance (n 124), 1.
126 The IFC’s own accountability mechanism, the Compliance Advisor Ombudsman (‘CAO’) found that the ‘IFC had failed adequately to consider the environmental and social risks to which plaintiffs would be exposed as a result of the Plant’s development’; and that in ‘the CAO’s estimation, IFC then compounded that error by failing to perform an environmental and social impact assessment “commensurate with project risk,” and by failing to “address [subsequent] compliance issues during [project] supervision”: Jam First Instance (n 124), 4.
127 While the Plant was being built by the CGPL, a private corporation, the IFC remains responsible for the monitoring and supervision of CGPL. This is to ensure CGPL’s compliance with internal IFC policies: Jam First Instance (n 124), 3.
128 Jam First Instance (n 124), 1.
129 Ibid, 5.
Regime immunities similar to those enjoyed by states. In 1945, states enjoyed virtually absolute immunity,\(^{130}\) and thus, IOs enjoyed similar immunities too.\(^{131}\) However, the evolution of the restrictive doctrine of state immunity now widely accepted,\(^{132}\) and culminating in the introduction of the *US Foreign Sovereign Immunities Act* in 1976 (‘FSIA’), provided that states were only entitled to immunities in respect of their sovereign or governmental functions, not their commercial acts.\(^{133}\) The question then became whether this restricted view of state immunity was transposable to the immunities of IOs subject to the IOIA regime. In *Jam*, relying on precedent,\(^{134}\) both the court at First Instance and the appellant level concluded that under the IOIA, IOs continued to enjoy immunities as envisaged in 1945 for the FSIA did not apply to IOs.\(^{135}\) Under the IOIA, the IFC possessed an immunity far greater than even that of states. As a result, both the court at first instance and on appeal upheld the IFC’s immunities.

There are two obvious problems with the IOIA approach to immunities, one of a general nature and the second of a specific kind. Firstly, it is wrong to equate immunities founded in the sovereign equality of states, being the basis of state immunity, with IO immunities, the latter strictly treaty based and ‘functional’ in nature.\(^{136}\) Secondly, the sovereign v non-sovereign distinction also referred to as commercial v non-commercial or private v public, a distinction now critical to establish whether state immunity can in fact exist,\(^{137}\) is irrelevant in the context of institutional immunities. The activity of IOs cannot be divided into sovereign or non-sovereign. The pitfalls of particularly using that distinction in the context of MDBs (which the plaintiffs in *Jam* argued in favour of seeking to limit the IFC’s immunities) were pointed out

\(^{130}\) For the leading work on the evolution of the law of state immunities, and a discussion of the move from the absolute to the restrictive doctrine, see H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP 2015), 25-72.


\(^{132}\) Over the decades, State immunity has increasingly been restricted, where States cannot benefit from immunities in respect of their ‘private’ (also referred to as ‘commercial’ or ‘jure gestionis’ acts), but only in respect of their ‘public’ (also referred to as ‘sovereign’ or governmental’ or ‘jure imperii’ acts: see Fox and Webb (n 130); R Van Alebeek, *Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 11-102; such developments are manifested in Art 10(1) United Nations Convention on Jurisdictional Immunities of States and Their Property (opened for signature 2 December 2004, not yet in force) UNGA Res 59/38.


\(^{134}\) *Atkinson v IADB* (DC Cir 1998) 156 F.3d 1335.

\(^{135}\) But see the inconsistent approaches on the issue within the US legal system: Young (n 131), 329, citing amongst others, *OSS Nokalva v European Space Agency*, (3d Cir 2010) 617 F.3d 756, 758 (where the 3\(^{rd}\) circuit determined that IOs under the IOIA regime only possessed restrictive immunities).

\(^{136}\) Wood (n 91).

\(^{137}\) This in itself is a difficult distinction further discussed in chapter 2.
by Judge Silberman (with Judge Edwards agreeing) in the following terms: ‘if that exception applied to the IFC, the organization would never retain immunity since its operations are solely “commercial,” i.e., the IFC does not undertake any “sovereign” activities.’

The specific approach to institutional immunities taken against MDBs means that the standard of immunities that MDBs enjoy remains in a state of flux. Despite the irrelevance of the sovereign v non-sovereign distinction to institutional immunities, that standard continues to apply to MDBs. While Jam is now before the Supreme Court of the United States (awaiting judgment), the reality is that until the IOIA’s fundamental structure is changed, the conundrum of MDB immunities is here to stay regardless of the outcome in Jam.

b) The corresponding benefit test – the arbitrage compounded

In Jam, once the application of the scope of the IFC’s immunities pursuant to the IOIA was settled, there was the question of how the IFC’s broadly phrased express immunity waiver was to be interpreted. To deal with the overly broad treaty based express waiver, the court relied on its previous jurisprudence that has developed the so-called ‘corresponding benefit’ test, which requires close scrutiny of an organisation’s functions and the underlying purpose of immunities. In Mendaro v the World Bank, it was said that ‘most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization’s goals’. Immunity in that case was only restricted for ‘actions arising out of [an organization’s] external commercial contracts and activities’. The rationale is that if external parties do not have an option to seek legal redress against an IO, they might

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139 Judge Pillard observed: ‘I agree that Atkinson and Mendaro, which remain binding law in this circuit, control this case. I write separately to note that those decisions have left the law of international organizations’ immunity in a perplexing state. I believe both cases were wrongly decided, and our circuit may wish to revisit them.’ (Jam Appeal (n 124), 11).

140 Jam First Instance (n 124), 8

141 Mendaro v World Bank (n 120).

142 Ibid, 617.

143 Ibid, 620.
not be minded to do business with it. Hence, the benefit to the IO would demand a waiver in such circumstances.

The ‘corresponding benefit’ test which involves a balancing of the ‘benefits’ and ‘burdens’ to an organisation can be used to suit the interests of either party to litigation. Defining what constitutes a ‘benefit’ or what is a ‘burden’ is a subjective matter.\textsuperscript{144} In \textit{Jam}, the plaintiffs argued that as the claims arose out of the IFC’s external activity, the express waiver of immunities was triggered. The Court rejected this argument, stating:

\begin{quote}
Plaintiffs’ own complaint characterizes the suit as one that “arises out of” IFC’s “irresponsible and negligent conduct ... in appraising, financing, advising, supervising and monitoring its significant loan” to CGPL. ... By focusing on IFC’s internal decision-making processes, the suit invites—indeed, demands—“judicial scrutiny of the [IFC’s] discretion to select and administer its programs.”\textsuperscript{145}
\end{quote}

Ultimately, it is apparent that the more the Court is required to scrutinise the internal functioning of an organisation, the less likely a waiver would apply – with the organisation granted significant deference. The first instance court, with whom the majority of the appellant court agreed, said in \textit{Jam}:

\begin{quote}
Plaintiffs cannot so easily blur the boundaries between cost and benefit. The D.C. Circuit has identified “judicial scrutiny of the organization’s discretion to select and administer its programs” as a burden or cost, without regard to whether the underlying litigation is meritorious or in some other sense deserved ... the possibility that a waiver could provide some incentive for IFC to adhere more scrupulously to its policies, over and above the pressure already applied by the CAO. But that marginal benefit must be weighed against the relevant costs which, in suits like this by these kinds of plaintiffs, remain quite substantial.\textsuperscript{146}
\end{quote}

It was concluded that ‘suits like the plaintiffs’ are likely to impose considerable costs upon IFC without providing commensurate benefits. Hence, IFC has not waived its immunity to this

\textsuperscript{144} As the majority of the Appeal Judgment noted, the word ‘benefit is a misnomer’; \textit{Jam} Appeal (n 124), 9.
\textsuperscript{145} \textit{Jam} First Instance (n 124), 9.
\textsuperscript{146} Ibid, 10-1; \textit{Jam} Appeal (n 124), 1.
suit’. Just like the approach taken to the UN’s immunities, it is clear that national courts are unwilling to take jurisdiction over a claim against an MDB even where the underlying claims are meritorious, and fault on part of the organisation is obvious. In the case of the MDBs, the endorsement of the structural bias of immunities is even starker because there exists an express waiver which can be read in a way so as to limit an organisation’s functional immunities. Indeed, in *Jam*, Judge Pillard advocated for such an approach, stating ‘[i]t is not entirely clear why we have drawn the particular line we have pursuant to *Mendaro*. Why are suits by a consultant, a potential investor, and a corporate borrower in an international organization’s interest, but suits by employees and their dependents not?’ The Judge went on to note ‘[e]ntities doing regular business with international organizations can write waivers of immunity into their contracts with the organizations. … Sophisticated commercial actors that fail to bargain for such terms are surely less entitled to benefit from broad immunity waivers than victims of torts or takings who lacked any bargaining opportunity’.

Despite severe judicial criticism of the majority approach in *Jam*, the prevailing view is that even the perception of the hint of a burden on an organisation’s independence will suffice to limit the operation of an express waiver to immunity contrary to the plain meaning of the language of that waiver. The current way in which the arbitrage in the MDB immunities regime is resolved is by courts in the US reading the exception to immunities as narrowly as possible, with claims raising issues that would cause any intrusion into an IO’s policy sphere jurisdictionally barred. The combination of the IOIA treating the immunities of IOs as absolute, when combined with the narrow interpretation of express waiver provisions, has meant that despite the functional foundations of an MDB’s immunity, its immunities are close to *de facto* absolute.

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147 *Jam* First Instance (n 124), 11-2; *Jam* Appeal (n 124), 9 (endorsed the conclusion at first instance).
148 Decision of Judge Pillard in *Jam* Appeal (n 124), 7.
149 Ibid.
150 For a detailed discussion on the history of the US IO immunities regime and relevant jurisprudence, see Young (n 131); also see the discussion in CH Brower, ‘United States’ in A Reinsch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013), 303-27.
3.3.3 Employment cases – the inconsistency personified

It is the employment context where a significant amount of jurisprudence on institutional immunities is generated. Most of the developments have taken place in the context of the tension between the right to a fair trial and the application on the law of IO immunities discussed at (4). However, the employment context is one sphere where the concept of functionalism has played a role in restricting an IO’s immunities, albeit to a very limited extent. In essence, the question becomes in what circumstances would it be permissible for a national court to take jurisdiction over an employment claim in terms of not adversely impacting the organisation’s ‘functional independence’? Two contrary approaches exist.

a) The absolutist approach

On one extreme is the approach that a national court may never take jurisdiction over an employment claim. This approach is best symbolised by US jurisprudence. As the country where the UN is headquartered and several MDBs are based, US jurisprudence assumes much significance. In relying on the provisions of the General Convention (self-executing in the US), US courts have so far refused to lift the UN’s immunities in employment claims in light of that convention’s absolutist language. In so far as claims against organisations subject to the IOIA are concerned, US courts have again refused to intrude into an IO’s immunities on the basis that such a step would impermissibly interfere into the functional independence of the organisation. In Broadbent v OAS, in a case concerning claims of unlawful dismissal, in holding the defendant organisation absolutely immune, the court said that the internal administration of an IO fell clearly within the scope of its functional autonomy.

The absolutist approach to IO immunities has been further entrenched through jurisprudence involving MDBs where the express waiver provisions contained in their founding treaties were not interpreted so as to bring employment claims within the scope of such waivers. In Mendaro v World Bank, a claim concerning unlawful dismissal, the court said:

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152 Brzak v United Nations (2d Cir 2010) 597 F.3d 107 (‘Brzak v UN’). The result being that courts can directly apply the provisions of the General Convention when resolving Claims against the United Nations.
153 Ibid.
154 Broadbent v OAS (DC Cir 1980) 628 F.2d 27; 63 ILR 337.
155 Ibid.
156 Mendaro v World Bank (n 120).
A waiver of immunity to suits arising out of the Bank's internal operations, such as its relationship with its own employees, would contravene the express language of Article VII section 1. Rather than furthering the purposes and operations of the Bank, this waiver would lay the Bank open to disruptive interference with its employment policies in each of the thirty-six countries in which it has resident missions… Since a waiver of immunity from suits arising out of the Bank's internal relations would create such devastating administrative consequences without materially advancing its chartered objectives, Article VII section 3 should not be construed as abrogating the Bank's immunity to actions arising out of its internal affairs.

The current state of the law in the US is that employment claims are absolutely barred on the basis that taking jurisdiction over such claims would intrude into an organisation’s functional independence. Such an absolutist approach to institutional immunities in employment cases specifically, and immunities jurisprudence generally, has been taken in several other jurisdictions too. However, a somewhat different stance has been taken in certain other states.

**b) Flavours of the ‘functionalist’ approach**

While ‘function’ has been completely removed from the concept of ‘functional immunities’ in the non-employment context, it has played some role in restricting institutional immunities in the employment one. In three situations, some national courts have been willing to pierce institutional immunities on the basis that such a step would not interfere with the organisation’s functional independence.

157 Ibid, 618-9; this approach is generally followed in the US; for a recent example, see, *Smith v World Bank Group* (DDC 2015) 99 F Supp 3d 166.

First, where the claim is lodged by individuals in an organisation’s employment who are only incidentally connected to the work of that organisation, some national courts have indicated that immunities do not exist. This approach is evident in Italy and the Netherlands. In a claim regarding severance payments against the Intergovernmental Committee for European Migration (‘ICEM’), while the Italian Corte di Cassazione upheld ICEM’s immunities under that particular case, it did offer useful clarifications. The court said that IOs are immune from the jurisdiction of the domestic courts in Italy in respect of employment relationships with high-level management officials; those persons who permanently and continuously formed part of the establishment of the organisation’s internal structure (such as clerical staff); but not in respect of staff that did not ‘reveal an element of a public nature, such that it did not require or involve cooperation in pursuit of the employer’s aims’. On the same lines, no immunities subsisted where the task performed by an employee of the organisation is only incidental or ‘auxiliary’ to the performance and accomplishment of the IO’s institutional purposes. Claims by interpreters and housekeeping staff amount to such incidental claims. Similar to the Italian experience, the courts in the Netherlands are likely to take jurisdiction over a claim by a member of staff who does not play an essential role in the performance of that organisation’s tasks. There is however little clarity as to what tasks are considered ‘incidental’ and/or ‘auxiliary’, making the aforementioned jurisprudence only of limited assistance.

Second, some courts have shown a willingness to take jurisdiction over cases that only concern pecuniary disputes. Italian courts determined that no immunity will be recognised where the employee’s claim is confined to pecuniary issues of his or her employment, notwithstanding the nature of the employee’s functions. More recently, in an employment dispute between a senior staff member of the North Atlantic Fisheries Organisation headquartered in Canada,
while immunities were maintained with respect to the substance of the claim of unlawful dismissal, the Supreme Court of Canada nevertheless decided that the aspects of the plaintiff’s claims relating to his pecuniary entitlements under the organisation’s rules could be subjected to the jurisdiction of Canadian courts for such matters did not impinge on the defendant organisation’s functional independence. The rationale behind the aforementioned cases is that a national court deciding on purely monetary aspects of employee engagement could not be regarded as constituting an interference with the organisation’s performance of its institutional functions.

The third category where ‘functionalism’ has played some role is that of official immunity. In a prominent case concerning the scope of the immunities possessed by certain officials of the Asian Development Bank (‘ADB’) accused of criminally defaming the complainant, disregarding the former’s immunities, the Supreme Court of the Philippines held that ‘[S]landering a person could not possibly be covered by the immunity agreement because our laws do not allow the commission of a crime’. While this case concerned criminal conduct and involved the immunities of an official, what is of significance is that it gave affect to the functional basis of immunities, albeit the immunity was of an organisation’s official as opposed to the institution itself.

3.3.4 Functional immunities – a regulatory arbitrage and the denial of justice

The concept of ‘functional immunity’ has been interpreted so broadly that the word ‘functional’ has been rendered meaningless. It is not just the UN that has benefited from de facto absolute immunity. Other organisations that possess significant powers to alter the legal rights of others, such as MDBs, also enjoy close to absolute immunity as is evident by the US experience. The limited jurisprudence available from other jurisdictions involving MDBs indicates a similar

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165 See Liang v People (28 January 2000) GR No 125865; For an opposite result, see the case of Greenpeace Nederland and Procurator General (intervening) v EURATOM (13 November 2007, Supreme Court of the Netherlands) Decision No LNJ: BA9173, RvdW (2007) No 992, where the organisation’s scope of functional immunities extended even where certain alleged environmental criminal offences were committed, decision discussed in C Brolmann in International Law in Domestic Courts 838 (2007, Netherlands), H.1. While the latter decision did not concern an employment dispute, the inconsistency of approaches is immediately apparent.
166 For a discussion of Liang (ibid), see HHL Roque, ‘The Philippines’ in A Reinisch (ed), The Privileges and Immunities of International Organizations in Domestic Courts, 215-6.
trend. In the employment context, it may be said in most jurisdictions and in respect of most staff, functional immunity amounts to nearly *de facto* absolute immunity.

Problematic treaty language, the structural deficiencies in how immunities are domestically implemented, and the failure of national and regional human rights courts to engage with the concept of ‘functionalism’, has left the law inconsistent and uncoordinated. Different jurisdictions take different approaches to the question, even in claims belonging to the same subject matter. So much so that national judges on the same court also disagree vehemently on the nature and scope of institutional immunities as was the case in *Jam*. This conundrum can only be resolved by returning to the ‘functionalist’ theory of institutional immunities which underpins the regulatory framework pursuant to which IOs are governed; and creating consistency of approaches across jurisdictions. How to achieve that result is a matter considered in chapter 2.

On the law as it stands, even where manifest breaches of rights are attributable to the defendant organisation, the regulatory arbitrage is exploited by IOs to avoid liability for demonstrably unlawful conduct. Especially vulnerable are individuals with limited means who have suffered grave breaches of their rights. The blanket application of institutional immunities leaves persons adversely affected by IO action without a remedy, and ultimately justice. The crux of the problem lies in the grant of *de facto* absolute immunities to IOs. For the victims, what makes the situation worse is that national courts have been by and large unwilling to breach an organisation’s immunity even where it fails to comply with its access to justice obligations under international law.

4 Access to justice v institutional immunities

The presence of immunities does not imply that access to justice for victims of institutional conduct is to be sacrificed. Schermers and Blokker note the well accepted principle that the ‘existence of immunity for international organizations before national courts does not affect the existence of liability. Immunity is used to prevent international organizations from being subject to an outside judiciary: it does not affect the rights and obligations of the

167 See *World Bank Group v Wallace* (n 151).
organization.168 This proposition is uncontentious.169 Where certain Malaysian claimants approached the courts of that country seeking exemplary damages for allegedly libellous statements made by a Special Rapporteur of the Commission on Human Rights,170 while upholding the UN Special Rapporteur’s immunities before Malaysian courts, the ICJ emphasised in the final paragraph of its Advisory Opinion:

[T]he Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts.171

Immunities are only a procedural bar to the jurisdiction of a national court and they are not supposed to amount to impunity.172 Precisely because IOs are granted immunities before national courts, to ensure access to justice for private persons, they are expressly placed under binding obligations to ensure that the procedural barrier of immunities does not translate into impunity when private parties are harmed. In the remainder of this chapter, I commence by briefly discussing what ‘access to justice’ means (4.1). I then show that despite the presence of access to justice obligations that bind IOs (4.2), these obligations are regularly ignored. Moreover, there are little to no adverse consequences for organisations who do not comply with their access to justice obligations due to the regulatory arbitrage in the law of immunities at the national level and/or plain inaction at the international level.

4.1 Access to justice as a process value and the right to a fair trial

4.1.1 Access to justice – a process value

Friedman states that according to its typical understanding, ‘access to justice’ is a legal concept concerned with issues around a person’s ability to pursue a legitimate claim or complaint, including a consideration of the underlying setting that facilitates this pursuit in a ‘real and

168 Schermers and Blokker (n 1), section 1583.
172 See the decision of the ICJ in the case of Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening) ICJ Rep 2012 (‘Jurisdictional Immunities’) 99, para 92. See further: chapter 2.
practical’ way. Highlighting the multiple process values the concept entails, Karayanni points to its three dimensions. The first value involves considering whether a party has adequate courses of action when their substantive rights have been compromised. The issues of relevance include the ability of state parties to be able to bring a proceeding against a defendant, such as states, including foreign state instrumentalities (one may safely add IOs to this list); or ‘whether the system provides for class actions (or other forms of group litigation) for grievances that cannot be remedied through individual claims.

The second process value concerns ‘making the legal process available to those with limited financial resources in light of the heavy burdens of modern day criminal and civil litigation.’ Here, issues such as the availability of legal aid, contingency fee agreements, court fees, the existence of small claims courts, and the ability to recover legal costs, constitute the key areas of contention. Finally, the third value is concerned with the machinery employed to deliver justice, focusing on affording parties procedural mechanisms that make the legal process fair, such as ‘guarantees for neutral adjudication, whether parties of weak standing possess sufficient procedural powers to conduct litigation against strong parties…how efficient the process is as a whole in rendering judgment and having it executed within a reasonable time frame, and existing means of appeal and judicial review’.

At its heart, ‘access to justice’ aims to create a fair and just environment for individuals to seek a remedy for the breach of their rights. It refers to the environmental factors that are critical to translate the pursuit of a substantive right or claim into practical reality. It is the typically process based understanding of access to justice that this work is essentially concerned with. Those process based ‘access to justice’ values have now acquired normative force through international human rights law (‘IHRL’) generally and the right to a fair trial specifically. Thus, access to justice as a ‘theoretical abstraction’ has been translated into concrete reality.

175 Ibid.
176 Karayanni (n 174), 217-8.
177 AA Cançado Trindade, The Access of Individuals to International Justice (OUP 2011), 60; see F Francioni, ‘The Rights of Access to Justice under Customary International Law’ in F Francioni (ed) Access to Justice as a Human Right (OUP 2007), 7-9; see also Schmitt (n 98), 91-7 (where the author also draws a link between access to justice and the right to a fair trial).
4.1.2 The right to a fair trial – its key components

The right to a fair trial provides for the procedural safeguards in the administration of justice that are essential to maintain the rule of law, both nationally and internationally. While the right to a fair trial is of a procedural nature, its significance to realising an effective remedy and protect substantive rights is not to be underestimated. The right is critical to ensure justice not only as a matter of procedure, but also bears significance for the just resolution of the merits. Given its significance to the administration of justice, fair trial guarantees should not only be formally provided for, but must be fully and practically realised.

The right to a fair trial constitutes a fundamental human right and is a marked feature of all human rights treaties and instruments. Its acceptance as a fundamental principle of IHRL is evidenced by the near universal ratification of the International Covenant on Civil and Political Rights 1966 (‘ICCPR’) which enshrines the right to a fair trial in Article 14, which states in its paragraph 1:

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178 In his influential text, T Bingham, *The Rule of Law* (Penguin 2010), chapters 3-10, Bingham identified eight elements of a rule of law that state: 'The law must afford adequate protection of human rights; Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; Judicial and other adjudicative procedures must be fair and independent; and There must be compliance by the state with its international law obligations': discussed in, R McCorquodale, ‘Defining The International Rule of Law: Defying Gravity?’ (2016) 65 International & Comparative Law Quarterly 2, 279-80.

179 See *Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999) (’Waite and Kennedy’); IOs themselves are the principal proponents of the rule of law internationally: Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (2004) UN Doc S/2004/616, para 6; after an exhaustive study of the subject, McCorquodale identified that the international rule of law requires ‘measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers…’: McCorquodale (n 178), 284; McCorquodale’s definition has been critically commented at, Opinio Juris ‘Blog Archive Symposium: Defining the International Rule of Law-Defying Gravity?’ <http://opiniojuris.org/2016/05/17/symposium-the-rule-of-law-thick-but-not-too-thick/> accessed 6 June 2016; it is however to be noted that the right to a fair trial and access to court is an uncontroversial aspect of the international rule of law.

180 The relationship between the right to an effective remedy and the right to a fair trial has been discussed at length in Cançado Trindade (n 177), 52, 64; also see the case of *Kudla v Poland* App no 30210/96 (ECtHR, 18 October 2000), paras 146-9 and 151-60, where the European Court drew a direct link between the fair trial rights in Article 6 and the right to an effective remedy in Article 13 of that convention; a similar relationship exists between Article 14 and Article 2 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, UNGA Res 2200 A (XXI) (‘ICCPR’).

181 UN Human Rights Committee ‘General Comment No 32: Right to equality before courts and tribunals and to a fair trial’ (23 August 2007) UN Doc CCPR/C/GC/32 (‘General Comment No 32’); *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979); *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975); *Waite and Kennedy* (n 179).

182 ICCPR (n 180).
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…any judgement rendered in a criminal case or in a suit at law shall be made public… (emphasis added)

Article 14 provides for a number of guarantees within the rubric of a fair trial. Obvious on the face of the provisions are the guarantee of the right to equality in the administration of justice; the right to access a competent, independent and impartial court or tribunal in the determination of a ‘suit at law’; and the right to ‘fair’ and ‘public’ hearings, a critical aspect of which is the right to access a fair trial without ‘undue delay’. All other human rights instruments replicate the guarantees provided for in Article 14 of the ICCPR, emphasising the aforementioned fair trial rights in the clearest of terms. Together with Article 14 of the European Convention on Human Rights (‘European Convention’) which provides for the non-discriminatory application of convention rights, Article 6 of the European Convention manifests the key component guarantees of the right to a fair trial stated above. It provides in Article 6(1):

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 (emphasis added).

Article 8(1) of the American Convention, and Article 7(1) of the African Charter also enshrine the right to a fair trial in similar terms. Moreover, in terms of its application, in addition to the criminal context, the right applies to the entire spectrum of ‘suits at law or ‘civil’ claims, including in contract, tort, employment law claims, as well as in proceedings of an administrative law character. While the principles or basic guarantees constituting the

183 General Comment No 32 (n 181), para 27; Chapter 3 considers these component fair trial rights in detail.
187 As the Human Rights Committee notes in its General Comment No 32 (n 181) at para 16: ‘the concept of a “suit at law” or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions
components of the right to a fair trial are not controversial, their application has given rise to significant jurisprudence, both in the civil and criminal spheres. It is well beyond the scope of this work to conduct a general analysis of the meaning of each component fair trial right provided for in human rights law.

When it comes to the pursuit of claims against IOs, more often than not, an independent dispute resolution forum is either completely absent, or is unwilling to determine a claim due to entrenched inequalities and biases at multiple levels. It will be shown in later chapters that where dispute resolution forums exist (primarily within the employment sphere), serious equality and independence deficits prevail, and excessive delays in the justice process are much too common. It is for that reason that the fair trial rights that ought to be considered with the greatest scrutiny must hone in on the realisation to the right to equal justice, independent justice, and speedy justice. Only if those key component due process guarantees are realised effectively, the delivery of justice to the victims of institutional conduct can even begin to reflect the basic principles inherent to the concept of access to justice and the right to a fair trial, terms that I now use synonymously.

4.1.3 IOs and fair trial rights

The various due process guarantees contained within the right to a fair trial constitute the legal vehicle that transport the process based access to justice values into enforceable procedural rights. However, the application of human rights based fair trial standards to dispute resolution

\[\text{in the area of administrative law such as the termination of employment of civil servants ……'};\] pursuant to the jurisprudence of the European Court, \('[i]n ascertaining whether a dispute concerns the determination of a civil right, only the character of the right at issue is relevant': Konig v Germany App no 6232/73 (ECtHR, 28 June 1978), 170, paras 89-90; and the word ‘civil’ is to be given a broad meaning for the right to a fair administration of justice holds such a prominent place in a democratic society that ‘a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision’: Delcourt v Belgium App no 2689/65 (ECtHR, 17 January 1970), 355; and the European Court has also clarified that a civil claim incorporates proceedings of an administrative character, stating, the phrase in question ‘covers all proceedings the result of which is decisive for private rights and obligations, even if the proceedings concern a dispute between an individual and a public authority acting in its sovereign capacity; the character ‘of the legislation which governs how the matter is to be determined’ and of the ‘authority’ which is invested with jurisdiction in the matter are of little consequence’: Le Compte, Van Leuven en De Meyere v Belgium App no 6878/75 and App no 7238/75 (ECtHR, 23 June 1981),1, para 44; see also Baena Ricardo and Others v Panama (IACHR, 2 February 2001) (Judgment on the merits), paras 125–6, taking a broad view of the scope of a ‘civil claim’.

\[188 \text{ See A Clooney and P Webb, The Right to a Fair Trial in International Law (OUP 2019) (forthcoming).}\]

\[189 \text{ See chapter 3.}\]
at the institutional level is a somewhat convoluted issue. IOs are not parties to human rights treaties, and thus, the direct application of those treaties to IOs has been somewhat contentious.

While there is increasing academic consensus that as subjects of international law, IOs are bound by certain human rights obligations, presently, there is no need to address the broader issue of the human rights obligations on IOs generally. The focus of this work in general, and chapter in particular remains on the obligation of IOs to provide access to justice to persons adversely affected by their conduct. In that respect, as is shown below, the regulatory arbitrage and structural biases working against the individual claimant have meant that despite being placed under binding access to justice obligations, IOs regularly fail to comply with them, and in the process undermine the right to a fair trial.

4.2 Institutional access to justice obligations

Whereas an IO is free to approach a national court to realise its legal rights, a person wishing to raise a claim against an IO cannot do so due to the procedural bar of immunities. Jurisdictional immunities entrench inequality at the national level, intruding into the right to access justice. This entrenched inequality triggered by the application of jurisdictional immunities of IOs, while not impermissible under international law as such, embeds a bias in favour of the organisation by rendering it immune from suit.

To counter this structural bias, a key regulatory demand on the exercise of institutional power is that IOs must provide access to justice to individuals who are harmed by their actions. With the jurisdictional immunities accorded to IOs preventing claimants from successfully approaching national courts, compliance with an organisation’s access to justice obligations assumes even greater significance. It has aptly been said that the access to justice obligations on IOs cushions the impact of jurisdictional immunities. And as Reinisch notes that this obligation to provide for alternative dispute settlement mechanisms in case of an IO’s immunity

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190 See Freedman (n 117), 239-54, 250.
191 General Comment No 32 (n 181), para 18; Waite and Kennedy (n 179), para 63.
from legal process can be regarded ‘as an acknowledgment of the right of access to court as contained in all major human rights instruments’. 193

There are two ways in which access to justice obligations on IOs may be brought about. The first through direct treaty arrangements; and the second via the rulings of national and regional human rights courts concerning the relationship between immunities and the right to a fair trial that can create an incentive for compliance. Both those mechanisms have their own idiosyncrasies. However, none of them work effectively to secure compliance with an organisation’s access to justice obligations. As is shown, the former method has been largely ineffective due to the lack of consequences in cases of non-compliance; the latter, due to inconsistent approaches across jurisdictions, 194 and the failure of courts to meaningfully assess compliance with fair trial standards. 195

4.2.1 Direct treaty obligations

As the status of the UN as the supreme kind of international organisation that confronts claims against it more frequently than any other organisation, the overall historical context of the rules imposed on the UN vis-à-vis its access to justice obligations are of immense significance. The General Convention (forming a basis for other regimes including some MDBs) provides for obligations contemplating that an organisation in the position of the UN, from time to time, would be confronted with claims against it. While the General Convention granted the organisation immunities from the jurisdiction of domestic courts in order to preserve its functional independence, some method had to be devised to ensure that private claimants were not denied justice.

Access to justice obligations were expressly imposed on the organisation upon its creation as a complement to its jurisdictional immunities. The rationale being that as jurisdictional immunities prevented complainants from approaching national courts to air their grievances

194 For the inconsistent approaches to immunities, see M Steinbruck Platise, ‘The Development of the Immunities of International Organisations in Response to Domestic Contestations’ in M Kanetake and A Nollkaemper (eds) The Rule of Law at the National and International Level (Hart 2016), 67-96, 70.
195 See for example, the discussion by Schmitt (n 98), 264-8; where the author considers European jurisprudence showing that the European Court has never breached the immunities of an IO for lack of reasonable alternative means yet.
against IOs, access to appropriate modes of dispute resolution was imperative.\textsuperscript{196} And according to the organisation itself, such a provision would avoid impunity.\textsuperscript{197} To achieve that aim, Article VIII, section 29 of the General Convention relevantly provides that the ‘United Nations shall make provisions for appropriate modes of settlement of: Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party’.\textsuperscript{198}

Jenks identifies the inspiration behind Section 29 of the General Convention as Draft Article 18 of the so called ‘ILO Memorandum’ which sought to create rules for the International Labour Office, which became the International Labour Organisation (‘ILO’) immediately following the post war period in 1945. The ILO Memorandum suggested that as a supplement to its immunities, the ILO establish a permanent tribunal that was vested with ‘the jurisdiction to determine disputes arising out of contracts to which the Organisation is a party’; disputes against officials who enjoy immunities by virtue of their official position; and claims raised by staff members against the organisation.\textsuperscript{199} While the prefatory documents shed only limited light regarding the nature and scope of Section 29 of the General Convention, it is clear that the ILO Memorandum motivated the inclusion of the access to justice obligation, albeit in a modified form.

First, the obligation to provide appropriate modes of dispute resolution was specified in Section 29 not only in relation to disputes concerning contracts to which the organisation was a party, but more generally to disputes of a ‘private law character’. The lack of a definition on what precisely a private law claim means is a matter that has given rise to controversy.\textsuperscript{200} That being

\textsuperscript{196} While the preparatory discussions on the General Convention (n 18) simply assumed the human rights rationale behind Article VIII, Section 29, the preparatory documents to the Specialized Agencies Convention (n 100) expressly refer to the access to justice rationale behind placing the Specialized Agencies of the United Nations under obligations to provide alternative means. That obligation is assumed by, and imposed on, other IOs based on the same access to justice justification.

\textsuperscript{197} Notably, the UN considers that section 29 of the General Convention (n 18) eliminates the possibility of impunity. In a memorandum of law in support of its motion to dismiss and to intervene in \textit{Brzak v UN} (n 152), the UN stated: ‘In civil cases, the uniform practice is to maintain immunity, while offering, in accord with section 29 of the General Convention, alternative means of dispute settlement [including negotiation, conciliation, mediation and/or arbitration]. ... This practice achieves two fundamental goals: it ensures the independence of the United Nations and its officials from national court systems, but at the same time it eliminates the prospect of impunity: ‘Memorandum of Law in Support of the Motion of the United Nations to Dismiss and to Intervene’, 2 October 2007.

\textsuperscript{198} General Convention (n 18), art VIII, section 29, para (a).

\textsuperscript{199} Draft rule 18, ILO Memorandum, cited in Jenks (n 88), 17.

\textsuperscript{200} For an excellent discussion on the private-public distinction in dispute resolution, see generally, B Hess, ‘The Private-Public Divide in International Dispute Resolution: The 2017 Hague Lecture’ vol 388 (Recueil des Cours 2018), 49-266.
said, the obligation to provide ‘appropriate modes’ was essentially ‘tailored towards disputes over rights and duties within the private law sphere including classically domestic law claims such as in property, contracts, unjust enrichment, and tort (i.e., personal injury, illness, or death). Such claims involve instances where IOs behave like any other entity entering into legal relationships with other private persons on ‘an equal footing’.

Second, Section 29 of the General Convention also mandated that the organisation provide appropriate modes concerning private claims against officials of the organisation, who by virtue of their employment enjoyed immunities before national courts. Third, Section 29 made no mention of claims by staff members. However, this omission is unexceptional for the drafting committee to the General Convention recommended the establishment of an administrative tribunal to deal with staff disputes which appropriately addressed staff claims. For analytical purposes, it is now understood that the creation of IATs is founded in the requirement that IOs provide alternative means of redress to aggrieved staff members whose claims before national courts would be barred due to jurisdictional immunities of the defendant organisation.

The obligation to provide for appropriate modes of dispute settlement is not just limited to typically private law claims or situations where IOs exercise administrative power over their employees. As Kingsbury et al point, IOs ought to provide review mechanisms whenever they impact the rights of private persons. The jurisdictional bar of immunities can apply equally to all manner and form of claims against IOs, what is relevant to the existence of the access to justice obligation is not the context in which the claim arises (may it be in tort, contract, administrative law, etc.), but the need to ensure justice whenever IO conduct affects the rights of private parties. Although, as I discuss further in chapter 2, the character of a claim may impact the nature of the remedies that may be ultimately granted.

201 Schmalenbach (n 192), 529-31.
202 Ibid.
203 See chapter 3.
205 Such an understanding is also reflected in treaty arrangements. See for example, Article 24(1) of the Headquarters Agreement between France and INTERPOL (entered into force 1 September 2009), which provides that ‘unless the parties to the dispute decide otherwise, any dispute between the organization and a private party shall be settled in accordance with the Optional Rules for Arbitration between International Organizations and Private Parties of the Permanent Court of Arbitration…’.
As the powers of IOs have expanded, they impact individual rights in a very broad sphere, resulting in the creation of sector specific and (loosely speaking) access to justice mechanisms. This proposition is evidenced by the various accountability mechanisms created at different IOs seeking to provide redress for a broad range of claims. Such mechanisms are created at MDBs (see above the discussion in Jam);\(^{206}\) mechanisms for persons/entities accused of corruption in relation to MDB funded projects to contest debarment decisions;\(^{207}\) various Ombudsman mechanisms, including the much criticised mechanism in place to hear complaints from persons subject to certain UN Security Council terrorism sanctions resulting in amongst other things, the freezing of assets and restriction to the freedom of movement of listed persons and entities;\(^{208}\) appellant mechanisms for individuals dissatisfied with refugee status determinations by the United Nations High Commission for Refugees (‘UNHCR’);\(^{209}\) complaint mechanisms at INTERPOL for individuals subject to INTERPOL Red Notices;\(^{210}\) to name just a few examples of IOs exercising international public authority.\(^{211}\)

What is apparent is that the absolute language of immunity provisions is generally mitigated by the fact that IOs are to make provisions for appropriate modes of settlement of claims raised by private parties (where a General Convention or a similar immunity regime applies). Where such provisions are absent, express waivers were written into an organisation’s immunities to ensure access to justice (as is the case with the regime applying to MDBs). Importantly, an IO’s obligation to ensure access to justice is not optional, it is mandatory. As Schmalenbach

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\(^{206}\) See further A Riga Sureda, ‘Process integrity and institutional independence in international organizations: the Inspection Panel and the Sanctions Committee of the World Bank’ in L Boisson de Chazournes, CPR Romano and R Mackenzie (eds) International Organizations and International Dispute Settlement: Trends and Prospects (BRILL 2002), 184; the CAO, discussed within the context of the Jam case (n 124) is also such an accountability mechanisms operating at the IFC: see “Compliance Advisor Ombudsman” (Office of the Compliance Advisor/Ombudsman) <http://www.cao-ombudsman.org/> accessed 20 June 2018.

\(^{207}\) Riga Sureda (n 206), 186.


\(^{209}\) BS Chimni, ‘Co-option and Resistance: Two Faces of Global Administrative Law’ (Global Administrative Law Series, 2015/16) IILJ Working Paper, 18; where the author highlights the refugee determination role of the UNHCR and points to the fair trial deficits in the appellant process respecting adverse determinations; also see M Smrkolj, ‘Public Authority & International Institutions and Individualized Decision Making: An Example of UNHCR’s Refugee Status Determination’ (2008) 9 German Law Journal 1.


\(^{211}\) See Introduction.
has said, that obligation ‘cushions’ the adverse effects of jurisdictional immunities. Whether or not such cushioning actually happens is the real issue of significance.

### 4.2.2 Institutional failure to deliver effective justice

In spite of the express obligation to provide ‘appropriate modes’ of dispute resolution in international treaty arrangements, more often than not, such arrangements are not provided at all. This justice deficit has devastating consequences especially for claimants advancing cases pertaining to mass human rights abuses which tend to take the form of mass tort claims. For example, the victims of the genocide in Srebrenica, cholera in Haiti introduced by UN peacekeepers (4.2.3), sexual abuse committed by military and civilian components of peacekeeping missions, have not received justice at any forum whatsoever. This institutional evasion is replicated in other organisations too. ‘The greatest obstacle preventing parties from challenging acts of [international organisations] is the lack of a legal forum where such disputes may be brought.’

On the other hand, where institutional means for dispute resolution are provided, often reluctantly and only after significant public pressure, problems remain. For instance, in respect of claims concerning the United Nations Mission in Kosovo’s (‘UNMIK’) responsibility and liability for the lead poisoning of several persons in Kosovo, despite adverse findings against the UNMIK by the UN’s own human rights mechanism, those findings and associated recommendations remain unenforced. Similarly, claims against the World Bank and other international financial institutions concerning grave breaches of individual rights cannot be effectively challenged before the internal structures of those institutions. This is because those

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212 See, Schmalenbach (n 192), 529.

213 Yet another prominent example of the lack of such an institutional facility to seek justice is claims arising out of sexual abuse perpetrated by both, the civilian and military component of IOs including but not limited to the UN. Despite having an obligation to create a Standing Claims Commission to provide redress in respect of such matters, no such commission has been established by the UN or any other organisation facing such claims: see M Zwanenburg, Accountability of Peace Support Operations (Martinus Nijhoff 2005), 102.


dispute resolution systems are procedurally so deficient that they do not constitute a viable option to seek justice (see Jam above). The well-known fair trial deficits of the Ombudsman delisting process concerning UN Security Council terror sanctions are frequently noted by courts and commentators alike.\textsuperscript{216} Even where IATs have been created, as I show in chapter 3, their independence is so compromised that it can hardly be said that access to justice is being effectively realised.

The upshot is that on too many occasions, victims of institutional action are denied justice within the legal structures of an organisation. The question is how IOs can evade complying with their mandatory access to justice obligations?

4.2.3 The lack of consequences for non-compliance with ‘access to justice’ obligations

The structural bias of jurisdictional immunities put in place that seek to coordinate the relationship amongst different justice mechanisms in a deliberately predetermined way is the reason why institutions can without consequences evade their duty to deliver justice. Ultimately, institutions are favoured over individuals, and in the end, power over justice. In his well-known work, *Apology to Utopia*, Koskenniemi explained that the structural bias argument is predicated on the realisation that ‘the system still de facto prefers some outcomes or distributive choices to other outcomes or choices’\textsuperscript{217}. There is no better example of entrenched structural biases in a regulatory regime than in the law surrounding international institutions. Fundamentally, there are no legal consequences for IOs when they fail to deliver justice as they are obliged to do. This is best understood by way of yet another prominent and disturbing example that has attracted much public attention.

In October 2010, cholera broke out in the Artibonite region of Haiti. So far, the disease has caused severe devastation in that country, infecting over 7% of the population, and killing more than 9,000 people.\textsuperscript{218} The victims’ accounts detail how cholera caused a ‘violent onset of

\textsuperscript{216} For a comprehensive discussion on the UN Security Council Sanctions regime and issues of due process in terms of access to justice for individuals impacted by UNSC sanctions, see generally, D Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP 2016); for recent jurisprudence, see *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR, 21 June 2016), para 52.

\textsuperscript{217} M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), 606-7.

sickness, rapid death, psychological trauma, and total loss of livelihood.\textsuperscript{219} There are countless stories of hardship. The following being just one example:

The Petitioners include the daughter of a man who was the sole provider for her family. The father fell sick in the middle of the night with continuous diarrhoea. His family rushed him to the Cholera Treatment Center in Mirebalais. After three days, his condition worsened and he was transferred to the hospital. There, the daughter watched as her father lay still for hours until he died. The daughter and her family are now struggling to survive without any financial support.\textsuperscript{220}

The victims of the cholera outbreak allege that it is ‘directly attributable to the UN because of amongst other things, the gross negligence and the deliberate indifference ‘for the health and lives of Haiti’s citizens by the UN and its subsidiary, the United Nations Stabilization Mission in Haiti (“MINUSTAH”), amounting to amongst others, the commission of a tort under Haitian law.\textsuperscript{221} More specifically, it is alleged that cholera was introduced in Haiti by UN Peacekeepers, and the UN is liable due to amongst other things, it ‘failed to screen troops for cholera infection prior to deployment from Nepal…’.\textsuperscript{222} The link between cholera in Haiti and UN Peacekeepers from Nepal is now undeniable. This much has been concluded by the very Independent Panel established by the UN Secretary-General to investigate the source of cholera in Haiti.\textsuperscript{223}

Aiming to seek justice, consistent with the UN’s internal procedures, the plaintiffs first filed administrative claims at the UN on 3 November 2011, seeking compensation and associated remedies pursuant to the UN’s obligations under Section 29 of the General Convention; as well as the Status of Forces Agreement between the UN and Haiti entered into on 9 July 2005 (‘SOFA’).\textsuperscript{224} The UN did not respond until February 2013. In its response of 9 July 2013, Legal Counsel for the UN said that the claims were not receivable because consideration of the claims

\textsuperscript{220} Ibid.
\textsuperscript{221} Ibid.
\textsuperscript{222} Ibid.
\textsuperscript{223} Ibid.
\textsuperscript{224} Pursuant to Art 55 of the Status of Forces Agreement (SOFA), the UN must establish a Standing Claims Commission to resolve disputes of a ‘private law character’. In the case at hand, the UN did not do so. Accordingly, consistent with UN procedures, the claims were filed at the UN Claims Unit on 3 November 2011.
would involve ‘a review of political and policy matters.’

Until recently, the UN denied responsibility despite ‘overwhelming evidence of its wrongdoing and mounting public pressure for accountability and action.’

After being denied justice at the UN, on 9 October 2013, the plaintiffs filed a class action against the UN in the US District Court for the Southern District of New York, asserting various causes of action, including negligence and wrongful death. Amongst other remedies, the plaintiffs sought injunctive relief, namely remedying Haiti’s waterways and provision of sanitation infrastructure needed to control the continuing epidemic, as well as damages for the deaths and injuries caused. Significantly, the plaintiffs argued that UN immunity under Section 2 of the General Convention did not apply given the mandatory nature of the UN’s access to justice obligations contained in Section 29 of the General Convention which the UN failed to comply with. However, on 9 January 2015, showing considerable deference to the views of the US Government in favour of upholding immunity, the court said that ‘nothing in the text of the CPIUN suggests that the absolute immunity of section 2 is conditioned on the UN’s providing the alternative modes of settlement contemplated by section 29’.

The aforementioned decision has now been upheld on appeal and the litigation brought to an end in the US. The widely held view in academic circles stressing that UN immunities (or IO immunities more generally) cannot apply where it fails to provide for ‘appropriate modes’ of dispute settlement has not succeeded. Not only in the US, a similar argument was also

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226 See, Cholera Litigation (n 218).
228 See ibid, 75.
230 Ibid, 5.
232 See, ‘Amicus Briefs by amongst others, International Law scholars and practitioners in support of Plaintiffs-Appellants’ (Institute for Justice and Democracy in Haiti, 15 May 2014) available at <http://www.ijdh.org/cholera/cholera-litigation/> accessed 6 June 2016; also see the various articles in support of a limited UN immunity: KE Boon, ‘The United Nations as Good Samaritan: Immunity and Responsibility’ (2016) 16 Chicago Journal of International Law 2, 341; EJIL Foreword (n 76); and Freedman (n 117). There are a number of authors who have argued that access to justice should trump IO immunities. See for example a relatively early work by I Pingel-Lenuzza and E Gaillard, ‘International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass’ (2002) 51 ICLQ 1, 1-15; for a recent discussion, see F Choudhury, ‘The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability’ (2016) 104 Georgetown Law
defeated in the claims of the victims of the Srebrenica genocide by the European Court. In that case, an underlying question was whether the immunity enjoyed by the UN is absolute or is subject to a test of its compatibility with the right of access to a court guaranteed by Article 6 of the European Convention, which parallels the fair trial guarantees pursuant to Article 14 of the ICCPR. The specific framing of the issue was not dissimilar to the ones pursued in US courts by the Haitian victims: that the UN’s failure to set up an alternative mechanism to provide redress meant that Section 2 of the General Convention was inapplicable.\textsuperscript{233} Without meaningfully engaging with this issue, the European Court simply concluded [it] does not follow…that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court.\textsuperscript{234}

The result in both the Haiti and Srebrenica cases shows that when it comes to a conflict between the right to access justice and the law on immunities, the latter rule of international law prevails, even where there exist grave violations - including of norms of \textit{jus cogens},\textsuperscript{235} and even if access to justice is denied.\textsuperscript{236} In both the Haiti and Srebrenica cases, despite compelling fault on the UN’s part, liability has been avoided. In a work on the Haiti case, Boon has noted that ‘under ordinary principles of torts law the maxim ubi jus, ibi remedium applies: “Where there is a right, there is a remedy.’\textsuperscript{237} She further says this ‘principle holds true when an individual or entity causes harm, even when acting with the best of intentions.’\textsuperscript{238}

\begin{footnotes}
\item[233] Srebrenica case (n 103), paras 73-4.
\item[234] Ibid, para 164.
\item[235] Ibid, para 158; applying the reasoning of the ICJ in \textit{Jurisdictional Immunities} (n 172), para 91; often, IO immunities and access to justice are treated in terms of a conflict of norms, where the former by and large trump the latter. Some commentators have argued that an interpretative approach is well-suited and is able to resolve the access to justice deficit resultant from the manner in which the rules on IO immunities are presently interpreted and applied by avoiding the conflict altogether: see, R Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations' in E De Wet and J Vidmar (eds), \textit{Hierarchy in International Law: The Place of Human Rights} (OUP 2012), 72. The reality remains that immunities bar access to justice for all practical purposes, and a conflict between the concepts does exist in practice.
\item[236] For example, in one prominent early case, \textit{Manderlier v Belgium State and UN} (n 116), 236-237, where certain individuals brought claims against the UN in Belgium courts for damage to persons and property caused by the UN Force in the Congo, an appeals court upheld the UN’s immunities in absolute terms while criticizing ‘the present state of international institutions [being that] there is no court to which the appellant can submit his dispute with the United Nations’ as being a situation that ‘does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights’.
\item[237] Boon (n 232), 349.
\item[238] Ibid.
\end{footnotes}
thus far has escaped its liability by using the arbitrage in the law. In the case of the Srebrenica victims, it is worth recalling the rhetoric of the then UN Secretary-General who said that the survivors of the Srebrenica massacre were absolutely right to demand justice for ‘the most heinous crimes committed on European soil since World War II’. Such statements have proven to be nothing but empty words.

Despite compelling evidence of the breach of victims’ rights; and lofty grandiosity, justice continues to be denied to countless victims of institutional conduct. Victims of grave violations continue to suffer a denial of justice because when the organisation refuses to meet its access to justice obligations, no adverse legal consequence’s flow for it. Two matters are especially relevant to explain how this denial of justice is made possible.

**a) Arbitrary power to determine scope of immunities**

With international law granting IOs a very broad discretion to determine the scope of their own immunity, and characterise claims, it is fairly easy to avoid responsibility. IOs can make procedural determinations that result in ending a claim even before it commences in earnest. In sum, at the institutional level, as things stand, once an IO takes a view as to the scope of its immunities, there is very little a private person can do to convince the defendant organisation to take a contrary view (waive its immunity), meaning that the merits of a claim remain unaddressed.

Despite the claims of the Haitian victims being obviously of a private law nature, the reason why the UN was able to deny the claims lodged by the Haitian victims is because of a false and arbitrary characterisation of their claims as arising from ‘political’ activity, and thus, non-justiciable. Such a characterisation must not be taken seriously for it is plainly wrong, solely designed to avoid liability. Tellingly, the UN Special Rapporteur on extreme poverty and human rights, Philip Alston found that the UN’s response has been ‘morally unconscionable, legally indefensible, and politically self-defeating.’ The claims of the victims of the Haiti cholera outbreak are classically tortious claims triggering the UN’s responsibility to provide

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239 Srebrenica case (n 103), para 129.
240 See chapter 2.
241 UNGA Report, ‘Promotion and protection of human rights: Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms’ (6 December 2016) (71st session, Item 68(b)), 11.
‘appropriate modes’ of dispute settlement. The UN has not done so until this day, instead choosing to establish a trust fund for the more than 780,000 persons who have been affected by the cholera outbreak in Haiti, a fund to which contributions remain limited.242

In sum, the institution itself plays the role of judge and jury. By not allowing a claim to be decided on the merits due to arbitrarily characterising it as non-justiciable, the organisation can effectively stifle access to justice. IOs are only too willing to evade their responsibility for doing so leads to no adverse legal consequences.

b) Immunities prevail

As there is little a private party can do to force an organisation to ensure the delivery of justice at the institutional level, it has only two realistic options remaining. Either end its quest for justice; or approach national courts. Unfortunately for the victims, the courts located within the national legal order have not come to their aid either due to the various biases and arbitrage in place. So far, the conflict between access to justice and immunities has been resolved in favour of the latter. How the law on immunities is understood and applied by most national courts is at the root of why the quest for justice for countless victims remains unfulfilled. IOs take an overly broad view of their immunities, with national courts around the world, by and large endorsing it. National courts have so far failed to provide a buffer in relation to access to justice for victims of international institutional conduct.

The current approach leads to a situation where the organisation can pick and choose when it seeks to create appropriate modes, with no legal consequences for the organisation should it fail to do so. The situation may be summed up in the following way: despite the express obligation to provide an alternative mode of dispute resolution in international treaty arrangements, that access to justice obligation has not translated into enforceable individual rights at the organisational or institutional, or the national level.

4.2.4 The immunity preservation incentive

Another way in which private persons have sought to impugn the actions of IOs is by suing host states for the breach of access to justice rights. IOs are not parties to human rights treaties,

and the only way to approach a regional human rights court (where such claims often end up) is through raising a claim against a host state. The idea is that if the host state is held liable for breaching an individual’s fair trial rights for hosting an organisation that fails to provide access to justice (where the courts of that state refuse to take jurisdiction), the host state is then in breach of its obligations to guarantee the right to access to court. If a violation is found, as Olson points out in the European context, ‘[a] court order to an ECHR member state forbidding it to honor [the organization’s] immunities on grounds that [the organization’s] internal procedures do not conform to the standards set forth in the Convention thus has the identical effect in the real world as would direct application of the Convention’s terms to [the organization].’\(^2\) In such a case, there may be a real incentive that justice is not denied at the institutional level so as to preserve IO immunities. Where it is denied, immunities could be pierced. Such an argument has met with some success in the employment field.

\(a\) \textbf{The Waite and Kennedy incentive}

The landmark case on IO immunities in employment disputes is \textit{Waite and Kennedy v Germany} (‘\textit{Waite and Kennedy}’),\(^2\) which involved contractors suing the territorial State, Germany.\(^2\) Mr Waite and Mr Kennedy, the Applicants, provided services to the European Space Agency (‘ESA’) pursuant to certain contractual arrangements. After those contractual arrangements ended, the Applicant’s argued that under German labour law, ESA was obliged to deem the applicants as its employees independent of any contractual relationship.\(^2\) ESA did not do so, and the Applicants sued the ESA for alleged breaches of their employment rights before German courts.\(^2\) ESA successfully relied on its immunity before the German courts.\(^2\) The Applicants approached the European Court arguing that their inability to argue the merits of the case before German courts was in contravention of the right to access a court in Article 6 of the European Convention.\(^2\) The central question concerned whether the ESA could rely on its immunities before German courts?


\[^2\] \textit{Waite and Kennedy} (n 179), \textit{Beer and Regan v Germany} App no 28934/95 (ECtHR, 18 February 1999).

\[^2\] \textit{Waite and Kennedy} (n 179), para 11.

\[^2\] Ibid, para 15.

\[^2\] Ibid, para 15.

\[^2\] Ibid, paras 22-4.

\[^2\] Ibid, para 43.
The European Court made two critical findings. First, it said that the right to access a court and a fair trial, while subject to restrictions, could not be limited in a way so as to ‘reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.’\(^{250}\) It went on to hold:

The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial…\(^{251}\)

Second, it was said:

For the Court, a material factor in determining whether granting ESA immunity from … jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.\(^{252}\)

The central proposition most frequently drawn from that case is that if an IO does not have a “reasonable alternative means” to settle a claim against it, this would be a “material factor” militating in breaching the defendant organisation’s immunity. The words “reasonable alternative means” have now become part of the folklore of IO immunities, and are often repeated in European court judgments in a pro forma way.\(^{253}\) Thus, in addition to the direct access to justice obligations imposed on IOs, the ‘reasonable alternative means’ concept has

\(^{250}\) Ibid, para 59.
\(^{251}\) Ibid, para 67.
\(^{252}\) Ibid, para 68.
\(^{253}\) See for example, Klausecker v Germany App no 415/07 (ECtHR, 29 January 2015), para 64; Srebrenica case (n 103), para 139; to name just a few examples.
become a test to determine whether institutional immunities can and should exist (at least in European jurisdictions).

Interestingly, while the *Waite and Kennedy* jurisprudence is best known in this sphere, it is not the only case propounding that access to justice be a material concern when determining questions of IO immunity. As far back as in 1982, the Supreme Court of Argentina went even further. The Argentinian Supreme Court developed the Cabrera doctrine, placing access to justice at a higher plane than perceived ‘institutional’ factors.\(^{254}\) *Washington Julio Efrain Cabrera v Comisión Técnica Mixta de Salto Grande*\(^{255}\) concerned an employment dispute against the Comisión Técnica Mixta de Salto Grande (the ‘Commission’), where the Commission enjoyed absolute immunity under the terms of the relevant Headquarters agreement. The Commission sought to rely on its immunity before Argentinian courts. In piercing the Commission’s immunity, the Supreme Court of Argentina held that the grant of immunities without considering the establishment of an alternative dispute settlement mechanism as was required by the applicable immunities regime,\(^{256}\) resulted in the breach of the principles of due process and the right to access to justice enshrined in the Argentinian constitution.\(^{257}\) Placing access to justice as the determining factor, as opposed to just a “material” consideration, the Supreme Court of Argentina concluded that the provision granting the Commission’s immunity was unconstitutional, and thus inapplicable. Not just in Europe, courts in other parts of the world have been willing to challenge the conventional application of the rules on institutional immunities. However, any optimism should be guarded.

**b) *Waite and Kennedy* – a false dawn?**

No doubt *Waite and Kennedy* has had some impact on the behaviour of some national courts. On occasions, courts have not only considered whether ‘reasonable alternative means exist, but have even assessed the adequacy of the alternative means. In several cases, courts in Belgium have pierced an organisation’s immunity for want of ‘reasonable alternative means’.\(^{258}\)

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\(^{254}\) For an analysis of Argentinian jurisprudence, see, RE Vinuesa, 'Argentina' in Reinisch (n 98), 19-21. While that case law concerns fair trial provisions under domestic constitutional arrangements, the immunity preservation incentive remains.


\(^{256}\) ‘Specialized Agencies Convention’ (n 100).

\(^{257}\) See the case discussed in Vinuesa (n 254), 20.

\(^{258}\) *Western European Union v Siedler* (December 2009, Appeal judgment) Cass no S 04 0129 F; ILDC 1625 (BE 2009), 21; *General Secretariat of the ACP Group v Lutchmaya* (21 December 2009, Final Appeal judgment) Cass
Similarly, in 2005, in a French case concerning a labour dispute against the African Development Bank, the social chamber of the Cour de Cassation decided to render the bank’s immunity in the circumstances inapplicable because of the absence of any internal tribunal accessible to the complaining staff member, on the basis that such a denial was contrary to the French international public order and a denial of justice. After analysing French jurisprudence, a French expert in the field, Burdeau, concludes that when making immunities determinations, French courts not only check that alternative means exist, but they also ensure that the alternative forum accords the plaintiff a fair trial.

While it ought to be straightforward that immunities can be breached where no alternative forum is provided, the question whether those means are actually ‘reasonable’ remains shrouded in mystery. It has been said that as IOs are not parties to human rights treaties, ‘the international organization’s dispute-settlement mechanism need not necessarily provide protection which is identical to the protection expected from domestic tribunals under article 6 ECHR; in line with the ECtHR’s Bosphorus case-law, equivalent protection may suffice’.

‘Equivalent protection’ constitutes a fairly low threshold. The European Court’s jurisprudence that ‘equivalent protection’ (and thus the ‘reasonable alternative means’) test is satisfied where the alternative means are not ‘manifestly deficient’ has left the test to a large extent an empty protection. So far, the European Court and most national courts have granted a very broad deference to IOs regarding compliance with how “reasonable alternative means” are established, and what guarantees are necessary to satisfy basic minimum due process

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260 Ibid.


263 See Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland App no 45036/98 (ECtHR, 30 June 2005), paras 152-7; as was pointed out in the concurring opinion of Judge Keller in in the case of Al-Dulimi and Montana Management Inc v Switzerland (n 216), para 13, the European court has developed a presumption of immunity and equal protection in respect of several IOs, including the EU, UN and NATO; particularly in the context of staff disputes, see AM Thévenot-Werner, ‘The Right of Staff Members to a Tribunal as a Limit to the Jurisdictional Immunity of International Organisations in Europe’ in A Peters, M Devers, AM Thévenot-Werner and P Zbinden (eds), Les acteurs dans l’ère du constitutionnalisme global / Actors in the Age of Global Constitutionalism (Paris, Société de législation comparée 2014), 111-39.
standards.\textsuperscript{264} In fact, there is not a single case where an organisation’s immunities have been breached for lack of ‘reasonable alternative means’ at the level of the European Court.\textsuperscript{265} As I show in chapter 3, this is not because the means are ‘reasonable’ but due to the court’s unwillingness to scrutinise the ‘alternative means’ with the nuance that is warranted.

An even larger issue is that while \textit{Waite and Kennedy} was not limited to its facts, for no sound reason, its application in the non-employment context has been rejected in other civil contexts. In the claims arising from the genocide in Srebrenica, despite no alternative means existing, the European Court simply refused to apply the \textit{Waite and Kennedy} reasoning to deny the UN’s immunity. There is no logical reason as to why the subject matter of a complaint ought to impact the compliance of an IO to provide ‘reasonable alternative means’.

In the final analysis, the result is this: (1) in Europe and certain other jurisdictions, IOs must provide ‘reasonable alternative means’ if they are to avoid an intrusion into their immunities; (2) because the standard of ‘reasonableness’ is so deferential there is no assessment of whether the alternative means actually comply with the basic guarantees central to the right to a fair trial; (3) it remains unclear whether the ‘reasonable alternative means’ are required to be provided in the non-employment context; and (4) most jurisdictions would probably completely refuse to link the question of immunities with the provision of ‘reasonable alternative means’. In short, the state of the law in this sphere is messy; inconsistent; and uncoordinated, both inter and intra-jurisdictionally. The only way to resolve the conundrum is by determining with specificity what ‘reasonable alternative means’ (or ‘appropriate modes’) of dispute settlement should look like; and how better coordination can be achieved across legal orders with the aim to enhance certainty and consistency. It is primarily those two most significant matters that the following chapters will deal with.

\textsuperscript{264} \textit{Gasparini v Italy and Belgium} App no 10750/03 (ECtHR, 12 May 2009); and \textit{Klausecker v Germany} (n 253); \textit{Perez v Germany} App no 15521/08 (ECtHR, 6 January 2015).
\textsuperscript{265} See ibid; also see the jurisprudence considered in Schmitt (n 98), 224-327; see further the concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyyev, Pejchal and Dedov in the case of \textit{Al-Dulimi and Montana Management Inc v Switzerland}, para 64, where the judges cited the vast number of claims against IOs that were rejected, including against the United Nations Interim Administration Mission in Kosovo and the Kosovo Force, the international civil administration in Bosnia and Herzegovina, the Administrative Tribunal of the International Labour Organisation and the European Organisation for the Safety of Air Navigation, the European Commission, the European Court of Justice (CFI and CJEC), the International Tribunal for the Former Yugoslavia, International Criminal Court, and the International Olive Council.
5 Inaction at the general international level – the bias continues

5.1 Inequality entrenched

Once recourse at the institutional level and the national level is exhausted, the only legal system possibly capable of providing justice to victims is the general international one. That the procedural rights of private parties generally, and the individual specifically, are seriously restricted at the general international level is well known.\textsuperscript{266} International courts of general jurisdiction have not been vested with the competence to hear complaints from private parties against IOs.\textsuperscript{267} The ability of private parties to approach regional human rights courts, moreover, only indirectly impugns the conduct of IOs. This means that individuals cannot approach an international court of general jurisdiction (such as the ICJ) when all other alternatives have been exhausted. On the contrary, the international system has inherent to it further structural biases working against the individual.

Highlighting the bias against the private person to bizarre limits was the ICJ’s advisory role allowing that court to render advisory opinions assessing the probity of judgments of certain IATs.\textsuperscript{268} Article XII of the Statute of the Administrative Tribunal of the International Labour Organisation (as it read prior to 2016) incorporated a structural bias where the defendant IO could trigger the advisory jurisdiction of the ICJ if it considered that there existed a ‘failure of justice’ at the level of the tribunal; but the litigating employee could not do so.\textsuperscript{269} As one judge of the ICJ has said, the Article XIII procedure creating the ILOAT’s review function amounts to treating the employee ‘as a spectator rather than a participant in proceedings whose outcome would have a direct and substantial effect’ on him or her.\textsuperscript{270} Judge Greenwood neatly summed up the ills of that review mechanism in his declaration in the \textit{IFAD Advisory Opinion} stating:

\begin{quote}
\textit{Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion) [2012] ICJ 10 (‘IFAD Advisory Opinion’), para 5.}
\end{quote}

\begin{flushright}
266 Higgins (n 10), 51.
267 Article 34, ICJ Statute (n 10); see the observations in Steinbruck Platise (n 194), 72: ‘organisations are generally not subject to compulsory jurisdiction of any international tribunal that could compensate for the lack of jurisdiction by domestic courts over claims against international organisations. While victims of human rights violations can, as a rule, bring their claims against the offending state before domestic courts of that state, such ‘domestic’ remedies are rarely available within international organisations. Their internal dispute settlement mechanisms are, for the most part, still in their nascent stage, if they are available at all.’
268 See further chapter 3.
269 ILO, Statute of the Administrative Tribunal of the International Labour Organisation (adopted 9 October 1946, last amended 7 June 2016). See further chapter 3 for a detailed discussion on IATs specifically.
270 \textit{Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion) [2012] ICJ 10 (‘IFAD Advisory Opinion’), para 5.}
\end{flushright}
[T]here is a marked inequality of access to justice in that the employer, but not the employee, may challenge a decision of the Tribunal. While that inequality might have been acceptable fifty years ago (although for some judges it aroused concerns even then), I do not believe that it is acceptable today. This inequality is no technicality; it is a fundamental flaw in the system created by Article XII. … The Court should not be asked to participate in a procedure whose inequality is at odds with contemporary concepts of due process and the integrity of the judicial function.271

Given such stringent criticism, the advisory role of the ICJ to review judgments of the Administrative Tribunal of the International Labour Organisation was rightly brought to an end in 2016, with a somewhat similar scheme pertaining to the decisions of the United Nations Administrative Tribunal also being terminated in 1995 following much condemnation.272 While the aforementioned review mechanisms have been brought to an end, they still serve as a stark reminder of the inferior status of the individual or private person in international law, despite the explosion of the international human rights framework.273

Such an inferior status has meant that due to the biases working against the individual, access to justice is trumped at the general international level too when it comes to the delivery of justice to persons affected by institutional action. The rights of private persons are considerably limited when compared with states,274 or even IOs on the international plane,275 with the result

271 Ibid, paras 3-6.
272 See further Chapter 3.
273 For a balanced discussion on the status and procedural capacities of the individual on the international plane, see K Parlett, The Individual in the International Legal System. Continuity and Change in International Law (CUP 2010); see Higgins (n 10), 49; also see the views of the ICTY in Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (1995) Case No IT-94-1-AR72; 35 ILM (1996) 32, para 97; for a strong defence of the individual as a full subject of international law, see generally Cançado Trindade (n 177); for other sources, see S Gorski, ‘Individuals in International Law’ in R Wolfrum (ed), Max Planck Encyclopedia of Public International Law (online edition) <www.mpepil.com> accessed on 30 June 2018.
274 ICJ Statute (n 10), art 34(1); but for the enhanced access to international courts by the individual, see for example, Cançado Trindade (n 177), 19-46, where the author outlines the access of the individual to the various regional human rights mechanisms; see also D Shelton, Remedies in International Human Rights Law (OUP 2006), 177-239 (regarding the range of human rights courts and monitoring mechanisms individuals have access to); There are a limited number of international courts or tribunals where private persons and natural persons have ‘standing’. These are either human rights courts, or courts set up by regional integration organisations such as the European Union. Namely, the European Court of Human Rights and the African Court on Human and Peoples’ Rights (human rights courts); courts of the European Union (the General Court of the Court of Justice of the European Union), Court of Justice of the Andean Community, the Central American Court of Justice, and Caribbean Court of Justice (courts belonging to the regional integration organisations). For a summary of those institutions, see Del Vecchio (n 38), paras 29-46.
275 For a summary conclusion of the procedural rights of IOs before international courts and tribunals see Boisson de Chazournes, Romano and Mackenzie (n 206), 36; also see C Dominice, ‘Request of advisory opinions in
that litigation at the World Court is not a viable option to resolve disputes between private persons and IOs.

5.2 The use of diplomatic protection – uncertainties enhanced

Diplomatic protection is a fundamental doctrine of international law which allows a state of nationality to take up the claim of an injured national against another state (or an IO) who has denied justice to the national of a claimant state. As the Reparation case clarified, this doctrine would operate between states and IOs too, albeit when IOs exercise a similar right, diplomatic protection is referred to as ‘functional protection’.276

Diplomatic protection gives effect to the fiction that injury to a national is an injury to his or her state of nationality.277 The claim then belongs to the state of nationality, and not the injured person as a matter of law. Whether or not the right to diplomatic protection is exercised is thus a matter lying within the state’s or the IO’s discretion as the case may be. Diplomatic protection, however, has not been much utilised by a state of nationality to pursue claims against IOs.278 It can hardly be expected that states who often rely on IOs for assistance, will raise claims against them when the latter’s nationals are harmed. Taking the example of the Haiti cholera case, it should come as no surprise that Haiti has been unwilling to take up the cause of its nationals who are the victims of the cholera outbreak given that country’s reliance on the UN.279 Any argument that diplomatic protection can be a panacea to enhancing access to justice for the victims of institutional conduct is highly misplaced.

It should not be forgotten that the investor-state arbitration revolution was triggered by the failures of the doctrine of diplomatic protection to help realise the rights of aliens whose

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276 Reparation case (n 12), 185.
277 Draft article 1 of the ILC, ‘Draft Articles on Diplomatic Protection’ (2006) (adopted at 58th session) Supplement no 10, UN Doc A/61/10 Official Records of the General Assembly, describes diplomatic protection as ‘resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.’
278 There is little practice of states exercising diplomatic protection against IOs, see Zwanenburg (n 213), 250-5; but see the lump-sum payments deployed with regard to the Operations des Nations Unies au Congo (ONUC) which, despite having provision for a claims commission, failed to set up either a claims commission or review board. The UN instead allocated a lump-sum payment from which compensation was awarded to nationals of certain states, including Belgium: K Wellens, Remedies Against International Organisations (CUP 2002), 99.
279 MINUSTAH was originally authorised by Security Council Resolution (30 April 2004) S/RES/1542 to support the Transitional Government in ensuring a secure and stable environment in Haiti, amongst other things.
property was subjected to unlawful expropriation by host states. The institutional context will be well served to draw obvious lessons from that experience. Relying on the protection of the state of nationality when IOs harm a state’s national must be an option of last resort due to the further uncertainties that would result. Leaving to one side its discretionary nature, there is no certainty that a remedy would be provided to the harmed individual even if the state exercising diplomatic protection ultimately succeeds; and the mere time it would take to resolve a dispute through the means of diplomatic protection would be most excessive. While diplomatic protection may become on occasions necessary, and that right would always remain with the state whose national/s have been denied justice by an IO, it is no substitute to the realisation of the individual right to access justice in his or her own right. Without undermining its potential significance, bearing in mind the further uncertainties created, I do not expend any significant time in considering the role of diplomatic protection in addressing disputes between IOs and private parties in the remainder of this work.

Not only at the institutional or national levels, the lack of recourse at the general international level is the final way in which the regulatory arbitrage and biases against private persons operate when it comes to resolving claims against IOs. Ultimately, after justice is denied or impossible to realise before institutional or national mechanisms, general international law has inherent to it certain biases that exasperate the prevailing regulatory arbitrage that enables IOs to avoid responsibility and liability for their unlawful conduct.

6 The need for better coordination

Structural biases are present at multiple levels and deeply engrained when it comes to the delivery of justice in claims against IOs. The totality of the structural biases creates a state of affairs leading to an outcome where organisations are more than willing to sacrifice individual justice to blunt institutional power, and decision makers at the national level are more than willing to give up their adjudicative jurisdiction for international niceties. In the meanwhile,

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\(^{280}\) See generally, S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law* (Hart 2012). Procedural rights of private persons have also been provided through investment arbitration mechanisms, especially through the International Centre for Settlement of Investment Disputes (‘ICSID’), pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (‘ICSID Convention’). The centre has jurisdiction to decide investment disputes between a private investor and a state, with the most important aspect being the direct access to arbitration afforded to private investors involved in a dispute with an ICSID Member State under Article 25 of the ICSID Convention.
member states observe victims suffer from a distance, and denied access to justice. Member states simply wash their hands of the grave breaches of individual rights. Ultimately, it is the regulatory arbitrage exposed in this chapter that causes a denial of justice to the victims of institutional conduct.

How to address this regulatory arbitrage is perhaps the most important question for the law surrounding IOs today. Regulatory gaps prevail throughout the entire dispute resolution process. Organisations pick and choose, how and when, if at all, to comply with them. IOs as a result, end up performing the role of judge and jury in cases raised against them. In too many cases, IOs either refuse to provide a forum for claimants to address their grievances, or when such forums are provided, they are seriously deficient. On the other hand, national courts abdicate and defer decision making, even where it is clear that justice will most likely be denied. To deliver effective justice that is compliant with basic fair trial rights, greater consistency and better coordination across legal orders is necessary. Without such coordination, access to justice will continue to be a victim of the prevailing regulatory arbitrage. How to achieve such coordination is the topic tackled in the following chapter.
CHAPTER 2:
MANAGING THE REGULATORY ARBITRAGE IN DISPUTES INVOLVING INTERNATIONAL ORGANISATIONS: A PRIVATE INTERNATIONAL LAW APPROACH

1 Introduction

This chapter contends that a PIL approach presents an ideal solution for ensuring that victims of institutional action can access justice and do not suffer from the regulatory arbitrage exposed in chapter 1. The role of PIL in the institutional context is seriously understudied. Apart from Jenks’ early work on choice of law in the context of international body corporates,1 trite references to PIL in jurisprudence,2 and general discussion in some academic works,3 not much attention has been focused on the topic. Few scholars have studied IOs through the lens of PIL generally; and there are no works considering how PIL tools can be used to secure access to justice for the victims of institutional conduct specifically.

By harnessing PIL’s potential to manage a regulatory arbitrage through its coordinating function, it is suggested that access to justice for the victims of IO conduct can be ensured. In pursuing that central argument, I first discuss the key functions of PIL, demonstrating that PIL has great potential to manage regulatory gaps across legal orders (2). I show that PIL is an ideal vehicle to coordinate the relationship between the national and IO legal orders. Given that it is the IO or the national legal order where the victims of institutional action can realistically achieve access to justice, a focus on the role of those two orders is critical. The chapter then provides a conceptual foundation for the applicability of PIL to manage relations between the IO and the national legal orders (3).

1 See generally, CW Jenks, The Proper Law of International Organisations (Stevens & Sons Ltd 1962).
2 See Chapter 1, section 2.2.2.
3 Perhaps the most detailed discussion, although in general terms, has been carried out in F Seyersted, Common Law of International Organizations (Martinus Nijhoff 2008), 525-66; for a brief discussion, see HG Schermers and NM Blokker, International Institutional Law (5th edn, BRILL 2011), section 1601; K Ahluwalia, The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations (Martinus Nijhoff 1964), 72-81; and also see, F Seyersted, ‘Applicable Law and Competent Courts in Relations between Intergovernmental Organisations and Private Parties’ (1967) 122 RdC, 427-616.
The discussion then moves from concept to application. I consider the specific coordinating role that PIL can play through its three main components, i.e., questions of adjudicative jurisdiction (4), applicable law (5) and the recognition and enforcement of foreign judgments (6). Situating the discussion in the IO context, I will provide the basis on which adjudicative jurisdiction across the national and institutional legal orders should be coordinated. Suggesting that dispute resolution mechanisms located in the IO legal order are the primary forum where access to justice should be realised, national courts must nevertheless play a secondary role where justice is denied at the institutional level. I will then demonstrate how PIL rules on choice of law and the recognition and enforcement of foreign judgments should be calibrated when coordinating between the national and IO legal orders. A carefully crafted PIL regime that balances the well-accepted boundaries of public and private international law can help ensure that an IO’s regulatory authority is respected at the same time as realising victims’ access to a court.

2 The functions of PIL

To understand how PIL mechanisms can be used as a tool to manage the regulatory arbitrage in disputes involving IOs, it is important to consider the key functions of PIL. In this section, it is shown that based on its classical coordinating function, PIL has great potential to also manage regulatory gaps across legal orders, including between the national and IO legal orders.

PIL rules (also referred to as conflict of laws) are triggered when a civil dispute cross-cuts legal orders and has connections with more than one legal system. In such situations, a dispute is said to possess a ‘foreign element’. A foreign element can manifest in different ways, such as

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4 For a brief description of PIL’s three elements, especially in the transnational setting, see H Muir Watt, ‘The Relevance of Private International Law to the Global Governance Debate’ in H Muir Watt and DP Fernández Arroyo (eds), Private International Law and Global Governance (OUP 2014), 1. All texts on PIL would have a focus on these main components. See for example, R Mortensen, R Garnett, and M Keyes, Private International Law in Australia (2nd edn, LexisNexis Australia 2011), 3; for a leading and comprehensive discussion on PIL (especially in the UK context), see generally, P Torremans, U Grušić, C Heinze, L Merrett, A Mills, C Otero Garcia-Castrillón, ZS Tang, K Trimmings, and L Walker (eds), Cheshire, North & Fawcet: Private International Law (15th edn, OUP 2017); for a comparative discussion, see J Basedow, G Ruhl, F Ferrari and PA de Miguel Asensio (eds), Encyclopedia of Private International Law (Edward Elgar Publishing 2017).

5 PIL is also known as conflict of laws in some jurisdictions, such as in the US: see M Davies, A Bell and P le Gay Brereton, Nygh’s Conflict of Laws in Australia (8th edn, LexisNexis 2010), 4. The term PIL is used in this work for I adopt an internationalist perspective on the subject. For an excellent discussion on the evolution of PIL, and for an understanding of the theoretical perspectives, see A Mills, The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law (CUP 2009), 26-73.

6 See Mortensen, Garnett, Keyes (n 4), 3.
due to the territorial or personal links of a dispute to more than one legal order. When a dispute has a foreign element, PIL addresses three things. First, it decides which court can adjudicate the dispute (adjudicative jurisdiction or competent court). Second, it provides rules on whether the merits of the dispute will be resolved under the substantive law of the state of adjudication (lex fori) or under the law of another state having a connection to the dispute (choice of law or applicable law). And third, it sets out the requirements under which the courts of one legal order will recognise and enforce a judgment rendered in another (recognition and enforcement).

At the micro-level, PIL rules seek to reduce the risk of inconsistent treatment of disputes across legal orders. Such an inconsistency of treatment is anathema to the effective administration of justice. Inconsistencies cause inefficiencies in the administration of justice by potentially resulting in parallel proceedings, conflicting judgments, and the relitigation of claims. Through its three components, PIL seeks to ensure that disputes having a foreign element are adjudicated efficiently and in line with party expectations. A robust PIL regime thus ensures that transnational disputes are resolved justly.

What is of immediate relevance is not only the role of PIL at the micro-level, but the functions it performs in a macro sense. Below, I show that PIL coordinates regulatory authority in transnational settings hand-in-hand with public international law. It aims to provide a stable, pragmatic and workable regime to help allocate regulatory authority across legal orders internationally (2.1). When performing that internationalist function, I show how PIL has

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8 For a good description of these three elements, see SC Symeonides, Choice of Law (OUP 2016), 1-2.
9 Ibid.
10 Ibid.
11 Mills (n 5), 22-3.
12 That parallel proceedings are to be avoided as a matter of comity is now accepted wisdom, making the forum non conveniens doctrine an aspect of international comity: see 472900 BC Ltd v Thrifty Can Ltd [1998] 168 DLR 4th 602, para 32.
13 Such an eventuality is to be avoided, and PIL (and the rules of comity) are resorted so as to avoid friction in the administration of transnational disputes: see T Schultz and N Ridi, ‘Comity and International Courts and Tribunals’ (2017) 50 Cornell International Law Journal 3, 578-608, 586; for early jurisprudence, see Belgenland (1885) 114 US 355, 363 (where the doctrine of forum non conveniens was used to show respect to foreign states in admiralty cases).
14 Mills (n 5), 3-4.
15 Ibid.
potential to be a manager of a regulatory arbitrage. I argue that this potential can and must be
harnessed to manage the prevailing arbitrage between the national and the IO legal orders (2.2).

2.1 The classical function - Coordinating regulatory authority internationally

PIL’s typical function is to coordinate regulatory authority across legal orders. Indeed, it has
performed this function for centuries. As has been said, ‘[t]he Conflict of Laws approach to
international regulatory coordination has a long and established pedigree. It was developed and
legitimized over centuries into a universally recognized body of law in the context of the need
for stable trade relations’.16 When compared to public international law, PIL pursues relatively
modest goals. Instead of seeking uniformity in substantive law, it aims to allocate regulatory
authority across legal orders. Riles has observed:

[PIL] rejects at the outset full international substantive legal harmonization as a utopian
pipe dream. Rather, it accepts that regulatory pluralism, and even regulatory
nationalism are facts of life, and sets for itself the more modest goal of coordination
among different national regimes. In other words, the approach of this body of law is
not to define one set of rules that apply for all, as in the case of public international law,
but rather to define under what circumstances a particular dispute or problem shall be
subject to one regulatory authority or another.17

PIL allocates regulatory authority by undertaking issue-by-issue determinations pertaining to a
dispute in terms of who may adjudicate a claim and which legal order ought to supply the rules
relevant to determine it.18 However, what drives PIL is not just doing justice in individual cases,
but allocating regulatory authority across legal orders internationally. This it does based on
what are referred to as ‘connecting factors’. As Mills has explained:

Private international law rules do not merely address the problem of reducing the
potential for inconsistent legal treatment of disputes. They are not just concerned with
achieving a rational or orderly division of regulatory authority. They also involve the
normative question of how that ordering of regulatory authority should be achieved.

Journal, 63, 89.
17 Ibid, 89.
18 Ibid, 90.
The selection of a particular rule of jurisdiction or choice of law rule is not just a recognition that … other legal orders may be more justly applied to a dispute. It is also a determination of which legal order should govern; it implies that the connecting factor adopted in that choice of law rule should be the foundation of the division of the regulatory authority of states (emphasis added).\textsuperscript{19}

It is the connecting factor that eventually determines how the three components of PIL are calibrated, and consequently, how PIL allocates regulatory authority across legal orders. The method used to determine the so-called connecting factor in PIL is in principle no different from how the regulatory authority of states is established in public international law.

Public international law conceives of the world as divided into states. Each state possesses the freedom to legislate, adjudicate and enforce laws in relation to persons, things or subject matters having a territorial connection to it, of course subject to any restraints provided for by international law.\textsuperscript{20} As will be observed at sections (4-6) in greater detail, in each aspect of PIL, whether competent court, choice of law or recognition and enforcement, ‘territoriality’ constitutes a principal connecting factor too. If transnational civil disputes are to be properly and satisfactory resolved, the outer limits of public international law need to be respected. That is why, when calibrating its three components, PIL pays proper regard for the prescriptive/legislative and enforcement jurisdiction of distinct legal orders in public international law.\textsuperscript{21} Each of PIL’s three aspects cumulatively perform an inherently internationalist function of allocating regulatory authority across legal orders in the context of administering transnational civil justice.

Evidence of PIL’s internationalist function and its international character is the increased treatification of PIL predominantly through the work of the Hague Conference on Private

\textsuperscript{19} Mills (n 5), 22-3.
\textsuperscript{20} See H Fox and P Webb, \textit{The Law of State Immunity} (3rd ed, OUP 2015) 73-4. In addition to territoriality, a state’s jurisdiction may be based on certain other grounds, i.e., nationality, protective and universal jurisdiction. As the authors explain, ‘nationality as a basis may be active or passive; the first relates to jurisdiction based on acts performed by the nationals of a State and the second to acts suffered as victims by nationals of a State’. The protective principle allows a state to exercise jurisdiction over foreigners outside its territory ‘to protect its own governmental functions’. Universal jurisdiction, by far the most controversial is said to entitle a state to exercise jurisdiction over a limited number of acts, such as piracy on the high seas.
\textsuperscript{21} A Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 British Yearbook of International Law 1, 187-239, 195.
International Law (‘HCCH’). Some argue that the public internationalisation of PIL is nothing but states agreeing to harmonise their particular domestic conflicts regimes. However, the better view is that PIL is already inherently international, and is now increasingly being translated into treaty form due to demands placed by the increased movement of people, goods and services across borders requiring more certain and predictable PIL rules. While the debate on whether PIL is part of international or domestic law continues, PIL’s inherently internationalist function when coordinating regulatory authority in transnational disputes cannot be doubted.

When playing its coordinating and allocative function, PIL’s real strength lies in its ability to slice regulatory authority with great specificity, without expecting substantive harmony in the law, and at the same time respecting public international law limits. When it comes to the resolution of disputes having a foreign element, PIL can provide for a powerful tool to address overlapping or conflicting claims to regulatory authority in a systemic fashion. PIL’s coordinative capacities and pragmatism mean that it can also perform the function of managing a regulatory arbitrage across legal orders by carefully balancing the interests of each order.

2.2 The potential function – PIL as a manager of regulatory arbitrage

Beyond its coordinating function, PIL has the potential to be a potent tool for managing regulatory arbitrage. The language of a regulatory arbitrage is most frequently used in the context of regulatory races between states to ease regulatory standards (such as banking, financial, environmental, labour standards) to attract business and investment by seeking to distinguish their jurisdiction as less burdensome than others. An example would be a bank based in New York moving its entire operations to Kazakhstan following the easing of regulatory burdens on banks in that state. The aim of the move is to rout the bank’s transactions

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23 While PIL was historically considered an aspect of international law, on a narrow view, it is considered to be part of domestic law: see Davies, Bell and le Gay Brereton (n 5), 4.
24 Mills (n 5), 216.
through Kazakhstan in order to escape the application of US law.\textsuperscript{26} As is increasingly discussed by legal scholars, PIL has the potential to place a bar on such endeavours.\textsuperscript{27} If a PIL regime is designed in a way that results in the disapplication of Kazakh law to the relevant transactions of the bank in a dispute being heard before US courts (where claims against the bank are likely to be raised), the exploitation of the arbitrage is readily defeated. PIL will help determine which state’s regulatory authority ought to govern the particular dispute at hand. It thus will be PIL that can prevent actors from ‘arbitrarily’ choosing a regulatory regime.

A sophisticated PIL regime can slice regulatory authority with intense precision. This is opposed to making blanket determinations of the scope of the regulatory authority that one institution based in one legal order has over another. By dividing questions of adjudicative jurisdiction and applicable law, PIL ensures that while a court may be competent to take jurisdiction over a particular dispute, it still may decide the merits based on the law of a different legal order, given the particular connecting factors at play.\textsuperscript{28} In such a case, regulatory authority is neatly divided. While the courts of one legal order are considered competent to adjudicate the case, the prescriptive jurisdiction of another legal order is also given effect. In doing so, private rights are enforced, the exploitation of a regulatory arbitrage avoided, and the prescriptive jurisdiction of another not compromised.

Where a regulatory arbitrage exists, PIL can thus help secure the enforcement of private rights, and yet respect the regulatory authority of the institutions based in different legal orders. The law of conflicts is a central piece of the global law governance regime because ‘it is the switchboard that routes agreements and rights for interpretation and enforcement.’\textsuperscript{29} PIL can play a role in addressing the exploitation of a regulatory arbitrage through sophisticated and carefully calibrated PIL techniques across legal orders.\textsuperscript{30} PIL’s full potential in managing the exploitation of regulatory gaps has not however been fully realised for various reasons. These

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\item[26] Riles (n 16), 96.
\item[27] Ibid.
\item[28] As has been said, ‘[o]ne of the fundamental starting insights of Private International Law is that questions of jurisdiction and questions of choice of law are divisible inquiries. What this means is that simply because a given regime has the power to govern a certain issue (just because it has jurisdiction) does not mean that it should do so (choice of law). In certain circumstances, it might be more appropriate for it to defer to another regulatory authority and to apply that authority’s rules if, for example, the parties have stipulated among themselves that a different law should apply to their transaction and it is appropriate to defer to the will of the parties, or again if another regulatory authority has a greater interest in the matter’: see ibid.
\item[29] Ibid. 88.
\item[30] Ibid, 91-2.
\end{enumerate}

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include the notion of PIL as a highly technical body of law having relevance to a limited number of legal areas, such as family or commercial law. Horatia Muir Watt has argued that PIL has had a ‘tunnel vision’ about the problems that the regime can address and not grasped its full potential.

It is time for PIL’s potential to be fully realised. Given its inherent strengths, there is no better vehicle than PIL to secure the enforcement of private rights when there is a risk that such rights may remain unenforced due to regulatory gaps. We are not here concerned with international banking or finance law, but with the arbitrage in the regulation of IOs. PIL can equally play a role in managing the latter. Regardless of the context within which it arises, the basic character of an arbitrage remains the same. The conditions that classically give rise to a regulatory arbitrage are said to involve the existence of an ‘ecosystem of diverse regimes and types of law, which are not organized into any clear, coherent, hierarchical whole. International law and state law, state law and non-state law, and differing bodies of national law … all contribute to blind spots and overlap between pieces of regulatory authority’. That precise predicament was exposed in chapter 1. By playing its coordinating and allocative role, PIL can well manage the arbitrage in the regulations of IOs.

3 The ability of PIL to coordinate between institutional and national legal orders

Before setting out in more detail how PIL mechanisms can be used in the IO context (in sections 4-6 below), this section will show that from a conceptual point of view, there are no obstacles to PIL coordinating between institutional and national legal orders. Admittedly, PIL rules have traditionally coordinated the relationship between legal orders with reference to state-based legal orders. Some may thus argue that legal orders that are governed by distinct normative frameworks are not comparable. Approaching this conceptual issue from the perspective of legal pluralism (3.1) and ‘subjecthhood’ (3.2), I will show that PIL is an appropriate vehicle to mediate the relationship between the national and the institutional orders.

31 Ibid, 99-100.
32 see Muir Watt (n 4), 1.
33 Riles (n 16), 72.
3.1 Institutional and national legal orders – a legal pluralist approach

PIL conventionally performs its coordinating and allocative function across state-based legal orders. As a result, PIL’s relevance in coordinating between the IO and national legal orders needs to be clarified. The law governing IOs may seem to be a less sophisticated and developed body of law than state-based orders; and there is great variation in the scope, nature and operations of IOs. How can PIL coordinate between such seemingly unequal legal entities?

The answer to that question commences with establishing that IOs possess their own legal orders. If the bodies of law between which the coordination is to take place are of the same nature, there are – from this perspective – no conceptual obstacles to coordination between them. As in the conventional setting between domestic legal orders, coordination would then occur between two similar legal entities, i.e. between two legal orders.

That IOs possess their own legal orders underpinned by their constituent treaties is well-accepted. Treves has noted:

The existence of internal legal systems of international organizations, distinct from the domestic legal systems of member States, as well as from the international legal system, has been recognized for some decades. These legal systems are based on the constitutive instruments of the organization. Such instruments do not function only as treaties establishing obligations for the member States. The implementation of these obligations creates the factual conditions for applying the constitutive treaty as the constitution of the organization, which is to say the basic rule upon which the internal legal system of the organization is built. … This system of rules should, nonetheless, be seen as separate from general international law because … one could say, because this system has a specific social basis distinct from that of the international legal system.36

Once brought into existence, the IO legal order forms its own autonomous order and possesses the regulatory authority based on the terms of its constituent instruments.37 For example, the

37 As Schermers and Blokker (n 3), section 1145, explain: ‘The constitution sets the pattern for the legal order of the international organization. Further rules develop from the operation of its organs. The power of these organs
UN’s order is created by the UN Charter, the World Trade Organisation’s legal system is based on the constituent instruments of that organisation, and so on. One could refer to an IO’s legal order as its domestic legal order containing organs roughly comparable to states, e.g., a law making and executive organ. This does not mean that the regulatory competences of an IO and state legal order are the same. Of course, the regulatory competences of an IO’s legal order are functionally delimited when compared to that of states. Mosler points out that the legal order of IOs is ‘limited to the exercise of the functions entrusted to the organization by its constituent treaty’. And Schermers and Blokker posit that ‘[c]onstitutions of international organizations are partial and functional’.

Whatever the scope of their regulatory capacities may be, IOs possess their own legal orders worthy of recognition by other legal orders. The national legal order is thus required to give full recognition to the existence of the institutional legal order as an independent legal system. Conversely, just like states are to recognise the IO legal order, the organisation itself is under obligations to respect the laws and regulations of the host state, or any other state where it may perform its work. Notably, the grant of privileges and immunities to IOs does not mean that IOs are exempted from complying with national laws. All they ensure is that the functional independence of an IO is not compromised by subjecting it to a small category of national laws, to take decisions stems from the constitution. From this common source, a hierarchy of the various legal rules is developed, and a single legal order thus created.’

38 It was pointed out in *Villamoran v Secretary-General of the United Nations* (UNDT/2011/126, 12 July 2011), paragraph 29, the UN legal order consists of constitutional characteristics. At the top of the hierarchy of the organization’s internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General’s bulletins, and administrative instructions.


40 ‘As is suggested by their charters, a tripartite structure is common to many IOs. Many have a plenary body consisting of the full membership, charged with broad powers to discuss policy…; an organ of more reduced membership capable of exercising some select powers, particularly of implementation…; and a staff or secretariat of ostensibly “independent” international civil servants drawn from, and broadly representative of, member states and headed by a “Secretary” or “Director” general’: see JE Alvarez, *International Organizations as Law-makers* (OUP 2006), 9.


42 Schermers and Blokker (n 3), section 1341.


45 See Section 7(b), 7(c) and 9(b) of the UN-US Headquarters Agreement (n 44).
such as a state’s taxation laws. What is clear is that the national and institutional legal orders are required to grant each other’s acts mutual respect, and recognise them within their own legal orders.

Further, such a mutual recognition between the national and IO legal orders is to be seen as occurring between orders that exist as equals for PIL purposes: making a PIL-based coordination conceptually possible between these legal orders. Adopting a legal pluralist stance, both legal orders can be said to coexist in a heterarchical manner. The IO legal order is not to be perceived as hierarchically linked to other legal orders. Conflicts of norms between IO law and state law are thus not resolved by some sort of a ‘primacy clause’ – which makes a different kind of coordination necessary.

‘Legal pluralism is a broad term to express the idea that a society often has a number of legal orders, of which state law is just one – an important one but not the only one.’ In today’s globalised world where law-making, adjudicating and, to a more limited extent, enforcement, occurs in both state and non-state based legal orders, differing legal orders exist side-by-side and without a ranking relationship. As Michaels puts it, ‘the irreducible plurality of legal orders, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position transcending the differences’ is a reality today. Along the same lines, Berman has said:

[I]t is now clear that the global legal system is an interlocking web of jurisdictional assertions by state, international, and non-state normative communities. And each type of overlapping jurisdictional assertion (state versus state; state versus international body; state versus non-state entity) creates a potentially hybrid legal space that is not easily eliminated.

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47 For an overview of this approach, see A Bianchi, International Law Theories: An Inquiry into Different Ways of Thinking (OUP 2016), 228-45.

48 See DJ Galligan, Law in Modern Society (OUP 2006), 162.

49 Schiff Berman (n 34), 1160-1.


51 Schiff Berman (n 34), 1159.
IO and national legal orders coexist, and run in parallel in this so-called hybrid space.\textsuperscript{52} This pluralist relationship is reflected in an IO’s status as a ‘subject’ of public international law. As a subject of international law, possessing its own legal order, an IO is a functionally-similar entity to a state. As was stated above, the IO legal order creates organs roughly analogous to those present in states. The functional similarities between states and IOs are not just limited to appearances. Increasingly, IOs have been performing state-like functions too. Jenks observed that international law has outgrown the limitations of a system consisting essentially of rules governing the mutual relations of States and must now be regarded as ‘the law of an organised world community, constituted on the basis of States but discharging its community functions increasingly through a complex of international and regional institutions’.\textsuperscript{53} Scholars including Sarooshi, note that IOs increasingly exercise ‘conferred sovereign powers’;\textsuperscript{54} and the global administrative law and the international public authority movements, when suggesting ways to make IOs accountable, show the inherently public/state-like activities that IOs now engage in.\textsuperscript{55} IOs and states are functionally similar as subjects of international law possessing distinct legal orders. This underlines that from a public international law perspective, the legal orders of IOs and states are considered to coexist in a pluralist manner.

As a consequence, IO and national legal orders are already required to grant each other mutual recognition through treaty law. And such mutual recognition occurs between functionally equal orders for PIL purposes.\textsuperscript{56} It is not surprising that real or perceived claims to the exercise of regulatory authority between IOs and states can arise in such circumstances. When legal orders co-exist, even if they are running in parallel in a so-called hybrid space, a method is needed to coordinate regulatory authority between them. A PIL approach is classically the body of principles adopted to mediate their relationship.\textsuperscript{57} A leading commentator has said that the ‘three classic legal doctrines often grouped together under the rubric of conflict of laws –

\begin{footnotesize}
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\item Ibid, 1163; Michaels (n 50).
\item Jenks, (n 1), 25; for more recent work on the public authority exercised by IOs see A von Bogdandy, R Wolfrum, J von Bernstorff, P Dann, and M Goldmann (eds), \textit{The Exercise of Public Authority by International Institutions: Advancing International Institutional Law} (Springer 2010).
\item D Sarooshi, \textit{International Organizations and their Exercise of Sovereign Powers} (OUP 2007), 15.
\item See Introduction.
\item Other commentators have also drawn similar conclusions in respect of the co-existence of the national and international legal orders: see Y Shany, \textit{Regulating Jurisdictional Relations Between National and International Courts} (OUP 2007), 199-200.
\item For a PIL approach to public international law fragmentation, see R Michaels and J Pauwelyn, ‘Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law’ (2012) 22 Duke Journal of Comparative & International Law, 349.
\end{enumerate}
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jurisdiction, choice of law, and judgment recognition – are specifically meant to manage hybrid legal spaces’. 58

Indeed, the application of PIL to coordinate the relationship between IO and national legal orders was perhaps first mentioned as early as 1962. Jenks suggested:

we may have to broaden the concept of the conflict of laws as generally understood ... As international law evolves from a law among States towards the common law of mankind, the conflict of laws will increasingly embrace conflicts between legal systems some of which are not the law of particular States but other types of legal system falling within the general framework of a world legal order. 59

Applying a PIL lens to coordinate between the IO and the national legal orders, Seyersted went one step further simply asserting that ‘formally, the internal law is a separate legal system for each organization, as national law is for each State. And it is via its rules on conflict of laws, not via incorporation in national law, that the internal law of an IGO is [to be] applied by national courts’. 60 Although Jenks or Seyersted did not provide a conceptual basis for their assertions, one may readily gleam a legal pluralist understanding which drove their respective views. It is suggested that the theoretical foundation for the application of PIL to coordinate the relationship between the institutional and national orders is best understood through the lens of legal pluralism. Where multiple legal orders now heterarchically coexist, PIL can indeed play a powerful role in coordinating between the plurality of legal orders.

3.2 IOs as legal subjects

A second perspective that explains the ability of PIL to coordinate between IO and national legal orders is to consider to what extent IOs are already subject to PIL and at the same time subjects of public international law. IOs are already subject to PIL rules in respect of their private transactions. How PIL would treat an IO is no different to how it would treat any other legal entity involved in a transnational dispute. 61 IOs are thus no strangers to the applicability of PIL to them. Moreover, as IOs possess their own legal orders and are accepted by public

58 Schiff Berman (n 34), 1228
59 Jenks (n 1), 27.
60 See Seyersted, (n 3), 55.
61 Ibid, 449.
international law as legal subjects as much as states are, they also should be treated functionally
similar to states in so far as the applicability of PIL is concerned. In this latter respect, just like
PIL coordinates between states, it may equally play a coordinating function between a state
and an IO.

Where IOs are simply a party to a transnational civil dispute, it is uncontroversial that they are
subject to PIL rules. Such transnational disputes can arise in the context of legal disagreements
with respect to an IO’s private legal relationships. Chapter 1 explained that IOs were always
envisaged to enter into relationships of a private law character. That is why they are granted
domestic personality. Placing the UN and its Specialized Agencies under binding treaty
obligations to provide appropriate modes of dispute settlement in relation to disputes of a
‘private law character’ presupposes that IOs will from time to time enter into private law
relationships. Moreover, the core function of international financial institutions is to engage in
inherently commercial activity. Thus, when performing their day-to-day activity, or on
occasions even in the performance of their mandates, IOs may enter into a broad variety of
private relationships and transactions. Such transactions include: entering into contracts of
service with their officials, employees, consultants, etc.; purchasing and leasing real property;
contracting for public utilities; taking out insurance policies for the protection of their property
and to cover liabilities towards third parties; possessing rights in intellectual property; charter
ships and aircraft; entering into financial transactions, including taking out and granting loans;
investing reserve funds and holding bonds, shares, treasury bills or negotiable instruments; to
name just a few. 62 All the aforementioned relationships, in their entirety or in part, constitute
classically private law transactions.

When disputes arise out of such transactions or legal relationships, transnational claims in
private law triggering the application of PIL rules can naturally arise. As an independent legal
person, when an IO sues or is being sued in a transnational dispute, its status as a public body
is irrelevant to the applicability of PIL as such. Just like any other legal person would be, an
IO is a ‘subject’ to PIL vis-à-vis cross-border civil and commercial disputes. As to the
application of PIL to IOs in such situations, Schermers and Blokker note:

62 Jenks (n 1), 36.
In many legal relations, private international law designates a particular national legal system (for example the law of the place where immovable property is situated or where a contract has been concluded), which can be applied to international organizations as well as to any other subjects of law.\(^{63}\)

It is only logical that in a transnational claim, where an IO is a plaintiff or a defendant, PIL will help determine whether the court seized has jurisdiction; what law applies; and whether judgments sought in one jurisdiction can be enforced in another. Chapter 1 showed how PIL techniques were applied in the context of recognising an IOs (AMF’s) domestic legal personality in one legal order (UK) based on the IO’s status in the law of another (UAE).\(^{64}\) This gave effect to the well-accepted rule of PIL that the status of a body corporate is to be derived from the law of the place of its incorporation. In that case, had the House of Lords not used PIL tools to recognise the AMF’s personality in the UK, the organisation would have been unable to access judicial protection to recover the proceeds of corruption from its former Director-General.\(^{65}\) In such instances, the institutional legal order subjects itself to the regulatory authority of a national system of law, already achieving a degree of coordination between the institutional and the national legal orders.

The elephant in the room in transnational disputes involving IOs is functional immunities, which goes to the exercise of a national court’s adjudicative jurisdiction where claims are advanced against IOs (see further section 4.2 below). As a matter of principle, one may conclude that each aspect of PIL can and does apply to IOs in so far as their private transactions are concerned. The dearth of case law specifically focusing on PIL in claims against IOs is not because of its irrelevance. It is because IOs do not tend to publish their practice with respect to their dealing with third parties, and most claims against IOs in national courts are dismissed based on IO immunities meaning that PIL rules are often not considered in any detail. Overall, the applicability of PIL in respect of coordinating the relationship between IO and national legal orders in respect of an IO’s private legal relationships may be readily assumed.

However, PIL’s role for IOs cannot be limited to private relationships. As stated in subsection 3.1 above, IOs and states are functionally similar as subjects of international law possessing

\(^{63}\) See Schermers and Blokker (n 3), section 1601.
\(^{64}\) See chapter 1, section 2.2.2.
\(^{65}\) See ibid.
distinct legal orders. Thus, PIL must take into account this functional similarity and broaden its applicability to IOs beyond private relationships. It should generally treat IO and national legal orders as two distinct orders, the regulatory authority of which is to be determined having regard to the degree of connection a dispute has to each of them. Such coordination is to take place in relation to any dispute – private or not – where the regulatory authority of a state or an IO may overlap or intersect.

Yet at the same time, an IO’s nature as a subject of public international law also needs to be reflected in how PIL is specifically applied. When an IO is party to a dispute, in contrast to other typically private legal entities, the issue of competent court, choice of law, and recognition and enforcement needs to take into account the international subjecthood of the IO. It needs to pay regard to its regulatory authority concerning each kind of dispute. How this can look like in practice, i.e., how PIL can be applied to IOs is a question of its application.

In sum, PIL can conceptually manage the regulatory arbitrage by mediating between the national and institutional legal orders. How this actually is to be done is by calibrating the three PIL components that properly reflect the division of regulatory authority between states and IOs. This task requires an analysis of the mechanics of PIL. In the remainder of this chapter, I establish how the three components of PIL ought to be calibrated in order to effectively coordinate between the legal orders at play. The aim is to ensure that PIL rules are designed in a way that respects the independence and interests of each legal order, but without compromising access to justice.

4 Adjudicative jurisdiction/competent court

Which court has the ability to decide a claim (possesses adjudicative jurisdiction) is a crucial procedural question for plaintiffs and defendants. In the absence of adjudicative jurisdiction, a court cannot decide a claim. If there are no courts possessing adjudicative jurisdiction to decide certain kinds of legal claims, then the right to access to court is undermined. Particularly, to determine adjudicative jurisdiction, we must distinguish between the rules on the existence of jurisdiction, and the rules on the discretion to exercise it. Claims against IOs are especially affected by the latter, i.e., the decision of a national court to exercise its jurisdiction that
otherwise exists.66 This is due – as this chapter contends – to IO immunities. Precise rules on when national courts should exercise jurisdiction over IOs constitute one of the most vexing questions in the regulation of IOs today.

This section suggests PIL rules on adjudicative jurisdiction concerning claims against IOs that should be implemented to manage the regulatory arbitrage to which access to justice becomes a victim. Working on the assumption that securing the right to a fair trial is a compelling reason to fight such an arbitrage, one way to combat it is by making the costs of denying justice high enough that the IO does not shirk its responsibility to ensure the provision of alternative means of dispute resolution at the institutional level. If alternative means exist, the need for national courts to take jurisdiction over an IO will not arise. Unfortunately for the victims of IO conduct, this is not the case, with private rights regularly remaining unenforced. Coordinating between the IO and national legal orders to make the cost of exploiting the arbitrage high enough becomes critical. How such coordination is achieved requires a focus on the following two aspects.

First, I focus on the rules around the existence of jurisdiction of national courts (4.1). In this subsection, I briefly explain the boundaries of jurisdiction in public international law (which PIL should respect) (4.1.1). I then outline the principal ways in which adjudicative jurisdiction specifically in PIL is established (4.1.2). I end the discussion by presenting the rules that ought to be the starting point for how jurisdiction is to be calibrated in claims involving IOs (4.1.3).

Second, I consider the rules around the exercise of jurisdiction where questions of IO immunity become highly relevant (4.2). I argue that if a jurisdictional regime that ensures the primary role of the institutional legal order to resolve claims against IOs is established, with national courts playing a secondary but pivotal role, the regulatory authority of each legal order is respected, without compromising on access to justice values. The cost for IOs of exploiting the regulatory arbitrage can only be made high enough if national courts are willing to use their discretion to take jurisdiction over an IO where there are institutional failures. I end this section by suggesting a PIL regime that creates such a precise ordering of regulatory authority.

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66 In some early jurisprudence, there has been some confusion about the issue of adjudicative jurisdiction in terms of its existence and exercise. That jurisprudence is discussed in A Reinisch, *International Organizations Before National Courts* (CUP 2000), 102-14.
4.1 The existence of adjudicative jurisdiction – grounds for jurisdiction

In any claim against an IO before a national court, the first question asked is whether the court possesses the jurisdiction to hear and determine the claim. The presence of jurisdiction over an IO in a given case is to be determined by reference to the general rules of adjudicative jurisdiction.

Generally, the concept of adjudicative jurisdiction in PIL can be said to be an implementation of a state’s prescriptive and enforcement jurisdiction in public international law. PIL respects (or should respect) the outer limits of ‘jurisdiction’ in public international law, and uses that as a reference point for adjusting its own connecting factors when guiding where transnational civil disputes are best resolved. It is helpful to consider the broad concept of ‘jurisdiction’ in public international law first (4.1.1).

I then move on to discuss adjudicative jurisdiction in PIL (4.1.2). Territoriality remains the key connecting factor when it comes to adjudicative jurisdiction in PIL and should form a key basis on which PIL rules on adjudicative jurisdiction are created. That being said, PIL jurisdiction can properly exist based on other connecting factors, such as the personality of a party or the pursuit of state interests that make a dispute proximate to the relevant legal order. In some situations, adjudicative jurisdiction may be calibrated to reflect those grounds of jurisdiction too.

4.1.1 Jurisdiction in public international law

When PIL calibrates the rules for adjudicative jurisdiction in transnational civil disputes (and for that matter its other two components), it does not do so in a vacuum. PIL has developed nuanced rules on adjudicative jurisdiction. Those rules are developed bearing in mind the limits provided by the broader notion of jurisdiction in public international law.

Jurisdiction in public international law is divided into prescriptive/legislative jurisdiction; enforcement jurisdiction; and adjudicative jurisdiction (better understood as a combination of prescriptive and enforcement jurisdiction). Prescriptive/legislative jurisdiction refers to ‘the limits on the law-making powers of [a state] — the permissible scope of application of the laws

67 Mills (n 21), 195.
68 Fox and Webb (n 20).
of each state.’ Enforcement jurisdiction refers to the coercive ability of state institutions (including courts) to engage in enforcement action, such as seizure of persons or assets.\footnote{Mills (n 21), 194.} Adjudicative jurisdiction (‘the limits on the powers of the judicial branch of government),\footnote{Ibid.} involves aspects of prescriptive and enforcement jurisdiction. Interpreting the law, and even judge-made law, are all aspects of prescriptive jurisdiction,\footnote{Ibid.} and enforcement action by the judiciary is an aspect of the exercise of a state’s enforcement jurisdiction.\footnote{Ibid.}

Public international law provides for various well-accepted bases of jurisdiction, with territorial jurisdiction being the primary basis. Conventionally, such a basis of jurisdiction recognises the state’s ability to exercise nearly plenary adjudicative jurisdiction within its own territory.\footnote{France v Turkey (1927) PCIJ Ser A, No 10 (‘Lotus case’), para 46.} More specifically, the scope of territorial jurisdiction may be defined as follows:

A state has jurisdiction to regulate within its territory, including in respect of events, persons or things in its territory (including cross-border events which are only partially in its territory), and, more controversially, external acts which have ‘effects’ within its territory.\footnote{Mills (n 21), 195.}

In a public international law sense, as a general rule a court’s jurisdiction will extend to determining claims over events, parties and things within its territorial reach. While prescriptive (and by extension adjudicative) jurisdiction can in principle be extraterritorial, the jurisdiction to enforce is strictly territorial. Taking enforcement action without a foreign state’s consent would be inconsistent with public international law notions of ‘jurisdiction’, being rooted in the concept of sovereignty. While territoriality provides for the primary basis of jurisdiction, nationality, the protective principle, and in a limited number of cases, universal jurisdiction, also may form valid bases of jurisdiction.\footnote{Fox and Webb (n 20).}

While the basic principles of jurisdiction in public international law can be readily stated, translating them into how they are operationalised in particular situations is not straightforward.

\footnote{France v Turkey (1927) PCIJ Ser A, No 10 (‘Lotus case’), para 46.}
This is especially the case in civil disputes. The rules of public international law that have been developed largely in the context of criminal law are rather rudimentary in general, and most problematic when it comes to the exercise of civil jurisdiction in particular. As Fox and Webb note:

There is … a surprising lack of certainty about the limitations which international law imposes on the exercise of jurisdiction by municipal courts in relation to civil proceedings; an uncertainty which exists with regard to the limits of civil jurisdiction over private parties, as well as over States [and equally IOs]. There is no general agreement as to the requirements of public international law with regard to the bases for the exercise of civil jurisdiction over private parties by States, although it seems likely that a court may not exercise jurisdiction where there is no significant connection with the forum…

With public international law of little practical assistance in civil cases, it is PIL that is responsible for providing nuanced rules for the existence and exercise of civil jurisdiction internationally. PIL, as is expanded upon below, also allocates regulatory authority in the sphere of its operation, i.e., the civil sphere, with reference to certain connecting factors that are primarily rooted in territoriality. This must not come as a surprise, for if PIL is to allocate regulatory authority effectively in a transnational sense, including in respect of claims against IOs, it must show appropriate regard for its public international law cousin. As I proceed with the development of adjudicative jurisdiction in so far as claims against IOs are concerned, it will be important to be specific enough for any proposals to be useful in practice, but at the same time the outer limits of public international law jurisdiction must be born in mind.

4.1.2 Adjudicative jurisdiction in PIL

Questions of jurisdiction in PIL become relevant in the resolution of civil claims that have a foreign element and transcend one legal order. In claims against IOs, a foreign element will always be present for the dispute in question is likely to have connections with the legal order of one or more national legal orders, as well as the institutional legal order. PIL has witnessed

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77 Ibid, 86.
78 Ibid.
a nuanced development providing for rules of jurisdiction with reference to the particularities of the parties to a dispute, its subject matter, or both of those things.

The basis for adjudicative jurisdiction can be founded on the following factors: consent; territorial proximity; proximity due to personality; proximity by virtue of state interest; and exorbitant jurisdiction (which is most controversial). While ‘proximity’ may be grouped into one connecting factor, due to the differences in how those connections come to pass, I treat them separately.

\[a)\] Consent

‘Consent’ is a well-recognised basis of jurisdiction in PIL. When the parties (especially the defendant) to a dispute submit to the jurisdiction of a national court, there is little controversy that the court would possess adjudicative jurisdiction to determine the claim in question as such. As Michaels observes:

[C]onsent is least problematical when the defendant submits to the jurisdiction during litigation. A defendant can consent to the jurisdiction either explicitly or implicitly, by pleading on the merits. … Prior consent, through a choice-of-court agreement, is in principle no different. A defendant who consents to the jurisdiction of a court cannot complain that the exercise of that jurisdiction violates its rights and interests, whether vis-à-vis the court or vis-à-vis the plaintiff.80

In practical terms, there is a close relationship between consent/submission to jurisdiction and waiver of any potential IO immunities. For the purposes of establishing consent based

\[79\] Indeed, exercise of extraterritorial civil jurisdiction has given rise to much controversy and debate. For a comprehensive analysis, see, International Bar Association, ‘Report of the Task Force on Extraterritorial Jurisdiction’ (IBA, Legal Practice Division 2008); the trend in jurisdictions such as the US (a significant centre for transnational litigation) is a presumption against extraterritorial civil jurisdiction: see for example, Kiobel v Royal Dutch Petroleum Co (2013) 569 US 108, No 10-1491; Morrison v National Australia Bank (2010) 561 US 247, No 08-1191; and for a claim raised by an IO, see RJR Nabisco Inc v European Community (2016) 579 US __, No 15-138.

\[80\] Michaels, (n 7), 18.
jurisdiction, it is assumed that IO immunities would exist. Submission to jurisdiction means that any potential IO immunities have no work to do and are thus presumed to be waived.

Submission can be established in various ways. If an IO initiates a proceeding in the courts of a particular state, then it cannot later seek to undermine the jurisdiction of the courts of that state. Similarly, if an IO submits to a court’s jurisdiction by arguing on the merits of a complaint, jurisdiction would exist, with any potential IO immunities considered waived. Where an IO enters into a choice of forum agreement, consent based jurisdiction is also established, and any potential immunities are inoperable as impliedly waived. In this respect, the provisions of the 2005 Hague Choice of Court Convention (‘Choice of Court Convention’) implements a robust jurisdiction and recognition and enforcement regime where parties have entered into a choice of forum clause in their contracts. Where such a forum selection clause exists, the selected court is to take jurisdiction, and the resulting judgment must be enforced. The Choice of Court Convention is a prime example of the public internationalisation of PIL. This regime aims to realise party expectations, and in doing so promotes the principle of ‘party autonomy’, being a concept that now perhaps is gradually assuming the character of a connecting factor in its own right. Treating a choice of forum clause as a waiver of immunities ought to be the correct approach. Adjudicative jurisdiction of a court would exist where an IO and a private person enter into a choice of forum clause – with

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81 This by no means should mean that IO immunities actually exist in a given case, a matter that would need its own independent analysis (see section 4.2 below).
82 For a discussion of waiver and submission to jurisdiction by IOs: see E Chukwuemeke Okeke, Jurisdictional Immunities of States and International Organizations (OUP 2018), 313-8.
83 Ibid, 314.
84 However, appearance before a court just to contest jurisdiction does not amount to waiver: see United States Lines Inc v World Health Organization (30 September 1983, Intermediate Appellate Court, Fourth Civil Cases Division), 107 ILR 182.
86 Convention on Choice of Court Agreements (opened for signature 30 June 2005, entered into force 1 October 2015) 44 ILM 1294 (‘Choice of Court Convention’).
87 See ibid, Article 1(1), Choice of Court Convention. Article 1(2) and (3) of the Choice of Court Convention creating a broad scope. However, as a sign of protection of the weaker party, it does not apply in employment cases: Article 2(1)(b).
88 See ibid, Article 5 of the Choice of Court Convention (the taking of jurisdiction); and Article 8 (on recognition and enforcement). See Article 1(2) and (3) of the Choice of Court Convention (n 86) creating a broad scope. However, as a sign of protection of the weaker party, it does not apply in employment cases: Article 2(1)(b).
89 For a discussion on party autonomy in PIL and how it should be seen as consistent with the rise of the individual in public international law, see generally, R Gulati, ’Resolving Dual and Multiple Nationality Disputes in a Globalized World’ (2014) 28 Journal of Immigration, Asylum and Nationality 1, 27-45, 41-2; for a very recent work on the issue, see A Mills, Party Autonomy in Private International Law (CUP 2018).
any potential IO immunities an irrelevancy.\textsuperscript{90} Similarly, where a choice of arbitration clause exists, a relevant national court would possess supervisory jurisdiction over the conduct of the arbitration for any potential immunities should be considered waived in such circumstances too.\textsuperscript{91}

While a consent/waiver based jurisdiction seems instinctively attractive to establish adjudicative jurisdiction, this ground is only of limited assistance to victims because IOs generally refuse to submit to national jurisdiction. Moreover, courts have tended to require an IO’s unequivocal submission to jurisdiction making it difficult to establish waiver.\textsuperscript{92} Overall, it is now assumed that consent based jurisdiction will exist where an IO initiates proceedings; contests the merits; enters into a choice of forum or arbitration clause, or otherwise expressly waives any potential immunity that it may possess.

\textbf{b) Territorial proximity}

Territoriality is the principal way in which a dispute becomes proximate to a legal order, whether through the location of the parties, the subject matter of a dispute, or both of those things.\textsuperscript{93} Here, public international law and PIL notions of adjudicative jurisdiction are coextensive, although PIL operates in a more limited sphere. As to the dominance of territoriality, and how this connecting factor manifests, Michaels states:

\begin{quote}
Territoriality is an important – for many, the dominant – basis of jurisdiction. The most important territorial connection in the law of jurisdiction is a party’s domicile … or its habitual residence. … In the common law, mere presence in the jurisdiction is sufficient as a ground for jurisdiction. … Many bases of specific jurisdiction are also based on a
\end{quote}

\textsuperscript{90} As a response, IOs now tend to avoid entering into choice of forum agreements: see the discussion in Chukwuemeke Okeke (n 82), 317.

\textsuperscript{91} The limited number of cases on point support the conclusion that an arbitration clause amounts to submission in any related proceeding before a court: see \textit{French Court of Appeal} (19 June 1998, Paris) Revue de l’Arbitrage 343; and \textit{International Tin Council v Amalgamet} (1988, Supreme Court of New York) 138 Misc 2d 383; 524 NYS 2d 971; but see \textit{Groupement d’Enterprises Fougerolle v CERN} (21 December 1992 Swiss Federal Tribunal) [1996] 102 ILR 209 (where a Swiss court did not imply a waiver based on the presence of an arbitration clause).

\textsuperscript{92} See the views of the Canadian Supreme Court requiring express waiver by the World Bank for its immunity to be considered waived: \textit{World Bank Group v Wallace} [2016] SCC 15, paras 90-1.

\textsuperscript{93} Michaels (n 50), 19.
certain place – the place of conduct or of injury for torts, the place of entering into a contract or of performance for contracts, and so on.\textsuperscript{94}

Evident from the above are the concepts of general (or personal) and specific (or subject matter) jurisdiction, with territorial proximity to the dispute being a common feature of both those bases of jurisdiction. General jurisdiction is ‘party-related and is comprehensive – it exists, untechnically spoken, at the defendant’s home.’\textsuperscript{95} It is essentially established based on the presence of the party on the territory of the concerned state.\textsuperscript{96} On the other hand, specific jurisdiction is based on a connecting factor and limited to issues related to this factor, for example jurisdiction in tort would exist at the place of the tort, or place where damage was sustained; in respect of contract, the place where the contract was made, a breach of contract occurred, place of performance, or one or more of those things (place of performance now seems to be the dominant view);\textsuperscript{97} in respect of property, the place where moveable or immovable property is located, and so on.\textsuperscript{98}

As regards an IO, which takes the form of a body corporate in domestic law,\textsuperscript{99} it is considered to be ‘present’ for PIL purposes where the IO is headquartered. That IOs are headquartered on state territory is well-accepted. As Judge Ago pointed out:

\begin{quote}
[An] international organization is like a State, a subject of international law, but it is one which enjoys limited international legal capacity, and in particular, unlike a State, it is a subject of law which lacks all territorial basis. Its ‘establishment’ in the territory
\end{quote}

\textsuperscript{94} Ibid, 19. There is some controversy whether mere ‘presence’ on the territory can be a sufficient basis to constitute an adequate territorial nexus. However, ‘presence’ is a well-accepted basis for the existence of adjudicative jurisdiction (in common law states). However, any excesses may be dealt with at the stage where a court uses discretionary criteria relevant to determine whether jurisdiction should be exercised in a given case: Mills (n 21), 201.

\textsuperscript{95} Michaels (n 50), 19.

\textsuperscript{96} Different manifestations of presence are ‘resident’, or ‘at home’ in the territory: Mills (n 21), 202.


\textsuperscript{98} Michaels (n 50), 19; Mills (n 21), 202.

\textsuperscript{99} See the discussion on IOs and domestic legal personality carried out in chapter 1, section 2.2.2.
of a given State is therefore a condition sine qua non of its actually functioning as an organization, carrying on its activities and fulfilling its objects and purposes.100

An IO frequently works across borders, so how does one determine where it is ‘present’ or ‘resident’ or ‘at home’? If one draws an analogy between IOs and other artificial entities for the purposes of determining where it is ‘resident’, a answer may readily be reached. As international body corporates, IOs are artificial entities whose ‘residence’ may be determined with reference to factors such as: where it has its statutory seat; where it may be incorporated; where it has its central administration; where it has its principal place of business.101 As IOs may be incorporated in more than one state (they usually would be), reference to its central administration and principal place of business/work would form the obvious way to determine an IO’s ‘residence’.

To determine where an IO’s central administration and principal place of business lies is a straightforward task. The headquarters of an IO would clearly be an IO’s place of central administration and principal place of business, for that is where it is geographically located and primarily conducts its work. Almost all IOs have a headquarters agreement the terms of which would be given domestic effect. Thus, if an IO is hosted in state A, then the courts of state A, in theory, would be able to exercise general jurisdiction over that IO.

To establish a court’s adjudicative jurisdiction in PIL, the safer course of action is to sue the defendant where it is ‘resident’. If suit is brought before a territorial court empowered to hear and determine the specific claim in question, adjudicative jurisdiction would exist. It is also worth noting that various PIL regimes moderate and calibrate this basic rule found in territoriality to protect weaker parties. For example, with respect to employees, considered as the weaker party when compared to the employer, they may be permitted to commence proceedings against the employer where they actually perform their work.102 This should not be considered as an undermining of the territorial principle, but as evidence of PIL’s ability to

101 See Article 4(2) of the Choice of Court Convention (n 86), which equally applies to IOs.
102 See Recast Brussels I Regulation (n 97), Articles 21 and 22.
calibrate its rules allowing for variations to ensure protection for employees (whether public or private sector employees), thus, enhancing access to justice.\textsuperscript{103}

c) **Proximity by virtue of personality**

Jurisdiction based on ‘personality’ (such as on the citizenship of a party) is another basis,\textsuperscript{104} though the relevance of personality-based jurisdiction in PIL has reduced significantly over time and is mostly relevant to the family law context.\textsuperscript{105} Jurisdiction based on personality is not inconsistent with public international law, for that sphere of regulation also allows for the presence of prescriptive (and equivalent adjudicative jurisdiction) based on nationality. Personality can be determined by reference to the citizenship of an individual, but increasingly, the concept of ‘habitual residence’ can be used to ground jurisdiction.\textsuperscript{106}

d) **Proximity through other state interests**

The governmental or state interests as the basis of jurisdiction can have a positive and a negative aspect:

Positively … a state may base its jurisdiction on the desire to make sure that particularly important regulatory interests are enforced. But state interests can also have a negative impact: another state’s strong regulatory interests may be a reason for a court to decline exercising its jurisdiction. In reality, it appears that courts are more willing to assert jurisdiction on the basis of their own state’s regulatory interests than to decline its exercise in view of such regulatory interests elsewhere. Indeed, such foreign regulatory interests can frequently be accommodated through application of the foreign state’s laws.\textsuperscript{107}

Under the state interest criteria, in theory, a broad jurisdictional scheme could potentially be implemented. Of special relevance to the present context is the regulatory interest of a state to ensure compliance with its human rights obligations generally; and the right to a fair trial

\textsuperscript{103} L Merrett, *Employment Contracts in Private International Law* (OUP 2011) 69, 87-91. As the author notes, the definition of an employee is to be understood broadly, focusing on the substance of the relationship; public and private sector distinctions are now largely irrelevant to the applicability of PIL; and finally, almost all employment disputes are classified as civil disputes to which PIL would apply.

\textsuperscript{104} Michaels (n 50), 20.

\textsuperscript{105} Davies, Bell and le Gay Brereton (n 5), 7.

\textsuperscript{106} For a detailed discussion of personal connections in PIL, see generally, Gulati (n 89), 27-45.

\textsuperscript{107} Michaels (n 50), 21.
specifically. Indeed, a state’s access to justice obligations could arguably provide for a basis for a jurisdictional duty on a state to ensure access to a court in respect of individuals within their territories or effective control. The pursuit of state interests through adjudicative jurisdiction could extend to providing access to a court concerning civil claims of all kinds. As Mills has noted, ultimately all civil claims are concerned with giving effect to the regulatory authority of a state in one way or another.

Whether a civil claim arises in the context of a claim in tort, contract, or for that matter as a result of the exercise of administrative power, the question of adjudicative jurisdiction (in its prescriptive sense) as such remains unaffected. In this latter sense, there exists some jurisprudence to suggest that national courts would adjudicate claims directly brought against IOs even where the subject matter is clearly of a public nature (taxation law) where the court possesses general jurisdiction over an IO, although the applicable law in such cases would be IO law (see section 5 below).

In recent times, a few prominent courts have engaged in an indirect judicial review of IO decision-making motivated by ensuring access to justice. Jurisprudence has arisen out of the actions of the UN Security Council sanctions committees. In such instances, the responsibility has been placed on member states (who implement IO decisions) to undo the harm caused to persons as a result of being placed on a particular UN sanctions list arbitrarily, and without the

108 See Mills (n 21), 216 and 224; a state’s obligation to ensure the right to a fair trial applies in respect of individuals on its territory or within its power or effective control: Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 10.
109 Mills (n 21), 199-200.
110 In cases of an administrative law nature, where judicial review of a decision made by a public authority is sought, significant 'respect and restraint' is shown towards the legal order whose laws are impugned; and deference may be given to the jurisdiction of the courts located in the territory of the place whose administrative decision making is challenged: see Fox and Webb (n 20), 85; and '[s]uch an attitude is dictated not by a rule of international law but by respect for the legislative jurisdiction of the other state because of its substantial connection with the subject matter': see A Lenhoff, 'International Law and Rules on International Jurisdiction' (1964) 50 Cornell L Rev 5, available at <http://scholarship.law.cornell.edu/dr/vol50/iss172>, 7.
111 See CECA c faillite des “Acciaierie e Ferriere di Bogaro” SpA (No 4621, 15 June 1968) (translation in excerpts in Journal des Tribunaux, Brussels), 403-5, where an Italian court took jurisdiction over the then European Coal and Steel Community against the bankrupt estate of an Italian steel company, applying Community law to the dispute.
benefit of a fair trial.\textsuperscript{112} This has meant that indirectly at least, the judicial review of arbitrary IO decision-making at the state level is made possible.\textsuperscript{113}

Whether an IO’s administrative decision is impugned directly (a claim is brought against the IO itself), or indirectly (through an action against an implementing member state), adjudicative jurisdiction ought to be present where the impugned administrative action has its impact. When engaging in judicial review of administrative decisions, a court’s role is relatively limited. As Finn points out:

A court undertaking judicial review is not being asked to resolve the administrative matter under review, in the absence of those questions of law which admit of only one resolution. Typically, the court supervises the decision-making process, and the outcome of a finding that this process was flawed is the remittal of the decision to the relevant administrative body to resolve the … matter in question, this time in accordance with law.\textsuperscript{114}

In claims of a public or administrative law character, while the role of national courts in terms of what relief they may grant should be limited, the proposition that they do possess adjudicative jurisdiction over IOs (should connections otherwise exist) is logically sound.

In sum, a broad adjudicative capacity (at least in a prescriptive sense) based on pursuit of state interests is consistent with the outer limits of public international law notions of jurisdiction.

\textsuperscript{112} For a comprehensive discussion on the UN Security Council Sanctions regime and issues of due process in terms of access to justice for individuals impacted by UNSC sanctions, see generally, D Hovell, \textit{The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making} (OUP 2016); for recent jurisprudence, including a potential ‘arbitrariness’ standard of judicial review in claims against IO decision making, see \textit{Al-Dulimi and Montana Management Inc v Switzerland} App no 5809/08 (ECHR, 21 June 2016), paras 52 and 146-7; See further, \textit{Nada v Switzerland judgment} App no 10593/08 (ECHR, 12 September 2012); and the much discussed Joined Cases C 584/10 P, C 593/10 P and C 595/10 P \textit{Commission and Others v Kadi} (18 July 2013, ECJ Grand Chamber) (‘Kadi litigation’) and the case of Joined cases C-402/05 P and C-415/05 P \textit{Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities} (3 September 2008, ECJ Grand Chamber) ECR 2008 I-06351. For a similar finding in a very different context (permissibility of judicial review of decisions of European Schools before German courts), see the English summary of the decision of the German Constitutional Court: ‘Effective protection of fundamental rights must be guaranteed where sovereign powers are transferred to supranational’ 2 BvR 1961/09 (Order of 24 July 2018, Press Release No 70/2018 of 29 August 2018) (Bundesverfassungsgericht, Germany), at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-070.html;jsessionid=DE5A5EF5D7B6193F832372CC08F0B859.1_cid393>. For a discussion about the judicial review of IO actions generally and the difficulties encountered, see generally, A Reinisch, \textit{Challenging Acts of International Organizations Before National Courts} (OUP 2010).

To ensure respect for the regulatory authority belonging to a foreign legal order, the choice of law determination, and the recognition and enforcement regimes in such cases will need to show considerable deference to the foreign legal order concerned (see sections 5 and 6 below). However, if any traditional form of connection is completely absent, this ground may be controversial due to its extraterritorial dimensions.

e) Exorbitant jurisdiction

A final form of jurisdiction in PIL is referred to as jurisdiction on extraordinary bases or exorbitant jurisdiction. Examples include: jurisdiction based on the plaintiff’s nationality; unlimited jurisdiction based on the presence of assets belonging to the defendant; and general jurisdiction based on a corporation’s ‘doing business’. Such a basis of jurisdiction is employed by some states with a view to ensure the right to a fair trial. As has been pointed out:

Exorbitant jurisdiction is closely related to so-called jurisdiction of necessity. Under this doctrine, a court may, exceptionally, assume jurisdiction even absent the normal connecting factors if this is necessary to provide the plaintiff with access to court. … Such necessity is thought to exist especially if no other competent court is available, either because other courts do not have or will not exercise jurisdiction, or because these other courts are incapable for other reasons of providing justice.

At its core, jurisdiction based on the ground of forum of necessity (in civil law jurisdictions, forum necessitatis) aims to prevent denials of justice. A denial of justice in a civil context can arise where a plaintiff does not have access to any court (accept the one seised) where the guarantees generally considered indispensable to the proper administration of justice can be realised, or the plaintiff has received a manifestly unjust judgment elsewhere. The concept of jurisdiction of necessity is motivated by fair trial concerns.

115 Michaels (n 50), 20-1.
118 Mills (n 21), 212.
119 Nwapi (n 117), 31.
The ground of jurisdiction by necessity however remains controversial. Whether or not this ground of jurisdiction firms up in the future remains to be seen. For the purposes of this thesis, it is suggested that the presence of adjudicative jurisdiction should be based on more traditional connecting factors. Fair trial concerns are best addressed when a court decides whether or not it should exercise its jurisdiction in a given case. It is by calibrating those discretionary aspects that the rules on adjudicative jurisdiction can properly manage the prevailing regulatory arbitrage.

4.1.3 Summing up the principles

Based on the preceding discussion, the approach I adopt suggests an adjudicative jurisdictional scheme that is based on well-accepted connecting factors in PIL when it comes to the rules on the existence of jurisdiction. The following rudimentary list sets out the circumstances where a national court would or could in principle possess the jurisdiction to determine a claim against an IO. The list is not exhaustive and attempts to capture the main basis of jurisdiction that would be open in designing and calibrating a PIL regime in the IO setting.

EXISTENCE OF ADJUDICATIVE JURISDICTION AGAINST IOs

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4.2 The exercise of jurisdiction – applying the forum non conveniens lens

It is one thing to possess the adjudicative jurisdiction to determine a claim, and yet another to exercise such jurisdiction. This section provides for a PIL-based framework for the exercise of jurisdiction over IOs. The discussion proceeds as follows. First, it is clarified that national courts possess adjudicative jurisdiction over IOs based on traditional PIL rules, and that this jurisdiction is possessed concurrently with institutional dispute resolution mechanisms (4.2.1).
Second, the decision whether a national court should exercise its adjudicative jurisdiction is really a question of ‘appropriateness’ of forum, a matter best understood through the lens of the doctrine of forum non conveniens. This step of the analysis applies the spirit of that doctrine to coordinate the relationship between the national and the institutional orders (4.2.2). I first explain how that doctrine operates generally (a). I then argue that the general rule should be that the IO legal order provides for the appropriate forum to address claims against IOs (b). This amounts to giving IOs the first opportunity to resolve claims against IOs (c). Finally, that general rule can be displaced should the institutional legal order fail to deliver justice. I will argue that where a fair trial is denied at the IO level, national courts must exercise their jurisdiction over the relevant IO for they are the appropriate court to do so. The doctrine of forum non conveniens provides for such a fair trial exception (4.2.3).

4.2.1 The existence of concurrent national and institutional jurisdiction

Focusing on the jurisdiction of a national court first, the PIL rules of adjudicative jurisdiction continue to apply to claims over IOs as they would to any other entity. As was discussed at section 4.1 above, consent, proximity (in all its forms), and potentially jurisdiction of necessity, would constitute the basis on which a national court can validly possess jurisdiction over an IO. The possession of IO immunities must not be confused with the existence of jurisdiction. They are different things. The existence of immunities does not remove the jurisdiction of a national court that would otherwise exist under the rules of PIL. As the ICJ held in the Arrest Warrant case, without the existence of jurisdiction, the question of immunities will not even arise. The Court explained:

the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction.  

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120 Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 24 (‘Arrest Warrant Case’), para 46.
121 Arrest Warrant Case, para 59; also Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening) ICJ Rep 2012 (‘Jurisdictional Immunities’), para 93.
Along the same lines, in the context of claims against IOs, in a civil claim pertaining to slander against the INTERPOL where the defendant IO contested the personal jurisdiction of US courts, Circuit Judge Ginsburg (as she then was) commented:

[w]ith regard to Interpol's arguments concerning sovereign immunity, the court found that its ruling was on the question of personal jurisdiction, of which immunity was not a facet. Where an appellate court simply rules on the question of personal jurisdiction, immunity is not a facet of that issue. Interpol also vigorously argues various issues of immunity. As my colleagues have noted, this action has yet to proceed on to the point where these may become relevant, and no question of official or sovereign immunity was tendered on appeal. We ruled simply on the question of personal jurisdiction, and it is generally accepted that immunity is not a facet of that issue.\(^\text{122}\)

Should a basis for national jurisdiction exist, immunities only affect how and when it is to be exercised, and not whether jurisdiction is present. It should be recalled that the very existence of an IO’s access to justice obligations (requiring the creation of alternative forums) is the flipside to jurisdictional immunities. The existence (or potential existence) of an alternative forum does not imply that a national court’s jurisdiction is removed, but simply another body is also capable of adjudicating a given dispute. Thus, together with the presence of jurisdiction at the national level, a relevant IO court (that does or should exist) also possesses concurrent jurisdiction with national courts in adjudicating claims within the sphere of their subject matter competence.\(^\text{123}\)

As to an IO’s jurisdictional capabilities, while IOs do not possess their own territories,\(^\text{124}\) they have their own independent legal orders that co-exist heterarchically with national legal orders

\(^{122}\)Steinberg (DC Cir 1981) 217 US App DC; 672 F2d 927. In the UK, the House of Lords have treated immunities as a substantive bar to jurisdiction: see Holland v Lampen-Wolfe [2002] 119 ILR 367, para 53 (per Lord Millett); however, that approach was not followed in Jones v Ministry of the Interior of Saudi Arabia and Lieutenant Colonel Abdul Aziz Case No A2 2003/2155 [2004] EWCA Civ 1394, para 81; the rule that immunities are only a procedural bar to the exercise of jurisdiction was also confirmed in the case of Jones and Others v The United Kingdom App nos 34356/06 and 40528/06 (ECtHR, 14 January 2014), para 164.

\(^{123}\)That national courts possess concurrent jurisdiction with the increasing number of international (and institutional courts) is now well understood: A Nollkaemper, National Courts and the International Rule of Law (OUP 2011), 27-8.

\(^{124}\)In exceptional situations, IOs can for temporary periods possess typically territorial jurisdiction when they become responsible for the administration of certain territories: see the discussion F Seyersted, Common Law of International Organizations (Martinus Nijhoff 2008), 99 (citing the example of the League of Nations’ role in the Saar Basin until 1935, jurisdiction of International River Commissions on navigation, and the administration of the UN in some former Italian colonies).
(see section 3). IOs have freedom to enact their own internal legal infrastructure in the sphere of their functional competence. An IO possesses what some call ‘inherent jurisdiction’ over its organs and officials. Such inherent control over internal affairs would be naturally required to maintain IO independence. Specifically in respect of jurisdiction over officials, a matter of current significance, IOs tend to create IATs and bestow them with the subject matter competence to adjudicate employment disputes raised by IO officials against an employer IO. In other spheres, IO jurisdiction is a direct consequence of what is often treaty action requiring IOs to provide for appropriate modes of dispute settlement in relation to claims advanced by private parties. For convenience, I refer to this as the access to justice ground of jurisdiction operating at the IO level. Some IO tribunals have referred to adjudication of private disputes at the IO level as a ‘jurisdiction of necessity’, given the difficulties third parties face in accessing justice in any other forum, be it at the national or at the general international level.

Existence of jurisdiction in respect of some subject matters at the IO level does not remove the adjudicative jurisdiction of a national court over an IO that otherwise exists under PIL rules. In principle, relevant national and institutional courts possess adjudicative jurisdiction over claims against IOs simultaneously. When jurisdiction is possessed by multiple courts in distinct legal orders in parallel, PIL helps determine which courts ought to exercise jurisdiction based on certain discretionary criteria captured by the doctrine of forum non conveniens.

4.2.2 Applying the doctrine of forum non conveniens: IO courts are the appropriate court

a) What is forum non conveniens?

Brand and Jablonski explain that forum non conveniens is ‘a doctrine applied in common law judicial systems allowing the court seised of a case the discretion to decline to exercise jurisdiction because the interests of justice are best served if the trial takes place in another

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125 See Seyersted (n 3), 120-25. The author suggests that an IO’s jurisdiction over its employees is exclusive (at page 167). This view cannot be correct because the jurisdiction of national courts is not removed just because a defendant happens to be an IO. Writers have seemingly been confused by the issue of the presence of adjudicative jurisdiction and the applicable law in staff disputes. Such inherent jurisdiction of an IO over its organs and officials is also referred to as ‘organic jurisdiction’ (page 173).
126 See chapter 3 for a detailed discussion on IATs.
127 See chapter 3, section 6.1.1(b).
128 Although there is some confusion on the issue created by conflating issues of competent court and choice of law: see Seyersted (n 3), 123; also see Reinisch (n 112), 102-14 (where the issue of competent court and appropriateness of forum is confused in some early jurisprudence).
The doctrine is applicable where more than one court possesses the adjudicative jurisdiction.

The doctrine provides for a discretionary test that allows a court to refuse the exercise of jurisdiction in favour of another court that it considers to be ‘appropriate’ in the circumstances. Tests to determine the ‘appropriate’ court can come in different forms, such as which is the ‘more appropriate’ court (UK), or is the court seised ‘clearly inappropriate’ (Australia). The wording may affect the way in which the discretion to exercise jurisdiction over a case is ultimately used. Regardless of the label used in particular national systems, the inquiry boils down to the consideration of whether another forum is better suited to exercise jurisdiction (assuming it is available) due to its connections with the dispute (such as the location of the parties, the law to be applied, where the tort occurred or the contract was to be performed), as well as other matters (access to premises, evidence and witnesses, potential issues with enforcement of judgments, efficiency in the administration of justice, etc.).

Certain US federal courts (especially in New York and Washington) are important centres of transnational litigation against IOs and their practice deserves attention and is adopted for analytical purposes. Pursuant to the doctrine of forum non conveniens, a US court may dismiss a case over which it has adjudicative jurisdiction ‘if there is an available and adequate alternative forum and the balance of private and public interests favors dismissal.’

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129 See RA Brand and SR Jablonski, Common Law Forum Non Conveniens: Four Countries, Four Approaches (OUP 2007), 1. For an excellent discussion of the history of the doctrine, see pages 1-6. While forum non conveniens is a common law doctrine, occasionally similar concepts have been used in civil law states (see pages 122-3). Generally, civil law states adopt the lis alibi pendens approach, which requires the court approached later in time to decline jurisdiction in favour of the court approached by the parties the first time around. This approach is much criticised for triggering a race to the court. This approach is adopted within the EU: see Recast Brussels I Regulation (n 97), art 29.

130 See Spiliada Maritime Corp v Cansulesx Ltd [1987] AC 460 (‘Spiliada’), 476, 478; a similar approach has also been adopted in Canada: Amchem Products Inc v British Columbia (Workers’ Compensation Board) [1993] 1 S.C.R. 897, 921.

131 See Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538; the test is satisfied where oppression or vexation (an abuse of process) is established: Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197.

132 See the factors set out by Lord Goff in Spiliada (n 130), 476: where amongst other things, if the alternative forum is unavailable, jurisdiction is to be exercised; the plaintiff’s choice is generally not to be disturbed if the defendant is resident in the jurisdiction; existence of other connections, such as the applicable law; see Brand and Jablonski (n 129), 34-5 for a detailed list of factors.

availability and adequacy of an alternative forum, amongst other things, trigger consideration of the opportunity for the plaintiff to receive effective justice at that alternative forum. The notes to the Draft Fourth Restatement of US Foreign Relations Law provide:

A federal court will not dismiss on grounds of forum non conveniens unless there exists an available and adequate alternative forum. An alternative forum is generally considered available if all parties are amenable to process and come within the foreign forum’s jurisdiction. An alternative forum is [in] general considered adequate if the parties will not be deprived of all remedies or treated unfairly.\(^{134}\)

Both ‘availability’ and ‘adequacy’ are disjunctive questions. On the one hand, if there is no alternative forum available, the court should exercise jurisdiction.\(^{135}\) Moreover, if the alternative forum lacks jurisdiction over the parties, including by virtue of any procedural bar, then the alternative forum is still considered unavailable.\(^{136}\) On the other hand, the question of adequacy looks at the quality of the forum in terms of whether a plaintiff will be treated ‘fairly’.\(^{137}\) In the end, ‘fairness’ triggers the question whether or not a plaintiff can receive a fair trial in the alternative forum? The trend of the jurisprudence is for national courts to exercise jurisdiction where there is sufficient evidence of a real risk that a fair trial cannot be realised in the alternative forum (such as where the courts lack independence).\(^{138}\) The pivotal factor in determining the appropriateness of forum then becomes the need to ensure a fair trial.\(^{139}\) As commentators have pointed out, the discretionary rules on *forum non conveniens* may translate into a jurisdictional obligation when access to justice is at stake. Mills has said:

The … effect of access to justice on private international law is in the context of jurisdictional discretion (in legal systems which accept such a discretion, such as those in the common law tradition) – the question of whether a court will in fact exercise adjudicatory authority. While this discretion is consistent with the traditional view of jurisdiction as a state right, the increasing influence of access to justice as an

\(^{134}\) See ibid, 155.

\(^{135}\) Ibid.

\(^{136}\) Ibid.

\(^{137}\) Ibid.

\(^{138}\) See for example, *Araya v Nevsun Resources Ltd* (2016) BCSC 1856, paras 255-6; also see *Lungowe and Ors v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528.

\(^{139}\) See P Webb, ‘Forum non Conveniens: Recent Developments at the Intersection of Public and Private International Law’ (12 January 2018), 1-22, 1 (paper on file with author).
international requirement suggests a shift toward viewing jurisdiction as an obligation.¹⁴⁰

Whether or not access to justice considerations translate what is traditionally a discretion into an obligatory exercise of jurisdiction, it is clear that fair trial considerations ought to be central to a court’s decision-making in determining whether it is an ‘appropriate’ court to exercise it. Such a presumption should only be rebuttable in the rarest of cases. This may only be done where the balance of public and private interest overwhelmingly militates against the exercise of jurisdiction. The situations where this would be the case would lie in the extremities.

Once the criteria of availability and adequacy are satisfied, the inquiry on balance of interests becomes relevant. The forum non conveniens test starts from the premise that the plaintiff’s choice of forum should rarely be disturbed, unless the balance of interests is strongly in favour of the defendant. As I argue later, this presumption requires adjustment in the IO setting.¹⁴¹

Courts take into account certain private and public factors in determining this balance of interest. Specifically, as to the private criteria, the factors are:

[1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to [5] the enforceability [sic] of a judgment if one is obtained.¹⁴²

On the other hand, the public interest factors relate to ‘the interests of the courts, including ‘court congestion’; ‘difficulties applying foreign law’; and considerations around the desirability in having localised controversies decided at their natural home (the forum to which a dispute is closely connected).¹⁴³ Due to the advent of modern technology, several concerns of practicability when making a balance of interests determination have been rendered less relevant.

¹⁴⁰ Mills (n 21), 222.
¹⁴¹ Foreign Relations Law of the United States (n 133), 155.
¹⁴² Ibid, 163.
¹⁴³ Ibid.
In sum, the first and most crucial element in making ‘appropriate’ court determinations concerns ensuring the provision of a fair trial. If an alternative court is unavailable or inadequate, jurisdiction should be exercised. The second element relates to the balance of interests, i.e., the effective administration of justice in practical terms. This question can involve considering the availability of judicial expertise. As I argue in section 5, this latter concern is rather overstated. After this brief analysis, the following discussion applies a *forum non conveniens* lens in the context of coordinating the national and IO legal orders which requires adjustment due to the unique characteristics of that relationship.

**b) The IO legal order – the forum non conveniens analysis**

(1) *Applying the jurisdictional presumption created by IO immunities*

It is to be recalled from the discussion in chapter 1 that IO immunities are motivated by reasons of functionality, seeking to ensure the independence of the IO. A focus on functionality is important to determine the scope of IO immunities. And as I argue at (2) below, it should play a greater role in this respect. More specifically, a different approach to the question of IO immunities is needed if the regulatory arbitrage created by an inconsistent and inaccurate understanding and application of the concept of IO immunities is to be resolved.

From PIL’s perspective, concurrent national and IO jurisdiction exists in respect of claims against IOs. The key issue is which forum should exercise jurisdiction that it otherwise possesses. I suggest the question of ‘exercise’ of jurisdiction over IOs specifically is really a question of ‘appropriateness’ of forum.

IO immunities should be seen in the light of what really motivates the grant of immunities to an entity in the first place. In the case of IOs, it is considered that national courts are presumptively inappropriate to exercise their adjudicative powers over an IO for a range of reasons, including avoiding subjecting an IO to potential interference from the host state (see further (3) below). This is why IOs have functional immunities. Immunities in turn are the reason why it is considered that an ‘appropriate’ forum is to be provided at the IO level to ensure access to justice for the victims of institutional action. This was the underlying rationale.
of the ICJ in its *Effect of Awards* Advisory Opinion\(^{144}\) where it said in the context of employment disputes between the UN and its staff:

> It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties. The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.\(^{145}\)

What may be inferred from the ICJ’s reasoning is that assuming immunities exist, IO jurisdiction in respect of private claims generally, and employment ones specifically, need an ‘appropriate’ venue so that access to justice can be ensured. Here, the fair trial rationale is intrinsically linked to the question of ‘appropriateness’ of venue due to the jurisdictional presumption created by IO immunities. IO immunities render IO courts as the ‘appropriate’ court. IO immunities must be then seen as a device that deals with the ‘appropriateness’ of forum, as opposed to a blanket exclusion from the exercise of national jurisdiction which was never intended to be the case.

In cases where IO immunities are applicable, the presumption that it is the IO legal order that is considered ‘appropriate’ to exercise relevant adjudicative powers is readily apparent when the design of the IO legal order is taken into account. There exists an inexorable link between IO immunities and the obligation to provide for appropriate modes of dispute settlement vis-à-vis private parties that come into contact with IOs at the institutional level. This is regardless of whether the subject matter of a dispute is in employment law, where IOs would possess what some call inherent jurisdiction; or for that matter other private claims where IO jurisdiction is assumed simply because an approach to national courts is presumptively barred. IO immunities create the presumption that the jurisdiction of an IO court (or a court to which jurisdiction may


\(^{145}\) Ibid, 57.
be delegated by the IO) is ‘appropriate’. Like many other presumptions, this presumption is rebuttable. As to when it is to be rebutted is a matter considered at section 4.2.3 below.

Where immunities exist, the general rule should be to defer to the IO legal order unless the presumptive appropriateness of the IO legal order can be rebutted (section 4.2.3). Thus, in general, domestic courts should refrain from exercising their adjudicative jurisdiction over IOs when the functionality of IOs is affected, where IO immunities would *prima facie* exist. In such circumstances, a *forum non conveniens* analysis should commence with the assumption that despite the links of a dispute to the national legal order, unless an IO submits to jurisdiction, the appropriate courts to exercise adjudicative jurisdiction over IOs are the ones located within the IO legal order. Here, due to the jurisdictional presumption created by IO immunities that drive the demand for access to justice at the institutional level, national courts should not exercise jurisdiction that they otherwise possess.

However, where IO immunities do not exist on a functional basis, immunities as such do not create any presumptive appropriateness in favour of the IO legal order (2). This is because the presumption created by IO immunities that the IO courts are the appropriate court has no work to do. In such situations, the rules on *forum non conveniens* would operate in their usual course but for the particularities of the relationship between the IO and national legal orders. Baring in mind those particularities, it will be argued that even where IO immunities do not apply, the first shot of delivering justice should still be given to the IO legal order (3).

(2) *Determining whether IO immunities exist – a task for the national courts*

The issue of functionality becomes crucial for determining whether the jurisdictional presumption that an IO court is the appropriate court applies in a given situation. When a national court wishes to assess the question of appropriateness and whether the jurisdictional presumption is triggered, an assessment of functionality is necessary. How courts are to undertake such an assessment in practice is a matter canvassed in this subsection.

The question of the exercise of adjudicative jurisdiction over an IO would be triggered when a claimant lodges a claim before a national court. How then should a court approach the question of functional immunities when considering issues around the exercise of jurisdiction? Generally, a national court has an ‘obligation to deal with the question of immunity from legal
process as a preliminary issue to be decided expeditiously *ex limine litis*’.  

Two things are relevant: the scope of IO immunity in a given case; and who makes such a determination.

First, one significant reason why a denial of justice is much too common for the victims of institutional conduct is the inconsistencies in the regulatory regimes allowing for the functional standard of immunities to be implemented as *de facto* absolute immunities. The practical manifestation of IO immunity does not correspond to the underlying functional theory. Often, cursory and trite statements purportedly promoting an IO’s so-called ‘functional independence’ are made to justify upholding IO immunity. This is a form of unfettered institutional bias. This institutional bias leaves individuals adversely affected by IO action, without access to a court, and ultimately justice.

Limiting as much as possible the application of the rules on immunities provides for an approach where the management of the arbitrage can be streamlined, and the instances of denials of justice reduced considerably. As Mills explained:

> because the exercise of jurisdiction was understood to be a discretionary matter of state right, there was no reason why a state might not give more immunity than required under the rules of international law. The development of principles of access to justice, however, requires a state to exercise its jurisdictional powers, and perhaps to expand those jurisdictional powers as a matter of domestic law to encompass internationally permitted grounds for jurisdiction, or even to go beyond traditional territorial or nationality-based jurisdiction.

Courts must not shy away from exercising jurisdiction over an IO that they otherwise possess if no intrusion into an IO’s functional independence will result. It was always the intention that

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147 Chapter 1, section 3.3.4.

148 See for example, Stichting Mothers of Srebrenica and Others v Netherlands and United Nations (13 April 2012, Supreme Court of the Netherlands) LJN: BW1999; ILDC 1760, para 4.2.

149 In one of the early cases regarding the General Convention, in Manderlier v Organization of the United Nations and Belgium (11 May 1966, Brussels Civil Tribunal) Journal des Tribunaux 1966, 721; (1972) 45 ILR 446, a Belgian court held that the Core Immunity Provision grants a general immunity from jurisdiction and do not limit it to what necessity strictly demands for the fulfilment of the defendant’s purposes’.

150 Mills (n 21), 223.

IOs only possess an immunity that is strictly necessary for the performance of its functions. The ILC Special Rapporteur on the relations between States and International Organisations had said ‘functional requirements must be one of the main criteria, if not the only one, used in determining the extent and range of the privileges and immunities that are to be accorded to a given organization. The independence of the organization will thus be safeguarded to the extent necessary for it to perform its functions and accomplish its objectives’.  

If one is to stay true to the functional theory, any regime on IO immunity should not amount to de facto absolute immunity. As Boon has pointed out, it is necessary that when determining the scope of immunities, we return to the true meaning of ‘functional immunity’. When confronted with IO immunity questions, logically, national courts should consider closely the impugned conduct in light of the functions of the defendant IO. The court seised is to make the determination of the functional scope of an IO’s immunities. If the defendant IO has engaged in conduct that is ultra vires or outside the scope of its functions, then no immunity can exist in respect of claims arising from such conduct. As the ICJ has said, ‘[s]ave as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action’.  

Just because determining the ‘functional’ scope of an IO’s immunity may on occasion be difficult, it does not follow that the concept is to be abandoned. In the case of the UN, while its functional immunities will understandably be broad given the vast scope of its activity, it is feasible to determine as to whether the UN should enjoy immunity in a particular factual instance by assessing the relationship between the impugned conduct and the UN’s functions. Leaving to one side questions of the permissibility of the extent of damages and enforcement for the moment, it is highly questionable whether taking jurisdiction over the UN in a

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154 See Edward Chukwuemeke Okeke (n 82), 292.
155 For example, in Siedler v Western European Union (17 September 2003, Appeal judgment) Journal des Tribunaux 2004; ILDC 53 (BE 2003), para 40, a Belgium court implied that, under the functional necessity doctrine, an international organization’s immunity could be lifted if the relevant acts of the international organization were ultra vires.
classically private law claim in tort, as was the situation in the Haiti Cholera case, interferes with the ability of the UN to pursue its functions. A judgment that the UN has been negligent in performing its role is a reflection of the legal and factual reality as opposed to an intrusion into the UN’s functional independence. In the case of the MDBs, a significant transformation of the scope of their immunities may indeed be imminent. It is significant that in the context of the Jam litigation discussed in chapter 1, the US government has submitted that the IFC should not be accorded absolute immunities. Should the US Supreme Court endorse that view, a tectonic shift in the law of IO immunities will occur, making the role of ‘appropriateness’ of the exercise of jurisdiction even more significant. Whether the US Supreme Court endorses the US government’s approach remains to be seen and no more is said on the case here. Finally, in respect of other IOs with limited mandates, immunities should be even narrower given the limited scope of their respective functions.

Overall, what is critical to determining IO immunity should be the relationship between the impugned conduct with the defendant IO’s functions. If the impugned conduct does not fall within the limits of an IO’s functions, or the conduct in question is not necessary to further those functions, then no immunity can logically exist. And where no immunity exists, the presumptive appropriateness of an IO court cannot prevail.

Second, once it is accepted that IO immunities are to be limited by reference to the functional standard, the question who makes that determination remains vexed. Two related issues are of relevance. First, international law grants a very wide latitude to IOs to determine the scope of their own immunities. This means that the defendant IO can play the role of a gatekeeper on

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157 See chapter 1, section 3.3.2.
159 Gonzalez (n 152), para 50, and at para 54 it was stated: ‘it should not be forgotten that there are certain international organizations to which it may not be necessary to grant privileges and immunities, even if they have been established by an agreement between States. This would be true of intergovernmental international organizations established in such a form that they can function exclusively as legal entities under the domestic law of the host State.’
160 Ibid, para 49.
161 Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) [1999] ICJ Rep 62, ICGJ 204 (ICJ 1999), para 61 states: ‘When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.’
the exercise of the adjudicative jurisdiction of a court. From the perspective of a national court, uncritically relying on the determination made by IOs as to the scope of their immunities, is an obvious affront to the proper exercise of its adjudicative jurisdiction, and only encourages their abuse. It should be beyond contention that a defendant to a suit must not determine whether the court can in fact exercise its jurisdiction in a given case; that decision ultimately can only belong to the court in question. For justice to be done, and for it to be seen to be done, the defendant to a claim must not be allowed to effectively make immunity determinations.

A related issue is of much practical significance. How an IO would normally assert its immunities is through the executive branch of the host state. This is done through the issuance of an executive certificate by the government of a host state asserting the IO’s immunities on its behalf. In modern times, while such certificates carry weight,¹⁶² it is the court seised that must determine whether immunities exist on the facts of the claim in question. One prominent decision endorsing this proposition is that of the Supreme Court of the Philippines in *Liang v The People*.¹⁶³ (*Liang*). *Liang* concerned a claim of defamation by an employee of the ADB against certain ADB officials. The court disregarded the executive certificate put forward by the Department of Foreign Affairs of the Philippines on ADB’s behalf, and held that no immunities existed on the facts of the case. It remarked:

> [C]ourts cannot blindly adhere and take on its face the communication from the DFA that petitioner is covered by any immunity. The DFAs determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts. … The needed inquiry in what capacity petitioner was acting at the time of the alleged utterances requires for its resolution evidentiary basis that has yet to be presented at the proper time.¹⁶⁴

While this statement was made in the context of the scope of official immunity, the same logic ought to apply to the determination of the scope of an IO’s functional immunity as well. Today,

¹⁶² See *Georges v United Nations*, (US 2nd Cir, August 2018) No 15-455-cv, 12 (where the court used the language of ‘great weight’).
¹⁶⁴ Ibid.
national courts are unlikely to blindly adhere to the executive’s view on the matter, which ought to be the preferred approach on the issue.

Where a national court determines that an IO does not possess functional immunity, there is no presumptive jurisdiction for an IO court as such. In such cases, a national court could exercise jurisdiction over an IO. Whether they should in a specific case, however, depends on whether they are the ‘appropriate’ court. Where an alternative forum is unavailable (often the case in claims against IOs), the national court would be the ‘appropriate’ court. However, assuming compliant alternative means exist, a classical instance of competing jurisdictions would arise. In such circumstances, I suggest coordination between IO and national legal orders must take into account the special nature of that relationship, and give the IO the first shot of delivering justice.

(3) Giving the IO legal order the first shot at delivering justice if IOs provide an adequate court

Where IO immunities do not exist, and assuming that dispute settlement mechanisms are available and adequate at the institutional level, the first shot of determining claims against IOs should be given to the IO itself. Although there would exist no presumptive jurisdiction for an IO court in such a situation, such an ordering takes into account the degree of connection a dispute may have with the IO legal order, as well as being a satisfactory outcome from a legal policy perspective. Both those sets of overlapping factors render the IO court the appropriate court.

As to strength of connections, links between the IO legal order and certain subject matters are often self-evident. For example, IOs exercise a form of inherent jurisdiction over their staff, and as outlined in section 5 below, it is IO law that governs staff relations. Given the jurisdictional competence of an IO to regulate its staffing matters, the appropriateness of IO courts to be given the priority to resolve such claims may be readily deduced. To varying degrees, the same may be said of other disputes of an administrative law character. For other private disputes, such as in tort or contract, but for the presumptive appropriateness of the IO court, a national court could indeed be an ‘appropriate’ forum. This could be due to the territorial connections of a dispute, the applicable law being national law, etc. However, even in such cases, the presumptive appropriateness of the IO court (even though immunities should not apply) must be given effect to as long as the presumption is not rebutted.
Regardless of the degree to which a dispute may be connected to a national legal order, the presumptive appropriateness of IO courts (where they exist) can be well explained as a proper response from a legal policy perspective. Steinbruck Platise identifies the set of reasons as to why it is preferable that victims of IO conduct receive justice at the institutional or international level. She argues that national courts may be not the preferred forum to resolve claims against IOs because: (1) IOs can be subject to unilateral control through the courts, especially that of the host state; (2) if national courts take jurisdiction, there is a real risk of fragmented jurisprudence, ‘even with regard to the same organisation that could be sued with respect to the same subject matter in different states’; (3) ‘even when the immunities can be set aside in a particular legal proceeding – for example, due to a waiver by the relevant international organisation – the question still remains what enforcement measures may be considered as appropriate for the implementation of a court decision against the organisation’; (4) national courts may lack expertise in certain specialised areas of law, such as international administrative law; and (5) ‘if each and every state were allowed to scrutinise the acts of international organisations and domestic acts that implement those international acts, the binding quality of international acts could be called into question.’ Based on those factors, she concludes:

The protection of human rights against violations by international organisations at the domestic level can therefore be unsatisfactory and the establishment of effective human rights protection mechanisms at the international level is considered necessary.

Despite some of the above criticisms levelled at national courts being a matter of perception and not reality (see section 5 below), by and large it is fair to conclude that the presumptive appropriateness of IO courts is well grounded in law and policy. Should there be present IO courts where victims can seek justice, national courts should defer to the institutional legal order to deliver it. However, this is only to be done where the alternative forum is available and adequate. As to availability and adequacy, the analysis is in essence about compliance with

166 Ibid.
the right to a fair trial. That analysis is carried out at section 4.2.3(a) and would apply regardless of whether or not IO immunities exist.

**4.2.3 National courts’ jurisdiction based on the fair trial exception in the forum non conveniens doctrine – accommodating IO immunities**

Given the broad interpretation given to an IO’s ‘functional’ scope of immunities, one of the most significant issues relates to the situation where taking jurisdiction over an IO would prima facie impact its functional independence. The discussion of the concept of *forum non conveniens* in section 4.2.1 above identified the role fair trial concerns play in determining questions of ‘appropriate’ court. The relevant issues concern the availability and adequacy of an alternative forum, as well as a balancing of public and private interests. However, if an alternative forum is ‘unavailable’ or ‘inadequate’, the presumptive appropriateness in favour of the IO court should be rebutted. This is the case whether or not IO immunities are at issue, albeit when immunities apply, they will need accommodation.

As I show below, where the alternative forum is unavailable, the presumptive appropriateness in favour of the IO court is readily rebutted (a). Where an alternative forum exists but is deficient, a close scrutiny of its compliance with fair trial standards is needed (b). If the forum is found to be ‘inadequate’, the presumption is still rebutted. It will also be seen that where a fair trial at an alternative forum is not possible, as long as PIL jurisdiction exists, the balance of public and private interests would be in favour of a national court taking jurisdiction. And if national jurisdiction is exercised, the ability of PIL to neatly slice regulatory authority by separating questions of competent court and applicable law can be harnessed to ensure that the regulatory authority of each legal order is maintained without compromising on access to justice. By doing so, where they exist, IO immunities can be accommodated.

**a) Availability and adequacy of the alternative forum**

**(1) Where no alternative means exist**

Where there exists no other jurisdiction that can do justice in a case against an IO, the only realistic option for the victim is to approach a national court. The presumption that the IO mechanisms are the appropriate forum is readily rebutted in such a situation. The presumption that the institutional order is the appropriate court is unsustainable for that court does not even exist. In the language of *forum non conveniens*, the alternative forum is simply not ‘available’.
The relevant national court then becomes the appropriate court. The national court ought to exercise the jurisdiction that it possesses because the alternative forum has not performed the function that it was supposed to. What is more, from a human rights perspective too, where the alternative forum is unavailable, and the court seised refuses to exercise jurisdiction, the right of access to court is manifestly breached. This approach of a secondary intervention by the national court ensures that the exploitation of the regulatory arbitrage can be well managed.

Should a national court decide to exercise jurisdiction, it also must balance considerations relating to the functional independence of an IO. This may be achieved by carefully calibrating the rules on choice of law and recognition and enforcement (discussed at sections 5 and 6). Foreshadowing that discussion, PIL can indeed be used as a manager of a regulatory arbitrage by neatly slicing regulatory authority (see section 2.2 above). For example, if a court takes jurisdiction over an IO, but nevertheless decides to apply the law of the IO to the merits of a case, appropriate respect to the IO’s regulatory authority is manifestly being shown. Such an approach has already been taken by some courts. In one case where a Belgian court took jurisdiction over an IO in an employment case, where the IO failed to provide any alternative means of dispute resolution, the court required the application of the international administrative law of the IO to resolve the merits of the claim. By this approach, the court ensured that private rights were enforced, and at the same time showed deference to the prescriptive/legislative jurisdiction of the IO. Similar divisions of regulatory authority can be readily adopted in respect of different subject matters too, and indeed have been adopted occasionally.

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167 JJ Fawcett, M Ni Shuíleabháin and S Shah, Human Rights and Private International Law (OUP 2016) (‘Human Rights and PIL’), section 6.84. Recently, some authors have in passing attempted to apply a similar forum non conveniens in the IO setting, however, without providing any detail on how the doctrine may apply in practice or how it relates to IO immunities: C Fersman, International Organizations and the Fight for Accountability: The Remedies and Reparations Gap (OUP 2017), 131.
168 Ibid, section 4.62, 4.78.
170 See CECA c faillite des “Acciaierie e Ferriere di Bogaro” SpA (n 111), 403-5.
Where the quality of the alternative means is questioned – adopting the ‘failure of justice’ test

In circumstances where alternative means are present and/or have been already accessed, the question for the court seised is more challenging. Before a court may take jurisdiction over an IO, it must determine whether the delivery of a fair trial elsewhere has been (or can be) provided. In other words, an assessment of the alternative forum’s ‘adequacy’ is raised. Determining the alternative forum’s ‘adequacy’ is not an easy question. I argue that the ‘adequacy’ in PIL should be synonymous with the inquiry whether the alternative forum has or can provide justice consistently with the right to a fair trial from a human rights law perspective. The advantage of adopting a human rights stance is the significant standard setting that has already occurred in this sphere; and any such standards are universal.171

Regardless of the label used to determine ‘adequacy’,172 a close assessment of the objective and subjective aspects of access to justice need to be considered. Of particular relevance is the jurisprudence of the ICJ specifically relating to dispute resolution at the institutional level. In the Application for Review of Judgment No 158 of the United Nations Administrative Tribunal173 the court provided for a useful guide to the most fundamental aspects of the right to a fair trial. The ICJ stated:

[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable

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172 In Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland App no 45036/98 (ECtHR, 30 June 2005), paras 152-7, the European Court developed the doctrine of equivalent protection - that for Article 6 of the European Convention, as long as the person was able to attain equal protection at an IO, i.e., protection that was not ‘manifestly deficient’ when compared to the European Convention regime, no interference in the right to a fair trial could be established. As was pointed out in the concurring opinion of Judge Keller in the case of Al-Dulimi and Montana Management Inc v Switzerland App no 5809/73 (ECtHR, 21 June 2016), para 13, the European court has developed a presumption of immunity and equal protection in respect of several IOs, including the EU, UN and NATO (citations omitted); particularly in the context of staff disputes, see AM Thévenot-Werner, ‘The Right of Staff Members to a Tribunal as a Limit to the Jurisdictional Immunity of International Organisations in Europe’ in A Peters, M Devers, AM Thévenot-Werner and P Zbinden (eds), Les acteurs dans l’ère du constitutionnalisme global / Actors in the Age of Global Constitutionalism (Paris, Société de législation comparée 2014), 111-39.
time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent’s case; the right to equality in the proceedings, the opponent; and the right to a reasoned decision (emphasis added).\(^\text{174}\)

Given the above statement was made by the ICJ in the context of dispute resolution at the IO level, it is a sensible standard to adopt when assessing the ‘adequacy’ of the alternative forum. If a plaintiff has approached an alternative forum, and there exists a ‘failure of justice’, that forum is to be assessed as inadequate. This scenario is not controversial since a failure of justice has been found to exist in a concrete case, and a fresh trial consistent with fair trial standards is justified.

But what about situations where there is a risk that a fair trial elsewhere will be denied, and a failure of justice in a concrete case has not been established? Because national judges do not wish to be seen as passing judgment on the integrity of a foreign judiciary,\(^\text{175}\) establishing inadequacy is no easy matter. Nonetheless, there are PIL cases where national courts have exercised jurisdiction on the basis of being an appropriate court where evidence of deficiencies of the relevant foreign court is adduced,\(^\text{176}\) and it can be established that there is a ‘real risk’ that the party to the proceedings will be denied justice in the alternative forum. Here, PIL demonstrably intersects with human rights law. The standard of ‘real risk’ is remarkably similar in wording to the test used in human rights law too. Under IHRL, a state’s responsibility may be engaged where there are ‘substantial grounds for believing that … he [or she] would be exposed to a real risk of being subjected to a flagrant denial of justice’ (fair trial provisions have an indirect effect in such circumstances).\(^\text{177}\) Under IHRL, if ‘the plaintiff is denied jurisdiction in … State A and ends up being forced to bring the action abroad … in which, although trial is available, there is no fair trial, Member State A should be held to have violated [the right to a fair trial]. The plaintiff has access to a court, but this can be by no means considered effective’.\(^\text{178}\)

\(^{174}\) Ibid, Review of Judgment No 158, para 92.

\(^{175}\) However, see Yukos Capital SARL v OJSC Rosneft Oil Company [2012] EWCA Civ 855, paras 73, 86, 91 and 135 (per Lord Rix), where English courts have shown a willingness to evaluate a foreign judiciary where cogent evidence of fair trial deficits is present (in that case, it concerned the manifest partiality of certain Russian courts).

\(^{176}\) Human Rights and PIL (n 167), section 6.90.

\(^{177}\) Ibid, section 5.93; see also Al Nashiri v Romania App no 33234/12 (ECtHR, 31 May 2018), 242, para 597.

\(^{178}\) Human Rights and PIL (n 167), section 4.88.
Noting the same spirit behind the approaches to the issue in PIL and human rights law, in a situation where a concrete breach is not established, the analysis is to focus on the question whether there exists a ‘real risk’ (equated by some with ‘real possibility’) that the complainant would face a failure of justice at the institutional level.\textsuperscript{179} If the answer is in the affirmative, not only the court seised should be the appropriate one to exercise jurisdiction on a \textit{forum non conveniens} analysis, but if the court refuses to exercise its jurisdiction, the responsibility of the relevant state for the breach of the right to a fair trial may be established. There is thus a double incentive to take jurisdiction at the national level.

On yet another crucial but difficult question, how is one to assess whether a failure of justice has or will actually occur? To determine the adequacy of the alternative forum, a court ought to closely assess the justice machinery installed, and consider how that justice machinery is likely to be brought to bear in the individual circumstances of a case. This inquiry can be arduous. It requires the careful delving into the structures of justice, as well as the real life application of the justice machinery. That inquiry can only be addressed by examining the right to a fair trial as provided for in human rights law. Due to the significance of the issue, I will closely consider if the alternative forums existing at the institutional level comply with fair trial standards in chapter 3.

For the moment, it suffices to say that based on the evidence adduced to the court,\textsuperscript{180} if it can be established that a failure of justice has occurred; or there is a real risk that a failure of justice will occur; the alternative forum is also to be assessed as inadequate. Again, should a national court take jurisdiction over an IO, specifically tailored choice of law and recognition and enforcement rules can ensure that the regulatory authority of the IO is respected, and IO immunities accommodated where they are found to exist.

\textbf{b) The balance of public and private interests}

If the failure of justice standard at the alternative forum is met, the presumption is that a national court ought to take jurisdiction over an IO. Where PIL jurisdiction exists and the dispute is

\textsuperscript{179} As has been pointed out, the evidence required to establish a real risk of a fair trial breach in the alternative forum should not be prohibitive, where general reports as to the prevailing situation in the foreign state should suffice to show that the individual in question would be affected by the prevailing deficiencies: ibid, section 6.181–91.

\textsuperscript{180} See for example, \textit{Araya v Nevsun Resources Ltd} (n 138), para 255: ‘the plaintiffs must provide sufficient evidence such that the court can conclude that there is a real risk that they will not receive a fair trial in that forum’.

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connected to the national legal order, there is little possibility that the balance of interests should result in a refusal of jurisdiction. Once the inquiry about availability and adequacy is completed, a national court must also consider whether taking jurisdiction over an IO is consistent with the balance of public and private interests. In this respect, the doctrine of non-justiciability has been conflated with what is essentially a *forum non conveniens* inquiry. Below, I show that first, non-justiciability is irrelevant to the determination of claims against IOs. Second, where PIL jurisdiction exists, the balance of interests lie in favour of the exercise of national jurisdiction should the need for its exercise arise.

(1) *The irrelevancy of non-justiciability*

Non-justiciability is a prudential tool where a court otherwise possessed of jurisdiction refuses to decide a case because its resolution would involve a consideration of issues (such as foreign affairs) that are best left to the other branches of government, or to another forum. In the context of IOs, occasionally, the various species of non-justiciability have been used from time to time by national courts as self-imposed restraints on the exercise of judicial power. Nollkaemper points out that ‘such deference to an international procedure is in fact a deference to the powers of the political branches, which as a result of an allocation of powers to weak or hypothetical international procedures are freed of the controlling power of the courts.’ The reasons for the reluctance of national courts to exercise jurisdiction over IOs is made apparent by the decision of a Dutch court asked to determine claims brought in connection with the 1999 bombings of Belgrade by the North Atlantic Treaty Organization (‘NATO’). In that case, the court stated that the question of whether the Netherlands had acted in conformity with the rules on the use of force was best decided by the ICJ. While the court did not provide justifications for its decision, a Dutch legal expert explained:

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181 Reinisch refers to non-justiciability as one of the avoidance techniques adopted by national judges to refuse an exercise of jurisdiction over an IO, Reinisch (n 112), 84-99 (where the author talks about the act of state doctrine, political question and non-justiciability as belonging to the same sphere equally existing in common and civil law states).

182 The leading examples are *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969, [1990] 81 ILR 670, 693-4 (per Lord Oliver); *International Association of Machinists (IAM) v OPEC* 649 F2d 1354, 1361 (9th Cir 1981); for a case where justiciability was readily dismissed, see, *Council v Amalgamet Inc* (25 January 1988) 138 Misc 2d 383, 524 NYS 2d 971, 3.

183 Nollkaemper (n 123), 8.

184 *Danikovic v State of the Netherlands* (6 July 2000, Court of Appeal of Amsterdam) Case No 759/99, SKG LJN: AO0070 (the Netherlands), [5.3.8].
The court may have found that the ICJ was better equipped to deal with the matter, given the factually and legally complex nature of the dispute. As to the facts, the court may have doubted whether it could have obtained access to information on the nature and effects of the bombings. As to the law, addressing the claims on the merits may have required delving into the principles of prohibition on the use of force, humanitarian intervention, or on the allocation of responsibility within NATO – questions with which the judges on the court would have had little experience. … The rendering of a national decision in a complex matter may not assist the resolution of an international dispute as much as deferring the case to an international court for a decision. … The District Court of The Hague moreover may have wished to avoid duplication of proceedings at the national and international levels with possible conflicting outcomes.\textsuperscript{185}

Thus, national courts may be unwilling to be seen as intruding into the executive realm relating to the maintenance of foreign relations or are averse to exercising jurisdiction over IOs for the purported lack of manageable judicial standards. Both those concerns are misdirected. The justification that the judiciary ought not to exercise jurisdiction in cases where there is a risk of offending foreign relations is an indeterminate inquiry,\textsuperscript{186} and in any event, ought to have no relevance in the IO setting.\textsuperscript{187} The singular basis on which the management of foreign relations is dealt with in respect of maintaining the integrity of IOs is through the doctrine of immunities. If immunities do not exist, or ought to be otherwise accommodated, then a court must not rely on indeterminate questions of non-justiciability, effectively creating another layer of regulatory arbitrage. In doing so, courts end up abdicating jurisdiction, resulting in further denials of justice.

\textsuperscript{185} Nollkaemper (n 123), 8.
\textsuperscript{186} Reinisch (n 112), 92-3.
\textsuperscript{187} Indeed, any perceived impact on foreign relations as such has largely now been discredited as a factor for holding a dispute non-justiciable: see Belhaj and another v Straw and others [2017] UKSC 3, [2017] 2 WLR 456 and Rahmatullah (No I) v Ministry of Defence and another [2017] UKSC 1, [2017] UKSC 3, para 41. Another way in which concepts of act of state/non-justiciability are perceived is through the title of foreign relations law. Here, leading commentators have stated that regardless of its purported political dimension, a claim still remains a legal one requiring adjudication. See C McLachlan, Foreign Relations Law (CUP 2014), 5 (at section 1.05), where the author states that ‘foreign relations, despite their political dimension, are governed by law. They are not a zone of non-law within the municipal legal system.’ And the method used to resolve such issues is to adopt a conflict of laws solution due to its ability to allocate regulatory authority (pages 7-8, section 1.15).
However, a valid concern (at least in part) relates to the presence of manageable judicial standards. Here, questions of access to evidence, what law applies, familiarity with the subject matter, concerns about the enforceability of judgments, and preventing parallel proceedings, may in fact justify a court refusing to exercise its jurisdiction in a given case. However, such matters better belong to the realm of the doctrine of *forum non conveniens* (especially the determination of the balance of public and private interests) as opposed to concerns of non-justiciability. Ultimately, it is to be recalled that national and institutional courts (assuming there are any) co-exist and should not be perceived in terms of a rank relationship in a pluralist setting. Thus, when the jurisdiction of multiple courts may be established, what needs determining is the ‘appropriate forum’ that ought to determine a legal dispute between the parties, and not a focus on indeterminate and irrelevant matters such as the justiciability of an otherwise legitimate legal claim.

(2) *Assessing the balance of public and private interests*

Where a national court possesses PIL jurisdiction, it is hard to conceive of a situation where the balance of public and private interests should result in a refusal of jurisdiction, assuming the alternative means are not available or adequate. As to the balance of private interests, the national court whose jurisdiction may be seized is likely to be one belonging to the territory of the host state, or one to which the dispute is otherwise linked. Access to evidence, the parties’ geographical proximity, etc., ought not to present practical barriers in such circumstances. In any event, as was stated at section 4.2.2(a) above, modern technology has largely redressed the tyranny of distance. What is more, as is identified in chapter 3, in terms of geography, it is the IO court (and not the territorial court) that is often far-removed from the location of the dispute, and in colloquial terms, is significantly more inconvenient to access when compared to a territorial court. The balance of private interests ought not to present a bar should a national court possessing PIL jurisdiction over an IO decide to exercise it.

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188 As to the lack of familiarity amongst national judges with the issues lying at the heart of the dispute before them, the argument may have some merits in connection with internal disputes of a constitutional character and with staff disputes, but ‘certainly does not in disputes over contractual or tortious liability where a particular domestic law provides the governing legal rules’: K Wellens, *Remedies Against International Organisations* (CUP 2002), 117-8.
189 See Chapter 3, section 6-7.
Regarding the balance of public interests, a relevant matter relates to the available expertise in determining a claim that is also connected to a foreign legal order. Such cases may require the application of foreign law over which the national judge may lack expertise. Fears about the purported lack of expertise of national courts are overstated. In a large number of contractual or tortious claims, the applicable law will be a system of law which national judges would regularly apply in their day-to-day judicial roles. And to the extent that foreign law is applied, including the internal law of the IO, it is to be born in mind that national judges frequently make determinations on questions of foreign law based on expert opinion. Applying IO law as foreign law is no different. Further, it is national judges who are often appointed to institutional dispute resolution bodies, rendering the fear around the lack of judicial expertise unjustified. As long as an IO’s regulatory authority is respected, issues of expertise and the application of foreign law on their own do not render a court an inappropriate forum to determine claims against IOs.

A national court is perfectly capable of taking jurisdiction over IOs and determining questions of foreign law (should it be applicable). Where PIL jurisdiction exists, and the alternative forum is unavailable or inadequate, the presumption that jurisdiction ought to be exercised is most compelling. As is discussed in greater detail at sections 5 and 6, when a national court takes jurisdiction, the regulatory authority of the IO may be properly preserved if the choice of law, and the recognition and enforcement components of PIL are properly designed.

4.2.3 Summing up: When jurisdiction may be exercised against IOs

If the following jurisdictional scheme is adopted at the national level, the exploitation of the prevailing regulatory arbitrage can be addressed. The scheme should adopt the well-accepted PIL rules of adjudicative jurisdiction (in terms of existence of jurisdiction); and prescribe rules on the exercise of jurisdiction through a forum non conveniens lens. In this latter respect, the general rule is that: IO immunities create a presumptive appropriateness in favour of IO courts. However, where IO immunities do not exist, the presumption is inoperable. Even when the presumption is inoperable and IO immunities do not exist, the first shot of delivering justice ought to be given to the IO courts. However, where IO immunities prima facie exist, the presumption that IO courts are the appropriate court can be rebutted based on the fair trial exception. Here, the question of the availability and adequacy of an alternative forum is the key inquiry. To answer whether an alternative forum is available is an easy question. And to
determine whether the alternative forum is inadequate, the test to be adopted is whether there is a ‘real risk’ that there would be a ‘failure of justice’ at that forum. If an alternative forum is unavailable or inadequate, a national court is to exercise jurisdiction. The following table displays the suggested jurisdictional scheme in summary form.

<table>
<thead>
<tr>
<th>TORT</th>
<th>CONTRACT</th>
<th>EMPLOYMENT</th>
<th>Civil claims in GAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jurisdiction is only to be taken if there is no other available or adequate forum; and</td>
<td>(a) Jurisdiction should be taken if there is a choice of forum clause entered into between the IO and the plaintiff; or</td>
<td>(a) Jurisdiction may be taken if there is a choice of forum clause in an employment contract; or</td>
<td>Jurisdiction is only to be taken if there is no other available or adequate forum; an</td>
</tr>
<tr>
<td>• The IO is headquartered in the jurisdiction; or</td>
<td>(b) Consent or waiver can be established; or</td>
<td>(b) Consent or waiver can be established</td>
<td>(a) Place where IO is headquartered; or</td>
</tr>
<tr>
<td>• The acts giving rise to the injury took place in the jurisdiction; or</td>
<td>(c) In all other cases, jurisdiction is only to be taken if there is no other available or adequate forum; and</td>
<td>(c) In all other cases, jurisdiction is only to be taken if there is no other available or adequate forum, and</td>
<td>(b) A state where victim suffers the impact of the impugned administrative decision; or</td>
</tr>
<tr>
<td>• Consent or waiver by the IO can be established.</td>
<td>• The IO is headquartered in the jurisdiction; or</td>
<td>• The IO is headquartered in the jurisdiction; or</td>
<td>(c) where there is consent or waiver</td>
</tr>
<tr>
<td></td>
<td>• Another link in respect of contractual claims can be established (see 4.1.4 above)</td>
<td>• The court is located in the jurisdiction of the employee of the state of which he or she is a habitual resident</td>
<td></td>
</tr>
</tbody>
</table>
5 Choice of law

PIL is capable of neatly slicing regulatory authority across legal orders via its applicable law component. As we saw at section 2.2, this it does by separating issues of competent court and applicable law. Regardless of which forum adjudicates a dispute, the prescriptive authority of a foreign legal order can be given affect to through carefully crafted choice of law rules. In the present context, choice of law determinations may need to be made both at the national and IO levels. If a dispute is resolved at the IO level (or another forum to which jurisdiction is delegated), then according to PIL, it may very well be the case that domestic law is the applicable law. On the other hand, if it so happens that a national court exercises jurisdiction over an IO should the latter fail to provide access to justice within its own legal order, a court can preserve that IO’s regulatory authority (and functional independence) by applying IO law to a dispute if that is the proper law in the circumstances. If it does so, any potential IO immunities will be properly accommodated. Thus, through carefully tailored choice of law determinations, regulatory authority belonging to institutions located in different legal orders can be appropriately allocated.\textsuperscript{190}

How can the applicable law determination actually be made? The starting point for any choice of law determination is that some law would govern every cause of action. Just because the forum’s own law may not apply to a particular legal issue, it does not follow that the rights and duties involved fall into a ‘legal black hole’.\textsuperscript{191} Whether adjudicative jurisdiction over an IO is exercised at the national or the institutional level, choice of law determinations thus need to be made. This inquiry must be carried out in a methodical and genuine way. Below, I discuss the three stages of any choice of law inquiry: characterisation (5.1.1); localisation (5.1.2); and application (5.1.3).\textsuperscript{192}

5.1 Characterisation – the need for a genuine assessment in claims against IOs

The first step in a choice of law determination is referred to as ‘characterisation’ or ‘qualification’. This step involves determining which choice of law rule is ‘principally applicable to the case at hand, by fitting the case into a legal category of tort, contract, and so

\textsuperscript{190} A proper choice of law determination ‘separates the question of applicable substantive law from the procedural question of a claimant’s access to a remedy – [doing] justice to both the interests of the individual claimant and the autonomy of the international organization’: Ryngaert (n 169), 69.

\textsuperscript{191} Riles (n 16), 97.

\textsuperscript{192} Symeonides (n 8), 64.
forth, employed by the rule’.

While some claims can be readily classified, others are susceptible to multiple characterisations. The latter kind involve the exercise of a choice/judgment by the decision maker as to how a claim is to be qualified. Judgments as to qualification can be critical for it can impact on a court’s decision to exercise its adjudicative jurisdiction when conducting a *forum non conveniens* analysis (see section 4.2.2(a)).

Particularly concerning IOs, the issue of characterisation can be very significant. This is due to the rise of claims susceptible to multiple qualifications. In such cases, the same claim can be characterised as a cause of action in domestic law, IO law, as well as in international law. Take for example the claims of the Haitian cholera victims against the UN. Those claims can be characterised as a classic tort claim, but also as breaches of human rights, such as an infringement to the right to life, right to health, and other rights enshrined in IHRL. The same is true for the claims lodged against UNMIK by certain Roma victims who were placed in camps for Internally Displaced Persons in areas where the risk of lead-poisoning was known to be high. Due to UNMIK’s inaction for more than 10 years, a lead-poisoning outbreak was the result causing life-long injuries to hundreds of Roma. In respect of that harm, the UN’s own Human Rights Advisory Panel has already made adverse findings against the defendant IO.

A further example is provided by the claims advanced by the victims of the Srebrenica genocide against the UN. Those claims can be characterised as claims in tort, infringements of the right to life (amongst others), as well as infringements of aspects of international humanitarian law (‘IHL’) given those claims arose in the context of an armed conflict. In this respect, that tort law continues to apply even in situations of armed conflict is uncontentious, although the choice of law determination will be dependent on the circumstances that gave rise to the injury. As McLachlan has said following a detailed analysis of the jurisprudence, if the injury is caused

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193 Ibid.
194 See Human Rights and PIL (n 167), section 1.24.
196 See *NM and Others v UNMIK* (26 February 2016, Human Rights Advisory Panel) Case no 26/08, para 44.
197 For the findings of the Human Rights Advisory Panel, see ibid, paras 72, 91-3 (victims filed both claims in criminal negligence as well as civil claims), 99 (describing the IHRL claims), 347-9 (findings of breaches of several rights in IHRL, including right to life).
198 See chapter 1, section 3.3.1; see especially, *Stichting Mothers of Srebrenica v The Netherlands* App no 65542/12 (ECHR, 11 June 2013) (‘Srebrenica case’), para 40 (identifying breaches of IHL), 55 (breaches of tort and contract), 456 (breaches of public international law norms of state responsibility) 57 (identifying breaches of IHRL, especially the right to a remedy).
199 See the discussion in McLachlan (n 187), 290-3(at sections 7.83-7).
outside of the context of the battle (a matter for the trial judge to determine on the facts of a case), tort law would apply in its normal course. However, where the injury occurs in the midst of battle, there may be triggered combat immunity from tort law, with IHL and IHRL being the applicable law.

Another example is provided by the ongoing *Jam* litigation before US courts (discussed in chapter 1). Those Claims against the IFC may be characterised as in contract, tort, as well as infringements of several human rights, including right to health, right to livelihood, and other cultural, economic and social rights. Finally, even claims by employees against IOs can be susceptible to multiple qualification. Such claims may be characterised as arising in contract, employment law, administrative law, on occasions tort law, and also potentially IHRL when issues of discrimination and other international labour rights are at stake. The same may be said about other claims of an administrative law character which may be characterised as an aspect of GAL, national administrative law when a member state’s actions are impugned, indirectly challenging IO decisions, as well as in IHRL, amongst other potential qualifications.

How is a plaintiff’s cause of action against an IO to be characterised? A prominent approach may be to first select the applicable law based on a connecting factor, and then reverse engineer the qualification. The obvious flaw is that one may use it to suit a preconceived determination. The reality is that it is open to a court to qualify a claim in any way it sees fit. In matters of characterisation of claims susceptible to multiple qualifications, there is no ready answer as to what method is to be used to choose one qualification over another. Leaving those difficulties to one side for the moment, the concern about the characterisation process is not so much that a claim can be qualified in different ways, but more that the characterisation stage may be used for questionable motivations. When asked to qualify a claim against an IO, what may determine a court’s response may be an impetus to defer adjudication to a different forum as opposed to a sincere choice of law inquiry.

In this respect, the task of characterising claims against IOs can occur before national, institutional (or even general international) courts. Each of those courts can in theory adjudicate

200 Ibid.
201 Ibid.
202 For a discussion of this case, see chapter 1, section 3.3.2.
203 Symeonides (n 8), 64.
claims regardless of whether they originate in domestic or international law. For instance, in addition to hearing typical domestic law claims, national courts can and do regularly adjudicate international law based claims. Similarly, within the scope of their ascribed competences, in addition to determining questions of institutional and international law, there is no reason why institutional (or general international) courts cannot also determine questions of domestic law if the parties to the instrument establishing the relevant international tribunal so choose.

That being said, despite possessing adjudicative jurisdiction, a court may nevertheless consider to refuse an exercise of its jurisdiction on the purported basis that it is not an appropriate court due to the applicable legal standards that the court considers are best addressed by a different court. The characterisation of a claim can have significant impact on whether or not a court’s adjudicative jurisdiction is ultimately exercised. For example, if a national court chooses to qualify a claim as a breach of a rule of international law, as opposed to the commission of a domestic wrong, it may decide to defer the task of adjudication to a different forum altogether. The rationale could be multifold. A court may consider itself an inappropriate forum to resolve the claim for it does not possess relevant expertise; or the court may not wish to purportedly intrude into the prescriptive jurisdiction of an IO for reasons of comity; or other similar bases. Vice versa, an institutional (or general international) court may not wish to intrude into the autonomy of national legal orders if confronted with determining questions of domestic law. As is discussed further below, such concerns are more a matter of perception than reality.

Once adjudicative jurisdiction is established and the seised court is the ‘appropriate’ court, the qualification process must not be used to deny jurisdiction in favour of another forum, a forum

204 There is a vast literature on the role of national courts in the adjudication of international claims. Some argue this is a fragmentation of international adjudication, but the better view is a legal pluralist one: See W Burke-White ‘International legal pluralism’ (2004) Michigan Journal of International Law 25:963-79, 964-5; international law claims can also be pursued as domestic causes of action. For the various methods used by national courts to determine claims where inherently public international law disputes are determined by national courts: see Human Rights and PIL (n 167), section 1.22 (the US approach); and in other states, including the UK, an international law claim may be pursued through a domestic cause of action, such as the ‘general law of tort, such as the torts of false imprisonment (relating to the right to liberty) and battery (relating to the right not to be tortured or subjected to ill-treatment). The applicable domestic substantive law can only be identified using private international law rules relating to the applicable law (section 1.24).

205 This rationale has often formed a basis for finding that the claim is not justiciable: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 81 ILR 670; [1990] 29 ILM 670 (‘International Tin Council case’), 695; also see the discussion of *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] 2 All ER 387 (QBD) in G Ossman, ‘The Protection of International Organisations under the Rules of Conflict of Laws: Prevailing Subjectivity’ ICCLR 1995, 6(11), 380-7.
that may in fact not even exist. Where a plaintiff has a *bona fide* cause of action against an IO, there is no logical reason as to why the claim’s susceptibility to another qualification should mean that a court refuses to determine a cause of action which it is otherwise competent to decide. Perceived concerns about relevant expertise and respect for the IO’s regulatory authority can be met at the localisation and application stages.

5.2 Localisation

The second step in the choice of law inquiry is referred to as ‘localisation’. This step involves placing a dispute on the so-called map, by determining where the tort occurred or the contract was made or was to be performed.\(^{206}\) The localisation step obviously needs some adjustments when coordinating between the national and the institutional legal orders given that IOs do not possess their own territories in the same way that states do.

As was discussed at section 2 above, IOs have their own independent legal orders that co-exist heterarchically with national legal orders. One must note the IO’s freedom to enact their own internal legal infrastructure in the sphere of their competence. IO’s ‘exercise legislative, executive and judicial powers over their organs and officials; and an IO’s legal relations with its officials are thus governed by the internal law of the IO concerned.\(^{207}\)

In this respect, there can be no conflict of laws as such for the only legal order that supplies the applicable law is that of the IO. Particularly in the sphere of employment law, it is now well-accepted that it is the international administrative law of the IO that provides the applicable law in disputes between international civil servants and IOs.\(^{208}\) There is however significant convolution on the applicable law in disputes between certain IOs (including the UN) and consultants and contractors who are not in the permanent or fixed term employment of the employer IO. Concerning such individuals, general principles of international commercial law are said to apply.\(^{209}\) As to what that phrase means has not been clarified yet. It is most likely

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\(^{206}\) Symeonides (n 8), 64, 68. It is to be noted that multiple connecting factors can localise a dispute.

\(^{207}\) Jenks (n 1), 36-7.

\(^{208}\) There are several texts identifying the substantive IAL: see ibid; CF Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals* vol I and II (OUP 1994); for a more recent work, see G Ullrich, *The Law of the International Civil Service: Institutional Law and Practice in International Organisations* (Duncker & Humblot 2018).

\(^{209}\) See for example UN Secretariat, ‘Administrative instruction. Consultants and individual contractors.’ (19 December 2013) UN Doc ST/AI/2013/4, Annex 1 (General Conditions of Contracts for the Services of Consultants and Individual Contractors), clause 16.
that the terms of the legal relationship would be based on the contract of employment and the relevant aspects of international administrative law. This must be done to maintain the independence of the IO concerning staff affairs generally, and that of the international civil service specifically. Similarly, in respect of disputes of a constitutional, public or administrative law nature, it should be the internal law of the IO that is to apply in order to respect the scope of the prescriptive jurisdiction of the IO on such matters. In such cases, the applicable law will be IO law. Thus, should a national court take jurisdiction over an IO in a claim raising employment or other administrative law issues internal to the IO, the law of the IO should govern the dispute. Doing so would demonstrably respect the regulatory authority of the institutions located in the IO legal order.

In other kinds of disputes, PIL rules would apply in their normal course, albeit appropriate adjustments are required. For instance, in tortious claims, the applicable law may be determined by reference to the *lex loci delicti* rule (which can be displaced by a treaty provision), although the extent of damages may need to be restricted on the basis of the ordre public of the forum (see section 5.3.2 below). In respect of disputes concerning real or personal property, the applicable law will classically be the law of the place where the property is located. Further, a contractual dispute can be localised by reference to the generally applicable principles of party autonomy or to other well-accepted connecting factors.

Finally, due to the nature of the IO as an international subject directly bound by public international law rules, certain disputes will require the application of public international law. As is now apparent, the relationship between IOs and private persons may also raise claims where public international law would provide the governing law. If a cause of action lies in public international law (such as in IHRL or IHL), it is those bodies of law that are to apply in

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210 Although not as extensive, a degree of de jure administrative power is exercised by IOs over consultants and contractors: ibid.
211 See Seyersted (n 3), 450, 489 (noting that there are often no applicable law provisions in place; and PIL must take into account the unique nature of IOs in its application).
212 There is much work to be done to clarify the precise way in which tort law is to apply to an IO for international instruments are ambiguous. See, for example, Article 288 of the Treaty Establishing the European Community (10 November 1997) Official Journal C 340; (31 August 1992) Official Journal C 224, which merely states: ‘In the case on non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties’; see also the discussion in Seyersted (n 3), 488.
213 Seyersted (n 3), 473: where the author points out that MDB loan contracts also incorporate aspects of IO law, in addition to classical principles of contract law.
principle, although its application may require a nuanced and detailed analysis as to how those bodies of law apply to IOs.\textsuperscript{214}

Much work needs to be done on clarifying what the precise content of applicable law vis-à-vis the relationship between private persons and IOs is, especially where express choices are absent. The difficulty of ascertaining the content of the law would be equally present for IO and national courts alike. For the moment, what is relevant is that despite such difficulties, as was said at the outset, the starting point for a choice of law is that every dispute will be governed by some law. The task for a court adjudicating a claim against an IO is to meaningfully engage with the inquiry, and determine what that law is. This a court can achieve through the process of application.

5.3 Application

The final step in a choice of law determination is the ‘application’ stage. This involves several substeps. These principally include ascertaining the content of the foreign law; considering whether any exceptions to the application of the foreign law are operable; and finally, applying the foreign law to the case at hand.\textsuperscript{215} It is shown below that the perception that national or for that matter IO courts are incapable of applying foreign law to a given set of facts is misplaced.

5.3.1 Ascertaining the content of foreign law in the IO setting – a perfectly manageable task

When a court is engaged in determining the content of foreign law, the inexorable question is how foreign law is actually to be proved. In most common law systems, questions of foreign law are considered questions of fact. Expert evidence is used to prove the content of foreign

\textsuperscript{214} A discussion of what the content of law is outside the scope of this work. For an application of IHL specifically to IOs, see M Zwanenburg, Accountability of Peace Support Operations (Martinus Nijhoff 2005); note, IOs also provide for applicable legal regimes in such situations, although some confusion exists as to what its content is. For the difficulty in ascertaining the content of the tort law, see K Schmalenbach, ‘A Study on Claim Settlement in the Course of Military Operations and International Administrations’ 10 International Peacekeeping: The Yearbook of International Peace Operations, 33-50, 42-3.

\textsuperscript{215} Symeonides (n 8), 64.
law. In civil law jurisdictions, issues of foreign law are considered as questions of law. On either approach, a court will be furnished with detailed submissions on the content of the relevant foreign law that is applicable to a given issue or claim.

Professional judges are generally adept at resolving transnational disputes requiring the application of foreign law. The argument that national courts would lack the expertise to determine claims involving IOs for want of knowledge on matters of foreign law is misleading. If national courts decide to take jurisdiction over an IO, there is no reason why such courts cannot determine questions that may require an analysis of institutional law or public international law, when it is applicable. Just like courts resolve issues of a foreign state’s law, similar techniques would be adopted to determine the content of the law of an IO.

Moreover, in claims in tort, contract, property, and other areas, national law may be the applicable law. Resolving such claims would constitute routine work for the relevant courts. The expertise that a national judge may possess in relation to a contractual or tortious dispute (including evaluating evidence) is likely to be superior to the expertise of several institutional or international judges given the national judge’s experience.

In claims requiring application of IO law, such as claims in employment law, the international administrative law of a particular IO can readily be determined by way of the party/expert’s submissions. The sources of IAL are well-known. In one of the most influential decisions on the subject, de Merode v The World Bank, the World Bank Administrative Tribunal commented that a staff member’s conditions of employment are to be determined with reference to the contract of employment, the enactments of the organisation (including its

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216 The general common law position on proof of foreign law has been well captured in Rule 18 of Lord Collins of Mapesbury (ed), *Dicey and Morris on the Conflict of Laws* (15th edn, 2012 Sweet and Maxwell), 187, which states that foreign law is a fact, so that foreign law must be pleaded and proved; in general, foreign law must be proved by expert evidence. The US takes a different approach with foreign law being a question of law: see *Animal Science Products Inc v Hebei Welcome Pharmaceutical Co* (14 June 2018) No 16-1220, 1, referring to the Federal Rule of Civil Procedure 44.1, the US Supreme Court stated ‘in determining foreign law, “the court may consider any relevant material or source ... whether or not submitted by a party.” As “[t]he court’s determination must be treated as a ruling on a question of law,”.


constituent instruments, staff regulations and staff rules), general principles of IAL, and the practice of the organisation to the extent that it is ‘limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation’. 219

While each IO will have its own employment law, similarities exist. A common corpus of the employment law of IOs has now been created due to the parallels between the employment law of the different IOs, as well as the intense cross-fertilisation through the jurisprudence of IATs. 220 Overall, IAL incorporates elements of contract law, administrative law, domestic employment law, and human rights law (especially anti-discrimination law). Each of these constitute subject matters over which a professional judge ought to be able to adjudicate competently, especially when aided with expert submissions. In case a national court takes jurisdiction over an employment dispute involving an IO, access to justice and the preservation of the IO’s legislative jurisdiction can be maintained by applying IAL to the substance of a claim - unless the IO’s law is so deficient that the forum’s ordre public would exceptionally apply a different substantive law. 221

Furthermore, as the significant evidence-base gathered by the global administrative law movement has shown, the public or administrative law sphere also reflects common standards. When IOs impact private rights through their public or administrative conduct, ‘adequate standards of transparency, participation, reasoned decision, and legality’ must be met’. 222 Of course, the context in which various GAL disputes would arise would differ, however, what is common to those regimes is their administrative character. Again, aided by expert submissions, and showing deference (but without being bound) to the GAL regime applied by the IO in

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219 See de Merode v the World Bank (n 218), paras 18-22; also see Judgments of the Administrative Tribunal of the ILO (Advisory Opinion) ICJ Rep 1956, 91, para 23; also see, R Gulati (n 218).
220 De Merode (n 218), para 28.
221 This approach has already been adopted in some jurisdictions: see Western European Union v Siedler (n 169) discussed in Ryngaert (n 169), 65-6, where the authors said while national courts should apply the IAL of the IO in a relevant employment dispute, ‘however, if the substantive internal law of the organization were manifestly deficient, by, for instance, providing for a ridiculously low indemnity allowance, domestic courts should be allowed not to give effect to such internal law, possibly citing ordre public considerations drawn from private international law, and apply domestic law’. 222 See B Kingsbury, N Krisch and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 Law and Contemporary Problems 16-60, 17.
respect of the particular claim,²²³ should the need arise, national courts ought to be perfectly capable of determining GAL disputes.

Finally, regardless of the forum, whether it is an IO or national court, the rules of public international law are (and can be) applied by them regularly. Although how IHRL and IHL apply to IOs can be complex, making appropriate international legal pronouncements is now an aspect of the work of courts in national legal orders. Irrespective of the origin of the cause of action, a court vested with appropriate jurisdiction (national or institutional) is capable of deciding a broad range of causes of action. A choice of law determination in claims against IOs should not be impacted by a purported lack of judicial expertise.

5.3.2 The operation of the ordre public exception - disapplying foreign law

In exceptional circumstances, courts located in one legal order can refuse to apply the foreign law (or aspects of it) for reasons of ‘ordre public’ (also known as the ‘public policy’ exception). The principle was expounded by Judge Cardozo in Loucks v Standard Oil Co of New York.²²⁴ It was held that the public policy exception applies only if the foreign law ‘offends our sense of justice or menaces the public welfare’, ‘shock[s] our sense of justice’, or ‘violate[s] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common wealth’.²²⁵ A mere distinction between the laws of the different legal orders ‘is not enough to show that public policy forbids us to enforce the foreign right.’²²⁶ The ordre public exception may only be invoked in exceptional cases. For the exception to apply, ‘the application of foreign law must be “manifestly incompatible” with the forum’s ordre public or with “fundamental principles” of the forum state.’²²⁷

Moreover, the ordre public exception is applied to the impact of the application of the foreign law in the claim in question as opposed to assessing it in an abstract sense.²²⁸ In transnational cases, the doctrine of ordre public or public policy manifests as the concept of ordre public

²²³ In Animal Science Products Inc v Hebei Welcome Pharmaceutical Co (n 216), 1, the US Supreme Court stated that a 'federal court should accord respectful consideration to a foreign government’s submission, but is not bound to accord conclusive effect to the foreign government’s statements.' The decision is available at <https://supreme.justia.com/cases/federal/us/585/16-1220/#tab-opinion-3915290>.
²²⁴ Loucks v Standard Oil Co of New York (NY 1918) 120 NE 198.
²²⁶ Ibid.
²²⁷ Symeonides (n 8), 78-9.
²²⁸ Ibid, 80.
international, with the underlying aim that ‘a forum should be more tolerant of certain results in multistate cases than in domestic cases.’ While the exception may apply in differing contexts, of present interest is the general rule in PIL that the penal laws of one legal order do not extend to a foreign legal order. The result being that the ‘courts of no country execute the penal laws of another’. A penal statute is one which ‘punish[es] an offense against the public justice of the state … [as opposed to] afford[ing] a private remedy to a person injured by the wrongful act.’

Exemplary or punitive damages in civil cases (which are seen as penal in nature) may not be awarded or enforced based on the ordre public doctrine. Several jurisdictions have enacted laws that where a foreign law governs a tort, the amount of damages may not exceed the amount available under the lex fori. In the case of IOs specifically, the reason an appropriate national court takes jurisdiction over an IO in the first place is to guarantee the individual right to a fair trial, and not to impose a penalty on the defendant. Recognising or enforcing exemplary or punitive damages would not only impact on the functional independence of the IO, but amount to the enforcement of one state’s public/penal laws elsewhere. Bearing in mind that as national courts are performing a secondary role when exercising adjudicative jurisdiction due to the unavailability or inadequacy of the alternative means, remedies that the alternative forum could not have awarded should not be available through national courts. National or institutional courts should in exceptional circumstances be able to refuse to recognise the laws (or aspects of laws), including the rules on exemplary or punitive damages where doing so would be contrary to the forum’s ordre public.

So far, very occasional resort to the ordre public international concept has been made in the IO context by some civil law states. In one case where an IO did not provide any alternative means of dispute resolution to an official of the African Development Bank, French courts set aside the immunities of the concerned IO for doing so would have offended the ordre public of the

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229 Ibid.
231 See Huntington v Attrill (1892) 146 US 657, 673-4.
232 Symeonides (n 8), 84.
233 Ibid, giving the example of Germany and South Korea.
234 A good example is provided by the Haiti cholera litigation already discussed in detail. Note, in the Haiti cholera litigation, the victims’ lawyers claimed a total of approximately USD 36.5 billion. The annual budget of the UN at the time was approximately USD 20 billion. The cap for damages at the UN for third party loss is USD 50,000. Clearly, had the damages claimed been awarded, the functioning of the UN would have been significantly adversely effected: see the discussion in Boon (n 153), 348 and 370.
A French expert explained the application of the doctrine in that case as follows:

It has been argued that the French *ordre public* international aims at setting aside a foreign rule. This might be true for matters concerning the substance of a case. But in the special case of the principle prohibiting the denial of justice, it is applied if the forum state is not competent according to its regular (national) rules of competence and if no other court has jurisdiction, in order to avoid denial of justice. So, this particular rule may actually “set aside” the rule of the forum state denying a national court’s competence.

Interestingly, the court essentially treated IO immunities as an aspect of IO substantive law, and disapplied the immunity because the impact (a denial of justice) was contrary to French *ordre public*. Given that *ordre public* generally operates to exclude the application of substantive law, the conflation of substance and procedure may raise conceptual challenges, a discussion of which is outside the scope of this thesis.

While the correctness of the outcome should not be doubted, the better PIL approach is to rely on the issue of ‘appropriate court’ as opposed to relying on doctrines that are exceptionally used in certain national legal systems. Be that as it may, the *ordre public* exception is another PIL tool that may be resorted to by a national court when taking jurisdiction, where no other alternative means have been provided for by the IO.

5.3.3 Applying the applicable law

The final step in a choice of law determination is to apply the foreign law to the issue or claim at hand. Below is a simple table on the applicable law for categories of dispute that will need nuanced development in the context of the specific connecting factors that different

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238 In *African Development Bank v X* (n 235), para 3, the Court of Cassation said: ‘The jurisdictional immunity of an international organization could not be relied upon in relation to proceedings brought by an employee when no international administrative tribunal had been instituted by that organization with jurisdiction to hear complaints brought by its employees. It would otherwise be a denial of justice, in violation of the right to a court which, in France, was part of the ‘international public order’.”
jurisdictions may have implemented in their PIL regimes. If choice of law determinations are made in a way that defers to a foreign legal order’s prescriptive jurisdiction, the task of neatly slicing regulatory authority can be effectively performed.

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<thead>
<tr>
<th>NATURE OF DISPUTE</th>
<th>APPLICABLE LAW</th>
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<tbody>
<tr>
<td>Tort</td>
<td>Law of the place of the injury, as modified by the agreement of the IO and the state where the injury occurred</td>
</tr>
<tr>
<td>Contract</td>
<td>Law chosen by the parties or based on other accepted connecting factors (such as place of performance)</td>
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<tr>
<td>Employment</td>
<td>International administrative law of the IO</td>
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<tr>
<td>GAL disputes</td>
<td>The internal law of the IO</td>
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<td>Human rights</td>
<td>IHRL</td>
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<tr>
<td>Claims arising in the context of an armed conflict</td>
<td>IHL, as modified by the relationship between the IO and the states concerned</td>
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6 Recognition and enforcement

PIL’s third component involves the recognition and enforcement of foreign civil and commercial judgments. Recognition and enforcement can also intersect with IHRL. Emphasising that the right to a fair trial requires the right to an enforceable judgment, a workable and robust recognition and enforcement regime may be necessary to ensure the right to a fair trial generally, and to an enforceable remedy specifically. Moreover, when coordinating between the national and the IO legal orders, a recognition and enforcement regime can play a critical role in ensuring respect for each legal order. This is to be done by applying the mechanics of recognition and enforcement (6.1). When there are excesses in the exercise of jurisdiction, they can be tempered at the recognition stage. More importantly, if a court is confident that its decisions will be enforced, it is less likely to refuse jurisdiction on grounds of forum non conveniens. Finally, any PIL regime to coordinate the relationship

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239 See, Human Rights and PIL (n 167), 41.
between the IO and national legal orders also needs to take into account the uniqueness of the former, a task undertaken at 6.2. I will end the substantive discussion in this chapter by providing the fundamental elements of a recognition and enforcement regime that may be implemented to manage the regulatory arbitrage subject to the present discussion (6.3).

6.1 The mechanics of recognition and enforcement generally

Recognition and enforcement engages a court’s jurisdiction in two senses: the jurisdiction of the court originally asked to determine a transnational claim (direct jurisdiction); and that of the court asked to enforce the judgment of the original court (indirect jurisdiction).\(^\text{240}\) When a rendering court is asked to recognise and enforce a foreign judgment, it needs to ask whether the original court did in fact possess the jurisdiction in an international sense (general or personal jurisdiction) in the first place. If not, recognition and enforcement may be refused. Thus, in the sphere of recognition and enforcement, territoriality is unsurprisingly the principal connecting factor too.

After decades of effort, a global convention on the recognition and enforcement of civil and commercial judgments is close to finalisation. It supplies the rules that have attracted international agreement.\(^\text{241}\) I adopt its provisions as a starting point given the global consensus it reflects. As is evident below, the Draft Judgments Convention enshrines territoriality as a key connecting factor.

A foreign judgment must be enforced when the defendant is ‘present’ (habitually resident) in the state of the court rendering the original decision.\(^\text{242}\) If a court properly exercises general jurisdiction over a defendant, the resulting judgment ought to be enforceable. Other grounds of recognition and enforcement correspond to the well-accepted basis of subject matter jurisdiction. In respect of foreign judgments concerning non-contractual claims, such as in tort, Draft Article 5(1)(j) states that a foreign judgment must be recognised and enforced where ‘the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to

\(^{240}\) Michaels (n 50), 8.


\(^{242}\) See ibid, Draft Article 5(1)(a), (b) and (d); Draft Article 3(2) defines 'habitual residence' in respect of an entity or person other than a natural person as: (a) where it has its statutory seat; (b) under whose law it was incorporated or formed; (c) where it has its central administration; or (d) where it has its principal place of business.
or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred’, giving effect to the territorial *lex loci delicti* rule. Concerning contractual claims, while party autonomy is protected, Draft Article 5(1)(g) provides that recognition and enforcement must be affected with reference to the connecting factor of the place of performance; and if the place of performance cannot be determined, by reference to ‘the law applicable to the contract … unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State…’. A judgment in respect of property is to be enforced if it was delivered by a court located in the place where the property is located.

Draft Article 7 sets out the limited grounds on which a judgment may be refused recognition and enforcement. These include where service was not properly affected on the defendant; the judgment was obtained by fraud; ‘recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State’; and ‘the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties’.

The Draft Judgments Convention leaves unaddressed several questions of present relevance, including the rules relating to the question of the enforcement of foreign judgments rendered in an administrative context, how to deal with state and IO immunities, and the liability for the actions of armed forces. That is why any recognition and enforcement regime will need to be negotiated afresh (see conclusion). That being said, the rules enshrined in the Draft Judgments Convention can provide for a starting point for any future treaty that is IO-specific.

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243 See Draft Judgments Convention (n 241), Article 5(1)(g)(i); also see the landmark Choice of Court Convention (n 86) which provides that where parties have entered into a choice of forum agreement, the selected court must take jurisdiction and any resulting judgment must be enforced in all member states (see Articles 5 and 8). The convention as such applies to contracts involving IOs (Article 2(5)), although some confusion is caused by Article 2(6) that seems to preserve IO immunities.

244 See Draft Judgments Convention (n 241), Draft Article 5(1)(h) and (i).

245 Ibid, Article 1.

246 Ibid, Article 2(5).

247 Ibid, Article 2(1)(n).
6.2 Situating recognition and enforcement in the IO context

The central proposition is that a judgment against an IO should be enforceable as such. If this is not the case, the right to a fair trial is immediately engaged. Moreover, from a PIL perspective, as long as a court properly exercises adjudicative jurisdiction over an IO (see section 4), that judgment should be enforceable across legal orders. The principles that ought to govern recognition and enforcement of judgments against IOs must balance three things: the PIL rules of enforcement generally, including regard for the public international law limits of enforcement jurisdiction (see section 4.1.1); securing the right to a fair trial; and ensuring respect for the functional independence of the IO. All those considerations can be appropriately balanced through a carefully tailored PIL regime.

The issue of judgment enforcement against IOs can arise in several contexts which any regime will need to take account of. Obviously, if an institutional court renders a judgment that is complied with in full by the IO, the issue of recognition and enforcement will not arise. In other cases, any recognition and enforcement regime will need to coordinate between the national and institutional legal orders. As IOs have no power of enforcement, and its assets are located on state territory, the focus is to be on the recognition and enforcement action that national courts may properly take.

Three situations can arise. First, if an institutional court renders a decision, and the IO does not comply with it, the plaintiff must have an opportunity to enforce the judgment through the courts of a different legal order possessing enforcement powers. Second, if the courts of the host state have properly taken jurisdiction over an IO, then enforcement of that judgment ought to be ensured. Finally, attention needs to be paid to the enforcement of the judgments of one national court by another national court pertaining to judgments against IOs. Each of those scenarios is considered below.

6.2.1 Seeking enforcement of institutional judgments through a national court

If enforcement is sought in respect of a judgment emanating from an institutional court through a national court, then all the former is doing is to substitute its facilities of enforcement. As IOs do not possess their own enforcement mechanisms, enforcement through a national court is the
only realistic alternative. Practically, this is done through treating the IO judgment at the national level as a foreign judgment and recognising and enforcing it.\textsuperscript{248}

Therefore, where a national court decides to exercise indirect jurisdiction when recognising and enforcing an IO judgment, once recognised, the relevant judgment becomes a judgment as if it was delivered by the recognising court. In such a situation, any immunities from enforcement ought not to prevent enforcement action because no immunities should exist where the enforcement action is in respect of a judgment originally delivered by an IO court. As the judgment sought to be enforced is that emanating from the institutional legal order, it can compellingly be argued that immunities from enforcement jurisdiction should not apply as the national court is simply implementing what the IO’s own court has decided. In such circumstances, any treaty rule that may provide for immunity from enforcement should be inapplicable bearing in mind that the independence of an organisation is not compromised where its own decisions are being given effect to.

Further, where enforcement of institutional judgments is sought, recognition and enforcement is best sought through the courts of the place where the IO is headquartered, being the place where the IO’s assets are most likely located. As the enforcement action will be taken by a territorial court, the limits of public international law jurisdiction will then also be appropriately respected (section 4.1.1). In sum, while no immunities ought to apply where enforcement action is in respect of a judgment originally rendered by an IO court, for the avoidance of doubt, any PIL arrangement should expressly provide that the courts of the host state (or another nominated court) can take enforcement action against the IO’s assets to satisfy a judgment emanating out of the legal order of the IO itself.\textsuperscript{249}

\textit{6.2.2 Seeking enforcement of a national court’s judgment in the same legal order}

Where the courts of a host state properly take jurisdiction over an IO, their judgments must be enforceable if a fair trial is to be realised. Assuming an IO is unwilling to comply, in this scenario too, the rules of recognition and enforcement of foreign judgments do not arise as such. This is because enforcement is sought in the territorial jurisdiction of the rendering court.

\textsuperscript{248} Seyersted (n 3), 121.
\textsuperscript{249} See further conclusion to this work.
Should a national court properly exercise jurisdiction over an IO, any immunity from enforcement is to be disapplied. Indeed, some territorial national courts have in fact started to already take enforcement action against IOs where national jurisdiction is exercised, in doing so, rightly making the right to access to court practical and effective. Moreover, where a national court determines the merits pursuant to the applicable law as suggested at section 5 above, the likelihood of the award of punitive or exemplary damages is removed. Thus, any enforcement action at the national level will only be in respect of the actual damage suffered by the plaintiffs. Here, PIL can help ensure that the right to an enforceable remedy is realised, without intruding into the independence of an IO through the potential enforcement of excessive damages. Finally, an IO may of course resist enforcement on the various grounds open to it (see section 6.1 above).

6.2.3 Seeking enforcement through another national court

In this final scenario, the classical rules on recognition and enforcement of foreign judgments become relevant. When judgments issued against IOs in one national court are sought to be enforced in another national court, the concepts of direct and indirect jurisdiction are immediately engaged. If the original court properly exercised its adjudicative jurisdiction in line with PIL rules as adjusted in an IO context (section 4 above), then there ought to be no barriers for that judgment to be enforced across legal orders. The recognising court should in principle enforce the foreign judgment (subject to valid grounds against enforcement raised by the IO). Further, as was stated at section 5.3.2, exemplary or punitive damages should not be enforced.

As to the applicable connecting factors for indirect jurisdiction, the principles reflected in the Draft Judgments Convention could form a good starting point for designing a PIL regime in the IO context. The rules on tortious, contractual and property based causes of action in any

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250 See for example, in Lutchmaya v General Secretariat of the ACP Group (4 March 2003, Brussels Court of Appeal, 9th Chamber) Journal des Tribunaux 2003, 684; ILDC 1363 (BE 2003) (Belgium); and in General Secretariat of the ACP Group v Lutchmaya (21 December 2009, Court of Cassation of Belgium, 3rd chamber) Cass Nr C 03 0328 F; ILDC 1573 (BE 2009) (Belgium), Belgian courts permitted execution measures in a case where the claimant had no reasonable alternative means of enforcement; also see Consortium X v Swiss Federal Government (Conseil federal) (2 July 2004, Swiss Federal Supreme Court, 1st Civil Law Chamber), partly published as BGE 130 I 312, ILDC 344 (CH 2004), and BIS v NML Capital Ltd et al and Debt Enforcement Office Basel-Stadt (23 April 2010) AB 2009/102.
PIL regime can take direct inspiration from the terms of the Choice of Court Convention (for contract) and the Draft Judgments Convention for others.

While existing regimes provide for a good starting point, they are not comprehensive. For any PIL recognition and enforcement regime in the IO context to be meaningful, it must have a broader scope than the narrow terms of existing instruments. First, it must include within its scope cross-border enforcement concerning judgments arising out of administrative law. Second, claims arising out of the activity of armed forces (which could be equated with peacekeepers for PIL purposes) must be also included in any recognition and enforcement regime. Overall, any recognition and enforcement scheme should work on the assumption that regardless of the subject matter, where adjudicative jurisdiction exists, and is appropriately exercised, the resulting judgment must be recognised and enforced across legal orders.

7 Conclusion

This chapter argued that PIL is an ideal tool to manage the regulatory arbitrage that is responsible for denying justice to the victims of institutional conduct. It can neatly slice regulatory authority between the national and institutional legal order. Such nuanced allocation of regulatory authority can ensure that the different values at play can be realised fully without compromising on each of those values. Not only can the functional independence of IOs be maintained by tailoring the rules of adjudicative jurisdiction, choice of law, and recognition and enforcement, but a fair trial can be realised for the victims of IO conduct through a robust PIL regime.

I proposed that national courts should exercise jurisdiction over an IO only if a failure of justice has occurred, or there is a real risk that it will occur at the IO level. Even then, only national courts having appropriate connections to the dispute should exercise their adjudicative powers. Where there is a failure of justice at the IO level, the national court is the ‘appropriate’ court to adjudicate the dispute. And when a national court takes jurisdiction over an IO, it must fully respect the prescriptive jurisdiction of the defendant IO by applying carefully calibrated choice of law and recognition and enforcement rules.

Finally, as the pivot for coordinating the relationship between institutional and national legal orders comes down to a fair trial assessment, the next significant question tackled concerns whether institutional dispute resolution mechanisms comply with that fundamental right. If
they do, national courts will have no role to play. However, chapter 3 will show, institutional dispute resolution mechanisms are either completely absent or so deficient that a role for national courts in resolving claims against IOs becomes inevitable.
CHAPTER 3:

ASSESSING THE FAIR TRIAL ELEMENT IN THE REGULATORY ARBITRAGE – A MANIFESTLY DEFICIENT REGIME?

1 Introduction

The first port of call for the victims of IO conduct should be to seek justice within the legal order of the defendant organisation. Only where institutional dispute resolution mechanisms are unavailable or inadequate that the role of national courts is triggered. Assessing the compliance of dispute resolution forums at IOs with key fair trial guarantees thus becomes crucial. Such an assessment is pivotal to coordinate the relationship between the national and institutional legal orders.

To determine whether a failure of justice has occurred within the legal order of the IO concerned, a nuanced analysis is required. This chapter proceeds as follows. First, I show that internal justice systems at IOs are created due to considerations of human rights generally, and the right to a fair trial specifically. This analysis also shows that the right to access an independent and impartial court or tribunal in full equality has been incorporated into the institutional setting (2). The following two sections explain what those rights actually entail, specifically developing the criteria against which the internal justice systems of IOs must be assessed (3-4).

The chapter then moves on to assess the most prominent internal justice systems at IOs. The justice systems selected belong to the realm of international administrative dispute resolution for the reason that IATs are the only true judicial mechanism established at the institutional level so far (5).\(^1\) I assess the two most influential international administrative regimes, the UN’s internal justice system, consisting of the United Nations Dispute Tribunal (‘UNDT’) and United Nations Appeals Tribunal (‘UNAT’) (collectively referred to as the ‘UN tribunals’) (6), and the Administrative Tribunal of the International Labour Organisation (‘ILOAT’) (7).

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\(^1\) IATs are set up to resolve employment disputes between international organisations and their staff members. For a background, see, A Riddell ‘Administrative Boards, Commissions and Tribunals in International Organizations’ (OUP 2012) Max Planck Encyclopedia of Public International Law, 66.
By selecting the principal justice regimes that together exercise jurisdiction over more than 60 IOs and well in excess of 100,000 international civil servants operating around the world, this chapter identifies the fair trial deficits for a significant proportion of private persons affected by IO conduct. To the extent that the justice regimes not presently considered possess similarities with the regimes included within the scope of this paper, analogies may be drawn. The conclusions drawn in this paper may thus apply equally to other internal justice systems as well. Overall, based on the fair trial assessment, it will be concluded that even where IOs have created judicial mechanisms, national courts may in fact have a significant role to play to avoid failures of justice. Moreover, the suggestion that the jurisdiction of IATs should be expanded to address fair trial deficits in claims against IOs in the non-employment context will be rejected as unviable and imprudent.

## 2 The right to a fair trial and internal justice systems

That everyone seeking resolution of his or her legal claim has the right to access a fair trial is well entrenched in human rights law. How that right has embedded itself in the context of the delivery of justice within the institutional legal order is a question of much significance. Given that IOs are not party to human rights treaties that enshrine fair trial guarantees, the translation...
of the right in the institutional context deserves further explanation. I show that the right to a fair trial has been incorporated into the institutional setting. This development has primarily occurred via the jurisprudence arising out of international administrative dispute resolution.

Evident by the thousands of decisions rendered by IATs so far, employment disputes constitute the bulk of claims raised against IOs. And international administrative dispute resolution mechanisms are relatively sophisticated when compared to other spheres, where judicial mechanisms are often completely absent. It should come as no surprise that it is the employment context that has provided fertile ground in terms of the procedural standards applicable to the delivery of justice at the institutional level. Below, it is first shown that the very rationale behind the development of internal justice systems at IOs is to guarantee the right to access to court (2.1). Without access to a forum, the question of compliance with other component fair trial rights does not even arise. After establishing the operability of that critical right, I show that internal justice mechanisms at IOs must comply with the range of component fair trial rights that must be accorded if a failure of justice is to be avoided (2.2).

2.1 The fair trial rationale behind the creation of internal justice systems at IOs

The very creation and existence of internal justice mechanisms at IOs can be explained by the demands of human rights generally, and access to justice specifically. IOs create internal justice systems not just as a matter of policy preference, but to implement an organisation’s obligation to provide ‘appropriate modes’ of dispute settlement to private parties affected by their conduct, an obligation often enshrined in treaty law. The grant of IO immunities that entrenches inequality of access at the national level, creates the very demand for alternative justice mechanisms for private persons seeking to raise claims against IOs. It was precisely such a rationale that led the International Court of Justice (‘ICJ’) in its *Effect of Awards Advisory Opinion* to conclude that despite the absence of an express power in the UN Charter, the UN General Assembly had the power to create a judicial organ vested with the jurisdiction to resolve employment disputes between the UN and its employees.

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5 See especially (7) below. Also see the jurisprudence discussed in chapter 1 generally, showing that even in the national context, employment disputes are most frequently litigated.

6 See chapter 1.


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

Attesting to defy the UN Administrative Tribunal’s decisions, the General Assembly issued a request for an Advisory Opinion to the ICJ asking whether the UN could refuse to implement a decision of that tribunal. The US, supported by several other Member States, submitted that the General Assembly could refuse to comply with the decisions of the UN Administrative Tribunal for it was the General Assembly that created the tribunal, and the latter could thus not bind the former. The ICJ not only said that the UN had validly created a judicial body empowered to render final and binding decisions, but it laid down the human rights and access to justice based rationale behind the creation of an appropriate judicial body in the form of the UN Administrative Tribunal. *The Effect of Awards* Advisory Opinion explained the very need for judicial mechanisms to resolve employment disputes between the UN and its employees as protecting the latter’s right to access justice at a forum that was independent of the executive or political organs. The ICJ highlighted that the UN as an organisation charged with the promotion of human rights generally, could not possibly deny the right of its own employees

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9 See for a typical example requiring the independence of international civil servants, Charter of the United Nations (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (‘UN Charter’), art 100, enshrining the requirement of the independence of the international civil service.


11 Megzari (n 10).

12 Supplementary estimates for the financial year 1953 UNGA Res 785 (VIII) (9 December 1953) UN Doc A/RES/785 (VIII).

13 *Effect of Awards* (n 8), 13.

14 Ibid, 53.
to access a judicial or arbitral mechanism when their employment rights were allegedly breached.\textsuperscript{15}

The views of the ICJ in \textit{Effect of Awards} form the earliest exposition of the principle that private persons having claims against IOs (including IO staff) ought to have access to an independent tribunal or arbitral process based on what may only be described as a human rights rationale. Critically, the ICJ left no doubt as to the independence of the UN Administrative Tribunal as a judicial body, saying that its decisions were final and binding on the other organs of the UN.\textsuperscript{16}

Internal justice systems then must be wholly independent from the political or executive organs of an IO, with the concept of the separation of powers applying within the context of institutional dispute resolution.\textsuperscript{17} Further support for this proposition can be garnered from another important ruling of the ICJ involving yet another case that concerned the impact of the US Loyalty Program. This time, it was the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’) that had terminated the employment of certain US nationals within its employment following an agreement between the US Government and UNESCO’s Director-General.\textsuperscript{18} On this occasion, the ILOAT went a step further than the UN Administrative Tribunal, not only determining that the termination was contrary to the relevant staff regulations and staff rules, but questioned the very propriety of the agreement between the Director General and the US Government concerning the US Loyalty Program.\textsuperscript{19}

Similar to the UN’s reaction in \textit{Effect of Awards}, unhappy with the ILOAT’s findings, UNESCO triggered the mechanism seeking the ICJ’s Advisory Opinion regarding its obligations to comply with certain decisions of the ILOAT which it considered to be beyond

\textsuperscript{15} Ibid, 57.
\textsuperscript{16} Ibid, 53.
\textsuperscript{17} The principle of the separation of powers was endorsed in the context of the delivery of international administrative justice by the Internal Justice Council of the UN charged with monitoring the administration of justice in the reformed UN’s internal justice system: see Report of the Internal Justice Council – Administration of Justice UNGA Res 72/210 (24 July 2017) UN Doc A/72/210 (‘IJC 2017 Report’), para 3.
\textsuperscript{18} Judgements of the Administrative Tribunal of the International Labour Organisation upon complaints made against the United Nations Educational Scientific and Cultural Organization (Advisory Opinion) [1956] ICJ Rep 77 (‘UNESCO Advisory Opinion’).
\textsuperscript{19} See Re Duberg (Judgment No 17) (1955) ILOAT; Re Leff (Judgment No 18) (1955) ILOAT; Re Wilcox (Judgment No 19) (1955) ILOAT; Re Bernstein (Judgment No 21) (1955) ILOAT; Re Froma (Judgment No 22) (1955) ILOAT; Re Pankey (Judgment No 23) (1955) ILOAT; Re Van Gelder (Judgment No 24) (1955) ILOAT. For analysis, see Megzari (n 10) 181-2. In each of the cases, the ILOAT said the decisions to dismiss the officials was unfounded and impinged on the independence of the international service.
its competence for it concerned political questions. The ICJ held that the ILOAT was empowered to hear and determine the relevant cases, issue final and binding decisions, and its judicial character must be fully respected. The ICJ thus dismissed UNESCO’s argument that questions about the permissibility of the US Loyalty Program constituted a political question and allegedly non-justiciable. Political or executive organs, including the member states of an IO must not then interfere in the administration of justice by wrongly colouring legal disputes as political ones.

The access to justice and human rights imperative behind the creation of internal justice systems can now said to be accepted wisdom. Amerasinghe, a leading authority in the field, while speaking about the creation of the World Bank Administrative Tribunal, remarked generally that ‘where administrative power was exercised, there should be available machinery, in the event of disputes, to accord a fair hearing and due process to the aggrieved party. Hence, there was a need for an independent judicial body to decide complaints relating to the exercise of administrative power.’

Internal justice systems have come to be seen as mechanisms that must be created to ensure that private persons allegedly harmed by IO conduct can exercise their right to access an independent forum to resolve their claims against IOs. Indeed, in the international administrative context, in addition to the ones already mentioned, there are at least 22 more IATs currently in operation. Moreover, for those categories of IO officials not having access

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20 UNESCO Advisory Opinion (n 18), 17.
21 Ibid, 65.
22 Ibid.
23 Wellens (n 7), 14.
25 See chapter 1.
26 These are the UNRWA Dispute Tribunal; International Monetary Fund Administrative Tribunal; European Bank for Reconstruction and Development Administrative Tribunal; Asian Development Bank Administrative Tribunal; Administrative Tribunal of the African Development Bank; Administrative Tribunal of the Bank for International Settlements; Inter-American Development Bank Administrative Tribunal; Nordic Investment Bank Arbitral Tribunal; Black Sea Trade and Development Bank Administrative Tribunal; OECD Administrative Tribunal; NATO Administrative Tribunal; European Space Agency Appeals Board; European Organisation for the Exploitation of Meteorological Satellites Administrative Tribunal; Administrative Tribunal for the Organisation of American States; Administrative Tribunal of the African Union; MERCOSUR Administrative Tribunal; European Court of Justice (to which EU officials have access; Complaints Board of the European Schools; Administrative Tribunal of the European Stability Mechanism; Council of Europe Administrative Tribunal; Commonwealth Secretariat Arbitral Tribunal; Appeal Commission of the International Organization for the Francophonie.
to IATs, often, arbitral means purportedly exist (although significant issues of access remain). Beyond the employment context, the debate is not whether IOs are required to provide for alternative means of dispute resolution (which they clearly must do), but whether such binding access to justice obligations are being complied with. As is the case for the victims of certain grave breaches, such as the victims of the Haiti cholera outbreak, the Srebrenica genocide, and victims of peacekeeper abuse, the answer is readily ascertainable. No modes of dispute settlement exist, the right to access a court, and correspondingly, the access to justice obligations on IOs, are both being contravened. On the approach suggested in this work, the secondary role of national courts would be triggered in such circumstances. In other situations, where judicial mechanisms exist at the IO level, the question becomes whether the right to a fair trial is being practically realised? The answer depends on the compliance of the relevant dispute resolution forum with the key component fair trial guarantees that must be accorded in order to avoid a failure of justice. Before engaging in such an assessment, it is important to show that the key component fair trial rights have now been incorporated into the procedural guarantees that must accompany the delivery of justice at an IO’s internal justice system.

2.2 Incorporation of component fair trial rights into the procedural law of institutional dispute resolution mechanisms

It is unsurprisingly the international administrative context through which the various component fair trial rights have also been incorporated into the procedural law that must accompany the delivery of justice at the institutional level. This jurisprudence has been developed in the context of the ICJ’s advisory jurisdiction concerning the review of decisions of the two major international administrative regimes, being the UN Administrative Tribunal (abolished in 1995), and the ILOAT (abolished in 2016). Both those regimes permitted the ICJ to render advisory opinions where it could be shown that in delivering justice, the tribunal seized had failed to comply with fundamental rules of procedure.

In respect of the now-abolished ICJ review mechanism pertaining to the UN Administrative Tribunal, between 1956 and 1995, Article 9 of the UN Administrative Tribunal’s Statute

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27 See further (6) and (7) below. This issue is also discussed further in the conclusion.
provided the possibility for the ICJ to render an advisory opinion (binding on the parties), to determine the question whether the UN Administrative Tribunal had made a ‘fundamental error in procedure having occasioned a failure of justice’. What is currently important is the observations of the ICJ on what a fair delivery of ‘justice’ demands. In its advisory opinion in the Application for Review of Judgement No 158 of the United Nations Administrative Tribunal,\(^\text{29}\) the ICJ stated:

\[\text{[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent’s case; the right to equality in the proceedings, the opponent; and the right to a reasoned decision (emphasis added).}\(^\text{30}\)

In applying the fair trial standards found in human rights law to dispute resolution at the IO level, the ICJ did not expand upon its rationale with precision. The well recognised procedural guarantees falling within the scope of the right to a fair trial are best understood as a general principle of law; a source expressly mentioned in Article 38(1)(c) of the ICJ Statute. In fact, it is procedural law where the ICJ has invoked the general principles of law most frequently, often without using that label.\(^\text{31}\) That being said, as recently as 2012, through the IFAD Advisory Opinion,\(^\text{32}\) certain judges of the ICJ have gone further and presumed the application of fair trial provisions contained in human rights treaties as directly applicable to IOs.\(^\text{33}\)


\(^{30}\) Ibid, para 92.


\(^{32}\) Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion) [2012] ICJ 10 (‘IFAD Advisory Opinion’).

\(^{33}\) Ibid, 51 (per Judge Cançado Trindade); also note the dissenting opinion in the South West Africa (Ethiopia v South Africa) (Second Phase) [1966] ICJ Rep 6, 250 (per Judge Tanaka).
The component fair trial guarantees of the right to equality in the administration of justice;\textsuperscript{34} the right to access an independent impartial court or tribunal;\textsuperscript{35} the right to a fair hearing without undue delay;\textsuperscript{36} the right to be present at one’s trial, and other rights of defence (including the ability of communicating with counsel of one’s choosing);\textsuperscript{37} and the right to a reasoned judgment; have been specifically endorsed as applying in the IO setting. This list is not exhaustive for the ICJ was merely providing examples of the key component guarantees central to the right to a fair trial. If any of the aforementioned rights are breached, a ‘failure of justice’ is likely to be established. If there exists a ‘failure of justice’ at the institutional level, the right to a fair trial is manifestly breached, entitling a national court to exercise adjudicative jurisdiction over an IO. Given that serious but necessary consequence, it is essential to examine what the key component fair trial rights require.

3 The right to equality in the administration of justice

The right to equality and non-discrimination in the administration of justice is crucial to the realisation of a fair trial. So much so that the right is contained in the first sentence of Article 14(1) of the ICCPR which states that ‘[e]veryone shall be equal before the courts and tribunals’. This right is replicated in all other human rights instruments.\textsuperscript{38}

The right to equality may be divided into two subcomponents. The first is the right of an individual to equal treatment before a court or a tribunal; or for that matter any other public authority charged with administering justice. This right demands the right to equal and non-discriminatory access to the courts.\textsuperscript{39} Secondly, all parties to the proceeding must be treated equal in procedural terms. This latter aspect of the right to equality is referred to as the concept

\textsuperscript{34} See ICCPR (n 4), arts 2, 14(1) and 26.
\textsuperscript{35} UN Human Rights Committee ‘General Comment No 32: Right to equality before courts and tribunals and to a fair trial’ (23 August 2007) UN Doc CCPR/C/GC/32, (‘General Comment No 32’), para 19.
\textsuperscript{36} Ibid, para 27.
\textsuperscript{37} Ibid, paras 36-7. These rights would be especially relevant in disciplinary proceedings.
\textsuperscript{39} General Comment No 32 (n 35) para 8.
of ‘equality of arms’. Equality of arms, also a fundamental rule of ‘fairness’, requires that all parties to the proceedings are given an equal opportunity to present their case fully and are not subjected to discriminatory treatment. The Human Rights Committee states in its General Comment No 32 that:

[T]here is no equality of arms if, for instance only [one party] is allowed to appeal a certain decision. The principle of equality…demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.

Particularly in respect of its application to dispute resolution in the IO setting, the principle of equality was first endorsed via the principle of ‘good administration of justice’. That principle was devised to address the manifest equality deficit in the ILOAT Statute (as it read prior to 2016). Article XII of the ILOAT Statute empowered the defendant IO (but not the complainant before the ILOAT) to invoke the jurisdiction of the ICJ to issue a binding judgment where it found that a decision of the ILOAT was ‘vitiated by a fundamental fault in the procedure followed’.

Two distinct intrusions into the right to equality prevailed in the Article XII regime. Firstly, Article XII only allowed the defendant organisation to seek the ICJ’s Advisory Opinion where the very employee who initiated the litigation at the ILOAT had no ability to do so. Secondly, due to the limitations in the ICJ Statute, as individuals cannot appear before the ICJ (for lack of standing), the complainant before the ILOAT could not exercise his or her fair trial rights on an equal basis with the organisation. As the ICJ itself observed on numerous occasions, the inability of the very individual who initiated the litigation at the level of the tribunal to approach the ICJ, and put his or her case forward in his or her own right, raised grave issues of equality in proceedings that effectively constituted a contentious dispute, resulting in a binding judgment.

40 Ibid, paras 15-29.
41 Ibid, para 14.
42 For limitations as to standing, see UN Statute of the International Court of Justice 33 UNTS 933 (‘ICJ Statute’), art 66.
43 Ibid, para 5, Judge Greenwood said: ‘the reality of such proceedings as a confrontation between a staff member’ and the organisation’.
44 Ibid, para 4; also see the separate Opinion of Judge Antônio Augusto Cançado Trindad in the IFAD Advisory Opinion, paras 28, 92, and 101.
When first confronted by the equality deficit in the Article XII regime, in its *UNESCO Advisory Opinion* rendered in 1954, the ICJ allowed the employee to make submissions through the organisation, and dispensed with oral hearings altogether to bring about so called ‘actual equality’. The Court justified creating ‘actual equality’ by stating that the principle of equality of the parties follows from the requirements of good administration of justice. The concept of ‘good administration of justice’ is clearly motivated by considerations of a fair trial, a matter confirmed by the ICJ in its later jurisprudence (2.2). To put the applicability of the equality principle in the institutional setting beyond doubt, it is worth noting the views of Judge Greenwood in the IFAD Advisory Opinion, which perhaps had some role in causing a much awaited repeal of Article XII of the ILOAT Statute. In his declaration in the IFAD Advisory Opinion, Judge Greenwood said:

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

That equality in the administration of justice must be accorded whenever institutional dispute resolution mechanisms administer justice should now be beyond contention. Given the propositions stated by the ICJ apply to the carrying out of a judicial process as such, regardless of the subject matter of the dispute at hand, the principle of equality must be accorded as an integral aspect of access to justice. If the right to equality is breached, a ‘failure of justice’ will ensue.

**4 The right to access an independent and impartial tribunal and the fair administration of justice**

The right to access an independent and impartial court is one of the most significant fair trial guarantees for justice to be practically realised. As we will see later in this section, the content

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45 *UNESCO Advisory Opinion* (n 18), 86.
46 See further below at (7).
47 *UNESCO Advisory Opinion* (n 18), 86.
48 *IFAD Advisory Opinion* (n 32).
49 Ibid, paras 3-6.
of independence and impartiality also require the right and duty of a court to deliver justice ‘fairly’. Thus, the concepts of independence and impartiality can incorporate within its rubric other key component fair trial rights that must be accorded if a failure of justice is to be avoided.

The standards for independence and impartiality have been primarily developed in a nuanced way by human rights law. To determine whether internal justice systems can be said to be compliant with the basic standards of independence and impartiality, regard for human rights law becomes necessary, or else the concepts remain empty ones. Human rights law requires that a court or tribunal must be ‘independent and impartial’ for justice to be delivered in compliance with the requirement of a fair trial.\textsuperscript{50} The concept of independence demands that the judiciary makes decisions based on the merits of the case and not on any ulterior motives or political considerations. If a court or a tribunal is not independent and impartial, the right to a fair trial cannot be effectively realised: the substantive right to an effective remedy provided for in all major human rights conventions is then impermissibly restricted.\textsuperscript{51} Given its significance, the Human Rights Committee states that the requirement of ‘independence and impartiality …is an absolute right that is not subject to any exception’.\textsuperscript{52}

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

“Independence” means putting judges in a position to act according to their conscience and the justice of the case, free from pressures from governments … “Impartiality”, on the other hand, is the judicial characteristic of disinterest towards parties and their causes in litigation.\textsuperscript{53}

To measure a justice system’s independence and impartiality, several criteria have been developed. Guidance may be drawn from the jurisprudence of human rights courts and monitoring mechanisms, institutional judicial bodies (especially IATs), and critically, soft law instruments that have played a significant role in developing modern standards of independence

\textsuperscript{50} General Comment No 32 (n 35) para 3.
\textsuperscript{51} A Nollkaemper ‘National Courts and the International Rule of Law’ (OUP 2011) 61-2.
\textsuperscript{52} General Comment No 32 (n 35) para 19.
\textsuperscript{53} G Robertson, ‘Judicial Independence: Some Recent Problems’ (Thematic Paper No 4) (International Bar Association’s Human Rights Institute, June 2014) 3.
and impartiality.\(^\text{54}\) The principles and standards created and endorsed by the international community and international professional bodies are of much significance for they have been created following detailed and lengthy deliberations, reflect basic concepts of a fair trial, and mutually reinforce each other. Those standards are primarily contained in the: International Bar Association’s Minimum Standards of Judicial Independence 1982 (‘IBA Standards’);\(^\text{55}\) UN Basic Principles on the Independence of the Judiciary, 1985 (‘Basic Principles’);\(^\text{56}\) the Bangalore Principles of Judicial Conduct 2002 (‘Bangalore principles’);\(^\text{57}\) Commonwealth (Latimer House) Principles on the Three Branches of Government 2003 (‘Commonwealth Principles’);\(^\text{58}\) and the Burgh House Principles on the Independence of the International Judiciary 2004 (‘Burgh House Principles’).\(^\text{59}\)

The Burgh House Principles have been especially developed bearing in mind the particularities of international courts, applying to international judicial mechanisms such as IATs, as well as in respect of mechanisms and individuals performing roles of a judicial character (including arbitrators).\(^\text{60}\) While the Burgh House Principles have direct relevance to the work of internal justice systems at IOs,\(^\text{61}\) as was clarified in the Universal Declaration on the Independence of


\(^{60}\) Ibid, Preamble.

\(^{61}\) See ibid, which states that the Principles which shall apply primarily to standing international courts and tribunals [shall apply to] to full-time judges. The Principles should also be applied as appropriate to judges ad hoc, judges ad litem and part-time judges, to international arbitral proceedings and to other exercises of international judicial power. Burgh House Principles (n 59), para 1.2 establishes their applicability to IATs and similar judicial bodies.
Justice 1983 (‘Montreal Declaration’),\textsuperscript{62} the principles of independence and impartiality, applicable in the national context generally, equally apply internationally.\textsuperscript{63} Thus, all the aforementioned sources have application to the international/institutional context too. With reference to the above sources, the criteria for independence, impartiality and fairness are developed below.

4.1 ‘Independence’

Judicial Independence triggers considerations around the judiciary’s structural design, with the central demand being that the executive and the legislature must not interfere in the performance of the judicial function.\textsuperscript{64} This concept, referred to as the separation of powers, is fundamental to the rule of law.\textsuperscript{65} It is as much applicable to the administration of justice in national systems, as it is in the IO context.\textsuperscript{66} As has been said in the context of the UN’s internal justice system:

In a formal setting, independence of the judiciary is directly related to the separation of powers in respect of the arms of the governance structures of the United Nations. If there is no separation of power properly recognized and supported, not only do the necessary checks and balances not function properly in respect of the matters within the jurisdiction of the Dispute Tribunal and the Appeals Tribunal, but there can be no proper assertion of the rule of law or provision of justice… \textsuperscript{67}

The concept of judicial independence is best understood through the lenses of institutional independence and individual independence,\textsuperscript{68} although overlaps exist. Institutional independence refers to the structural design of the judiciary at large and requires the

\textsuperscript{63} Ibid, paras 1.06 and 1.07.
\textsuperscript{64} See Burgh House Principles (n 59) paras 1.1 and 1.2; Montreal Declaration (n 62) paras 1.02, 1.03 and 1.07; Basic Principles (n 56) para 1.
\textsuperscript{65} See for example Commonwealth Principles (n 58) Principle 1; as Nollkaemper (n 51) 54 points out: Independence in the second sense is a key component of the rule of law. In its minimal form, the rule of law requires that public power is effectively limited by law. By protecting the courts from political pressures, independence enables courts to settle disputes in conformity with the law, rather than politics.
\textsuperscript{66} Burgh House Principles (n 59) para 1.2: ‘Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation… ’; also see Montreal Declaration (n 62) para 1.7.
\textsuperscript{67} IJC 2017 Report (n 17) para 27.
\textsuperscript{68} Bangalore Principles (n 57) Value 1; Commonwealth Principles (n 58) Principle IV.
independence of the courts from the political and executive branches (4.1.1). Whereas individual independence refers to the personal and substantive independence of an individual judge (4.1.2). For a justice mechanism to be considered as independent, both, the independence of the courts in general, and individual judges in particular, must be guaranteed.

4.1.1 Institutional independence

Institutional independence requires that the judiciary at large must be independent of the other branches of government, requiring: ‘operational independence’ (involving both administrative and financial independence); decisional independence (requiring that court decisions be enforced and the judiciary have the autonomy to determine its jurisdiction); and the judiciary has both ‘the right and the duty to ensure fair court proceedings and issue reasoned decisions’. The criteria to measure institutional independence presently adopted are as follows.

- Operational independence (criterion 1)
- Decisional independence (criterion 2)
- Fairness of proceedings (criterion 3)

Each of the aforementioned criteria is briefly explained below.

a) Operational independence – criterion 1

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

Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall

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69 See for example, IBA Standards (n 55) para 2.
70 Each of these criteria are reflected in the various standards and principles on judicial independence discussed later. For a helpful summary and discussion of three criteria, see, International Bar Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (OHCHR, 2003) (‘OHCHR Report’)119-20; regarding the duty to provide a fair hearing, see especially para 4.5.8.
71 IBA Standards (n 55) para 7; Montreal Declaration (n 62) para 2.40; Burgh House Principles (n 59) para 1.2, and 1.3.
apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

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

To secure operational independence the judiciary should be adequately funded so that it can perform its functions effectively, and without interference from the executive.\(^{72}\) In the IO setting, this would amount to an internal justice system’s administrative and financial independence from the executive and political organs. Should the executive and the legislative or political branches possess the kind of administrative or financial control over the working of the internal justice system so as to undermine its independent functioning, then the relevant forum cannot be said to be institutionally independent.

\textbf{b) Decisional independence – criterion 2}

Decisional independence requires that the court is able to autonomously determine its own jurisdiction,\(^{73}\) and judicial decisions are enforced and respected.\(^{74}\) The former means that the dispute resolution forum provided by the IO may decide conclusively its own jurisdiction and competence. Regarding the latter, the relevant forum’s decisions must be binding, enforced, and respected by the administration. Without decisional independence, a court cannot be said to be institutionally independent. In fact, both aspects of decisional independence have been expressly endorsed in the context of dispute resolution at the institutional level several decades ago. Recall that in the \textit{UNESCO Advisory Opinion}, the ICJ had stressed on the ability of the ILOAT to determine its own competence in the sphere of its subject matter jurisdiction; and in the \textit{Effect of Awards} Advisory Opinion, the court had endorsed the requirement of the final and binding nature of the judgments of the UN Administrative Tribunal. More recently, the UNDT

\(^{72}\) Especially note Burgh House Principles (n 59) para 6 that states: ‘State parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively’; also see IBA Standards (n 55) para 7; Basic Principles (n 56) para 7; Commonwealth Principles (n 58) Principle IV(c); Montreal Declaration (n 62) para 2.41.

\(^{73}\) See Basic Principles (n 56) para 3 that states: ‘The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law’; also see Montreal Declaration (n 62) para 2.5.

\(^{74}\) IBA Standards (n 55) para 7; Basic Principles (n 56) para 4; Montreal Declaration (n 62) para 2.48.
has emphasised the need for the respect and enforceability of its judgments to ensure the due process of law is followed, and the separation of powers maintained.75

c) The right and duty to provide a fair hearing – criterion 3

The final criterion for institutional independence relates to the right and duty of a court to render justice ‘fairly’.76 Principle 6 of the Basic Principles relevantly states that the ‘principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected’.77 Independent justice thus also requires that no barriers ought to be placed before the justice machinery that may prevent it from delivering justice in compliance with the range of fair trial guarantees. This criterion accordingly incorporates into its rubric the key fair trial rights that must accompany the delivery of justice to ensure that a failure of justice does not occur (see 2.2).

Those fair trial rights relevantly include the right to equality in the administration of justice (see 3 above); right to a fair trial without undue delay (a due process right specifically endorsed by several internal justice mechanisms);78 the provision of a reasoned judgment; and the right to be present, including the right to defence.79 As has been endorsed by several experts responsible for designing internal justice systems at IOs, the right to an oral hearing,80 and the right to an appeal,81 also constitute core guarantees which may be required for a trial to be overall ‘fair’. All those key component fair trial rights need to be taken into account when determining whether justice at internal justice systems is being rendered ‘fairly’.

4.1.2 Individual independence

Individual independence requires the personal and substantive independence of individual judges.82 Personal independence means that ‘the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control’.83

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76 For a discussion, see OHCHR Report (n 70) para 4.5.8.
77 Also see Montreal Declaration (n 62) paras 1.8 and 2.45.
78 See (7) and (7.1.3(c)) below.
79 See General Comment No 32 (n 35), paras 25, 33-6, which is especially relevant in disciplinary studies.
81 Ibid, para 95.
82 IBA Standards (n 55) para 1.
83 Ibid para 1(b); Basic Principles (n 56) para 11; Bangalore Principles (n 57) Value 1.1; Montreal Declaration (n 62) para 2.2.
In General Comment No 32, the Human Rights Committee clarified that ‘to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law’. All those matters go towards ensuring a judge’s security of tenure.

In the absence of personal independence, the substantive independence of a judge will also be compromised. Substantive independence demands that individual judges ‘have a right and a duty to decide cases before them according to law, free from outside interference including the threat of reprisals and personal criticism.’

To ensure individual independence, the relevant criteria thus involve the process and basis of the very selection of judges, as well as all aspects of security of tenure. For ease of reference, the criteria for measuring individual independence are divided into two broad categories, i.e., judicial selection and security of tenure. Each of those criterion can further be divided into subcategories in the following terms.

- Individual independence
  - Judicial selection (criterion 1)
    - method of appointment
    - minimum qualifications required
  - security of tenure (criterion 2)
    - length of tenure
    - financial security
    - method of removal

Each of the aforementioned criteria are briefly explained below.

**a) Judicial selection – criterion 1**

Who appoints judges, and how and on what basis are judges appointed, constitute the central matters of concern under this head.\(^\text{85}\) To uphold the doctrine of separation of powers, it is...

\(^{84}\) OHCHR Report (n 70), para 4.5.8.

\(^{85}\) Traditionally, there are no strict criteria regarding the method of appointments or qualifications for appointment required. For method of appointment, see IBA Standards (n 55) para 3 (appointments should preferably be done by bodies comprising of members of the judiciary); Montreal Declaration (n 62) para 2.12 states that judicial appointments should be non-discriminatory allowing for nationality to be a criterion for appointments to international courts. For requirements on qualifications: see IBA Standards (n 55) para 26 (only appointments based on merit are permissible); Basic Principles (n 56) para 10 (requires that: ‘Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives...’).
increasingly considered that the executive or legislature ought to have a minimal role in the selection and appointment of judges. And that only appropriately qualified persons be appointed to judicial office. On the former, if the executive has undue influence on the appointment process, then there could be raised serious questions about the motives behind the appointment. Principle 10 of the UN Basic Principles relevantly states:

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

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

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

To remove this very risk of an improper motive in the appointment of judges, transparency is critical. Principle IV(a) of the Commonwealth Principles provides that to achieve judicial independence ‘appointments should be made on the basis of clearly defined criteria and by a

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87 E Cannon, I Warlam, ‘The Judicial Independence Of The International Labour Organization Administrative Tribunal: Potential For Reform’ (Report, Amsterdam International Law Clinic, 2007) (‘Amsterdam Report’) 34-35: ‘In sum, the jurisprudence confirms that while appointment by the executive is not in itself cause to question the independence of a tribunal, such a circumstance should be counter-balanced with guarantees that insure the independence of the tribunal at hand.’
88 Human Rights Committee, ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding Observations of the Human Rights Committee – Slovakia’ (4 August 1997) (79th session) UN Doc CCPR/C/79/Add.79 para 18. In Lauko v. Slovakia App no 26138/95 (ECtHR, 19 October 1995) the combination of appointment by the executive and the “lack of any guarantees against outside pressures and any appearance of independence” led the Court to conclude that the bodies in question could not be considered to be independent of the executive.
publicly declared process’, where ‘merit and proven integrity’ is the criteria of eligibility for appointment to public office.\textsuperscript{89} Similarly, Principle 2.3 of the Burgh House Principle states that ‘[i]nformation regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organisation or other body responsible for the nomination, election and appointment process’. Emphasising the need for transparency and independence in the selection process, it has been noted that it is ‘now relatively uncommon for judicial appointments to be in the hands of the executive alone, without the involvement of any other public body in selecting or shortlisting candidates’.\textsuperscript{90}

Transparent processes that are independent of the executive or legislature in the appointment of judges are required not only to ensure that the executive does not make appointments based on ulterior motives, but also to guarantee that the best possible candidates are identified and appointed to judicial office. Establishing independent and appropriately constituted bodies responsible for judicial selection, the particularities of which may differ from jurisdiction to jurisdiction, with a well-defined mandate, would be thus a key factor in ensuring the individual independence of a judge who is able to competently decide cases without fear or favour.\textsuperscript{91}

Judicial appointments must be made on merit and based on legal qualifications as the primary consideration.\textsuperscript{92} While no precise standards have been prescribed in the various instruments, without relevant experience and minimum qualifications required before an individual may be considered for a judicial role, not only there are raised concerns about the personal and substantive independence of a judge; but also whether a judge can discharge his or her role ‘competently’ – recalling that the right to access a court, is to be accompanied by the qualities of competence, independence and impartiality. As the Burgh House Principles provide in Principle 2.1:

\textsuperscript{89} Commonwealth Principles (n 58), Principle V(a).
\textsuperscript{90} Ibid; also see Burgh House Principles (n 59) para 2.22.
\textsuperscript{91} Commonwealth Principles (n 58) do not specify the mechanism by which judges should be appointed. However, the Parliamentary Supremacy, Judicial Independence: Latimer House Guidelines for the Commonwealth (19 June 1998) (Commonwealth Principles (n 58)) indicate that an ‘independent process’ should be used and recommend that genuinely independent judicial appointments commission be established where no such mechanism exists.
\textsuperscript{92} The Human Rights Committee has said that judges should be selected primarily on the grounds of their legal qualifications: Human Rights Committee, ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant – Concluding Observations of the Human Rights Committee – Sudan’, (19 November 1997) (79th session), UN Doc CCPR/C/79/Add.85, para 21.
Judges shall be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required for the court concerned. While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

In the context of courts or tribunals created by an IO, in addition to requirements of diversity of nationality, criteria typical to international judicial appointments, proven experience in the relevant subject matter, or related fields, must be a pre-condition for judicial selection. It is hard to imagine how an inexperienced candidate lacking in minimum qualifications can deliver justice competently, independently, impartially and fairly.

b) Security of tenure – criterion 2

Firstly, the length of the term of a judge is key to assessing individual independence. Short renewable terms tend to decrease independence; and relatively longer non-renewable terms enhance it. The assumption that a judge would wish for his or her term to be renewed is an obvious one. That being the case, subconsciously or perhaps on occasions consciously, a judge’s decision making may be compromised. Instead of basing the decision on the law and facts of a given case, the decision may be driven by ulterior motives, jeopardising the individual independence of a judge. Following an extensive analysis that included interviews with several judges from various international courts and tribunals, Dunoff and Pollack reach the conclusion that longer terms that cannot be renewed maximise judicial independence.

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93 The UN regime is considered at (6.1) below; another example is provided by the Statute of the World Bank Administrative Tribunal art IV (1) providing that the ‘Tribunal shall be composed of seven members, all of whom shall be nationals of Member States of the Bank, but no two of whom shall be nationals of the same State. The members of the Tribunal shall be persons of high moral character and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence’. In relevant fields such as employment relations, international civil service and international organization administration.


95 In this regard, see especially Burgh House Principles (n 59) paras 3.1 and 3.2. Para 3.2 provides that: ‘The governing instruments of each court should provide for judges to be appointed for a minimum term to enable them to exercise their judicial functions in an independent manner.’

96 See generally Dunoff and Pollack (n 94) 225-76.
Notably, the reasons for creating nine-year non-renewable terms for the judges of the European Court of Human Rights were rooted in the need for enhanced independence.\textsuperscript{97}

Implementing relatively lengthy tenures with limited to no possibilities for renewal (if at all) ought to then be the standard for judicial appointments. An example of best practice is provided by the UN’s internal justice system which has created seven year non-renewable terms for UNDT judges. Moreover, a matter especially relevant to internal justice mechanisms is that of the contract judge. The position of a judge on temporary contracts is akin to the situation of a judge whose tenure is short and renewable, with the judicial officer in question relying on one of the parties for renewal what is effectively a private contractual arrangement. Where the renewing person or authority is frequently a defendant before the judge (as will be the case at internal justice mechanisms at IOs) there is little doubt that structural independence is seriously and adversely affected in such circumstances.\textsuperscript{98}

In the IO setting, the effect of Awards, and UNESCO Advisory Opinion provide abundant evidence of the defendant organisation seeking to avoid judgments rendered by their own judicial mechanisms, blatantly trying to compromise their independence. Maintaining security of tenure at judicial mechanisms established by IOs is thus of immense importance. Without security of tenure, a court or tribunal cannot be said to be independent, especially where the party appearing before the court is also responsible for not only appointing judges, but determining whether their terms should be renewed. Where one party to the litigation can influence the renewal process, short renewable terms will almost always present such a structural deficit that independence is most likely always compromised.\textsuperscript{99}

Second, the financial security of a judge is also necessary to maintain individual independence. Generally, judicial salaries and pension rights ought not to be subject to reduction by the executive or the legislature for such a threat of action or its carrying out may compromise the


\textsuperscript{98} Robertson (n 53). Also note that international instruments state that temporary appointments must be avoided: see IBA Standards (n 55) para 22(b).

\textsuperscript{99} See especially Bangalore Principles (n 57) Values 1.2 and 1.3 that state ‘[a] judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate’ and ‘[a] judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.’
financial security of judges, creating a risk that decisions adverse to the government of the day are not made for fear of retaliation.\textsuperscript{100} Financial security constitutes an aspect of the security of tenure. As a recent commentary to the Commonwealth Principles explain:

The Commonwealth Latimer House Principles declare that ‘appropriate security of tenure and protection of levels of remuneration must be in place’ in relation to the judiciary. Such guarantees serve to shield judges from external pressures and conflicts of interest when they hold powerful individuals or government bodies legally to account...‘judicial salaries and benefits should be set by an independent body and their value should be maintained’.\textsuperscript{101}

As will become further apparent at (5.1), the financial independence of the judiciary can have a close relationship with the financial security of individual judges. Therefore, the absence of financial security not only can undermine the individual independence of a judge; but also may intrude into the institutional independence of the judiciary at large.

Finally, one way in which the executive or the legislature can intrude into the independence of the judiciary is through the process of dismissal. In that regard, it is now well accepted that dismissal is only permissible for the most exceptional reasons, such as in cases of proven misbehaviour or where a judge is of unsound mind.\textsuperscript{102} Moreover, should a judge be dismissed, he or she must be accorded the full protections of a fair trial.\textsuperscript{103}

\textbf{4.2 ‘Impartiality’}

Whereas judicial independence concerns the structural design of the judiciary, the rules on impartiality relate to the conduct of the judge/s in a particular case. ‘Judges who are not independent of the state [or organisation] will be perceived (and may actually become) partial to the state [or organisation] when it is a party to litigation in their court.’\textsuperscript{104} Issues of

\textsuperscript{100} See Burgh House Principles (n 59) para 4.2; IBA Standards (n 55) para 15(b); Commonwealth Principles (n 58) Principle IV(b); Montreal Declaration (n 62) para 1.14.
\textsuperscript{102} Burgh House Principles (n 59) para 17.1-4; IBA Standards (n 55) para 4(a)-(b) and 30; Basic Principles (n 56) para 12; Commonwealth Principles (n 58), Principle IV(d).
\textsuperscript{103} Burgh House Principles (n 59) para 17.2; Basic Principles (n 56) para 17; Montreal Declaration (n 62) paras 2.30 and 2.33.
\textsuperscript{104} Ibid.
independence and impartiality may especially intersect in such instances. Here, the concepts of independence and impartiality coincide for the structural deficits regarding judicial independence are sufficient to raise justifiable concerns relating to the impartiality of a court or tribunal.

At IO internal justice systems, independence and impartiality will invariably overlap. The need for statutory protections against conflicts of interest; and absolute compliance with those standards is necessary to guarantee that impartiality on part of judges in individual cases is maintained. In so far as the de jure guarantees pertaining to impartiality are concerned, the standards require that the judiciary does not promote the interests of one party over the other. Specifically, a judge should be free from objective and subjective bias. The Human Rights Committee has said in General Comment No 32:

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

Instances where a judge’s conduct, such as demonstrable hostility towards a particular party, or corrupt conduct is proved, subjective bias may readily be established. Most cases however concern objective bias as it can be difficult to produce compelling evidence regarding the personal conduct of a judge. Objective bias, also known as apparent or apprehended bias requires an assessment from the perspective of the reasonable person. The question asked is whether the court or the tribunal can reasonably bring an impartial mind to the case before it:

105 See Human Rights Committee, Communication No 802/1998 (3 April 2002) (7th session) UN Doc. CCPR/C/74/D/802/1998 para 7.4 (‘Rogerson v Australia’), the Human Rights Committee held that the ‘[i]mpartiality of the court implies that judges must not harbour preconceptions about the matter before them, and they must not act in ways that promote the interests of one of the parties’.

106 See General Comment No 32 (n 35), para 21; also see, Findlay v The United Kingdom App no 22107/93 (ECtHR, 25 February 1997) (‘Findlay v The United Kingdom’) para 73. In deciding whether there is a legitimate reason to fear that a particular court lacked independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see Findlay v The United Kingdom para 76).
if not, the judge must be disqualified from hearing the case.\textsuperscript{107} It is trite to say that justice should not only be done, but justice must be seen to be done.\textsuperscript{108}

Certain rules on impartiality are easier to apply in practice than others. Any conflict of interest, such as previous involvement in a case, personal knowledge of the facts, or economic interest in the outcome, ought to disqualify a judge from hearing it for such matters raise concerns around both, subjective and objective bias.\textsuperscript{109} However, other principles are more difficult to apply in practice due to the vagueness of the standards.

For example, Value II of the Bangalore Principles states that ‘[i]mpartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made’. Applying this value, Principle II of the Bangalore Principles encapsulates the rules that appear in various instruments in one form or another.\textsuperscript{110} The rules focus on the judge’s behaviour and conduct. First, a ‘judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary’.\textsuperscript{111} Second, a ‘judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases’.\textsuperscript{112} Third, judges are expressly prohibited from showing hostility to a party to litigation indicating the presence of bias.\textsuperscript{113} As may be obvious, there can be a myriad of conduct that may fall foul of such principles.

While more frequently litigated than questions of independence, impartiality is again notorious to prove. First, parties are naturally reluctant to question a judge’s conduct where that very judge is determining their rights and responsibilities. Because the application of the rules on independence and impartiality can be vague and uncertain, parties are obviously reluctant to

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\textsuperscript{107} See for example, Burgh House Principles (n 59) paras 9.1-2 and 11.1-2; IBA Standards (n 55) para 44; Bangalore Principles (n 57) Value 2.5; Montreal Declaration (n 62) para 2.27.
\textsuperscript{108} Bangalore Principles (n 57) Value 3.2.
\textsuperscript{109} Burgh House Principles (n 59) para 9.1-2 and 11.1-2; Bangalore Principles (n 57) Value 2.5.
\textsuperscript{110} See for example, IBA Standards (n 55) para 40 and 45.
\textsuperscript{111} Bangalore Principles (n 57) Value 2.2.
\textsuperscript{112} Ibid, Value 2.3.
\textsuperscript{113} Ibid, Value 2.4: ‘A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.’
\end{flushright}
make challenges to what effectively is the credibility of a judge. Second, in cases of alleged subjective bias, unless a party can produce evidence of personal conduct, establishing it can be highly problematic. Third, where a judge does not recuse him or herself from his or her own accord, the very judge accused of bias determines an application for recusal. This matter becomes of special concern where significant equality of arms deficits prevail favouring one party over another. The fair trial deficits can be further exasperated where there may be no forum to appeal decisions where a judge accused of bias decides that he or she is in fact not so biased. To address such concerns, guarantees concerning ‘fairness’, especially the right to equality of arms and the right to appeal, become necessary to guard against a risk of bias on part of a particular judge.

For any decision maker rendering justice as part of an IO’s internal justice mechanism, guarding against actual or apparent bias becomes greatly significant as one of the parties to litigation is always the person exercising a degree of explicit or implicit control on the justice regime, i.e., the defendant organisation. Some of these difficulties may be overcome by enacting a compliant regulatory regime that protects and promotes judicial independence and impartiality, incorporating the broader guarantees of ‘fairness’. Particularly, the statutes of courts and tribunals must provide for a judge’s disqualification to guard against the presence of subjective or objective bias. To further secure impartiality, it would be highly desirable to establish a judicial complaints procedure given the heightened risks involved in the context of dispute resolution at the IO level. Overall, the totality of the criteria to assess whether a justice regime is rendering justice impartially are as follows.

- Are legal standards in place (criterion 1). This would include standards contained in:
  - A court’s statute or rules
  - judicial code of conduct
  - judicial complaint mechanisms
  - broader guarantees of fairness (especially the right to equality of arms and the right to appeal)

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114 Burgh House Principles (n 59) para 14.2 relevantly provides: ‘Each court shall establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case. Each court shall establish rules of procedure to enable the determination whether judges are prevented from sitting in a particular case as a result of the application of these Principles or for reasons of incapacity. Such procedures shall be available to a judge, the court, or any party to the proceedings.’
4.3 Concluding comments on independence and impartiality

In a significant number of cases, legally enshrined guarantees of independence and impartiality will go some way in ensuring that the delivery of justice at IOs is compliant with the right to a fair trial. The presence of a rule is one thing, and its application and effectiveness yet another. No matter how robust the rules look on paper, several aspects of independence and impartiality will continue to prove difficult to apply. This is due not only to the practical concerns already identified, but also because of the often vague nature of the relevant rules. Instances where the executive exercises subtle control over the judiciary, whether it be by virtue of the deficits in institutional or individual independence, it can hardly be said that a perception of objective bias is not created when the executive is a defendant in the case. How far the structural deficiencies will automatically result in breach of the right to a fair trial is a matter of degree and can be unpredictable. Here, the extent of the structural deficiencies concerning judicial independence would ultimately be determinative.

Where the breaches of the standards of independence are stark, or where multiple deficiencies prevail (meaning that deficits are not cushioned by other protections), it will become highly likely that a fair trial cannot be practically realised. For instance, where judges are comprised of members of the executive,\(^\text{115}\) such as civil servants,\(^\text{116}\) or where the executive manifestly controls the judiciary,\(^\text{117}\) the breach of the standards of independence can be readily established. On one view, once independence is impaired, ‘the whole functioning of the courts is prejudiced’. And the only rational conclusion that follows is that fair trial standards have been breached.\(^\text{118}\)

In other cases, structural deficiencies on their own may not justify holding a trial or a proceeding unfair. Establishing a breach of the right to a fair trial in individual cases just based on non-compliance with standards of judicial independence can be highly problematic. In several instances, it would be simply too arduous to establish that the administration of justice has not been carried out properly just based on structural deficiencies alone, such as the length

\(^{115}\) Belilos v Switzerland App no 10328/83 (ECtHR, 29 April 1988).

\(^{116}\) Ibid; Sramek v. Austria App no 8790/79 (ECtHR, 22 October 1984).

\(^{117}\) See generally ibid.

\(^{118}\) See for example, Grieves v The United Kingdom App no 57067/00 (ECtHR, 16 December 2003).
of a judge’s tenure. In such situations, the rules on impartiality become highly relevant, especially in its objective sense, and overlap with issues of independence. Important will be the examination of the court’s treatment of the parties in general, and that of the complainant in particular. Where even a hint of bias is evident, a trial will most likely be unfair for serious questions about the relevant judge’s individual independence and objective impartiality are simultaneously raised.

5 Assessing the internal justice systems of IOs – a focus on the key internal justice regimes

Employment claims constitute the bulk of the disputes raised against IOs in terms of mere quantity. Relatively sophisticated mechanisms have been created to resolve such claims through IATs. In respect of other subject matters, as was outlined in chapter 1, IOs have established a limited number of certain other sector specific accountability mechanisms (such as Ombudsman regimes and management controlled accountability mechanisms). None of those constitute a forum that is empowered to render final and binding judgments. IATs are the only true full-fledged judicial mechanism established at the IO level.

As drastic as it may be, accept for employment cases (assuming access to an IAT exists), in every other kind of claim against IOs, the role of a national court will most likely be triggered for want of available or adequate means at the IO level. Given the possibility of reasonable alternative mechanisms available to private parties, some commentators have suggested that the subject matter jurisdiction of IATs could be expanded so that they may determine not just employment claims, but other categories of cases, such as in contract, tort, and ones belonging to the global administrative realm. The potential of IATs resolving a broader category of cases may be instinctively appealing as a simplistic response to a difficult problem. However, before any such step is seriously contemplated or considered, we must assess whether IATs are

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119 See Amsterdam Report (n 87) 38, citing, Sigfirdingur Ehf v. Iceland App no 34142/96 (ECtHR, 30 May 2000); also see jurisprudence considered in the Amsterdam Report (n 87), section 5.2.1. where the European Court of Human Rights stated that a short term of office cannot by itself be dispositive in determining the independence of judges (case was settled).

120 See chapter 1.

properly fulfilling their current role in terms of administering justice equally, independently, impartially and fairly.

In the remainder of this chapter, I consider the two most prominent IAT regimes, the UNDT and the UNAT (6) and the ILOAT (7). Regarding the UN tribunals, I will show the structural deficits that exist within the UN regime requiring an immediate fix. This must be done to ensure that the delivery of justice at the UN’s internal justice system is compliant with fair trial standards. The situation at the ILOAT is precarious. The ILOAT is so lacking that it will be concluded the tribunal is a manifestly deficient justice regime, facing serious independence and impartiality deficits, and is beset with excessive delays in the delivery of justice.

When assessing the selected justice systems, attention is paid to both, the law and practice of the selected regimes. Whether or not the right to a fair trial is being complied with depends not only on the characteristics of the justice machinery put in place, but ultimately how that machinery is brought to bear in a particular case. In a study of this nature, while the emphasis remains on the character of the justice machinery installed (the environmental factors), every attempt is made to demonstrate how the machinery is operating in practice. I consider both the situation de jure, and as much as possible, de facto. IHRL demands that the right to a fair trial is practically realised, and not just formally prescribed.

6 Assessing the UN tribunals

The UN tribunals provide for the UN’s internal justice regime pertaining to the resolution of employment disputes between the organisation and its staff. It remarkably replaced the UN Administrative Tribunal, which was severely criticized for its fair trial deficiencies. The now prevailing two tier justice system at the UN consisting of the UNDT and the UNAT said to constitute an independent, professionalized, expedient, transparent and decentralized justice system, created in 2009 following decades of reform efforts, no doubt provides a regime the independence and impartiality of which is a significant improvement from the situation that preceded the existence of those tribunals. Some of its features, such as judicial appointments

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122 General Comment No 32 (n 35) para 58.
123 Ibid.
126 Gulati (n 124)), 489-538.
provide for best practice and are worth replicating elsewhere. But as will be shown, other significant deficiencies remain.

6.1 Institutional independence

6.1.1 Assessing against criterion 1 – operational independence

On operational independence, the question is whether the UN tribunals are administratively and financially sufficiently independent from the Administration so as not to be considered to be under the latter’s control. Despite the legal standards in place giving the impression of operational independence, the situation is far from compliant.

a) Administrative independence

In so far as the ability of the UNDT to organise its own internal administration is concerned, the UNDT is empowered to enact its own rules of procedure pertaining to, amongst other things, the organisation of its work, functions of the Registry, evidentiary procedure, or any other matters relevant to the functioning of the tribunal.\(^\text{127}\) The UNDT’s ability to however determine the number of judges that should hear a case is curiously limited. While the UNDT’s Statute gives the UNDT the ability to institute a three member panel in complex or important cases (the default position being that a case is to be heard by one judge), it limits the UNDT’s administrative freedom by requiring prior authorisation from the President of the UNAT before a three-judge panel can be instituted.\(^\text{128}\) A role for the UNAT is created where none should exist.\(^\text{129}\) Despite this somewhat curious requirement, by and large, the \textit{de jure} standards for establishing administrative independence at the UNDT would be probably satisfied as far as the UNDT’s own statutory arrangements are concerned.

However, the rules and practices limiting the administrative independence that the UNDT itself has seriously criticised are one of the most significant issues facing the work and credibility of

\(^{127}\) Statute of the United Nations Dispute Tribunal (24 December 2008) UNGA Res A/63/253 (‘UNDT Statute’) art 7(1); also see United Nations Dispute Tribunal Rules of Procedure (16 December 2009) UNGA Res A/64/454 (‘UNDT Rules of Procedure’), art 18 (evidentiary requirements); art 19 (case management powers); art 21 (rules concerning support from the Registry).

\(^{128}\) See UNDT Statute (n 127), art 10(9); UNDT Rules of Procedure (n 127), art 5; and also see UNDT, Practice Direction No 1 on Three Judge Panels (17 December 2010) <http://www.un.org/en/internaljustice/undt/forms-filing-guidelines.shtml> accessed on 3 June 2018.

\(^{129}\) As the UNAT itself has said, the consideration of the President of the UNDT regarding the permissibility of a three judge panel should suffice: IJC 2017 Report (n 17), Annex II (Views of the UNDT), paras 64-5.
the UNDT. One egregious deficit identified by the UNDT itself is the conflation in the relationship between the judiciary, i.e., the UNDT and the UNAT, with the Office of the Administration of Justice (‘OAI’). The OAI, a purportedly independent statutory body headed by a senior member from Management is charged with the overall responsibility for the coordination of the United Nations system of administration of justice, as well as providing ‘substantive, technical and administrative support to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal through their Registries’. Not only do issues arise due to the legislative scheme implemented in respect of the operation and functions of the OAI, but also in terms of how the relationship between the OAI and the judiciary manifests in practice.

As to the situation de jure, pursuant to the relevant UN legislation, the Executive Director heading the OAI advises and reports to the Secretary-General, who is the only respondent before the UNDT. At the same time, the Executive Director is also mandated to provide support to the UN tribunals ultimately questioning the operational independence of the latter in a structural sense. The UNDT has commented:

The Executive Director cannot *bona fide* serve two masters whose interests are in conflict. Obviously, the Executive Director cannot give the judges substantive advice, neither directly nor through the Registries. Practical consequences of that built-in conflict are numerous and are present all along the administrative hierarchy of the Office of Administration of Justice.

For instance, further undermining the administrative independence of the UN tribunals is the position and role of the Principal Registrar of the UNDT and the UNAT who is charged with overseeing their operations. The Principal Registrar, who is based within the OAI, appears to have been granted judicial powers to enforce compliance with the Rules of Procedure (that...

130 Ibid, para 9.
132 UN Doc ST/SGB/2010/3 (n 131), sections 3.1, 3.4-5.
133 UNDT Statute (n 127), art 2(1).
134 IJC 2017 Report (n 17), para 34.
135 UN Doc ST/SGB/2010/3 (n 131), sections 4.2-3.
power belongs to the relevant tribunal only and cannot belong to the Registrar);\(^\text{136}\) the Principal Registrar performs his or her functions in respect of both the UNDT and the UNAT creating conflicts of interest and the potential of undue influence;\(^\text{137}\) and bizarrely, the Principal Registrar is placed under the authority of the Executive Director (whose position is already conflicted),\(^\text{138}\) and is thus ultimately answerable to the Secretary-General, the Respondent.\(^\text{139}\) The inability of the UN tribunals to recruit Registry staff independently of the Administration as officers of the court;\(^\text{140}\) and the practice of the Administration to second lawyers to the Registry of the tribunals who have previously acted for the Respondent and are clearly conflicted;\(^\text{141}\) are just some other instances that constitute grave interference into the UNDT and the UNAT’s administrative independence.

The conflation and lack of clarity in the roles of the key actors responsible for the administration of justice at the UN is not limited to the legal standards in place, but also in the practice of the organisation concerning the realities of the administration of justice. One of the Registries of the UNDT is located within the same building as the OAI with no physical differentiation created: the ‘sharing of premises has given rise to the impression that the judges are subservient to and accountable to the Administration through the Executive Director’;\(^\text{142}\) a perception has been created through, amongst others, the website of the OAI that the tribunals are a part of the former (which they are not);\(^\text{143}\) the tribunals are denied any role in the legislative process concerning laws related to the functioning of the Tribunals;\(^\text{144}\) and they are blocked from any dialogue with the General Assembly as a legislative body.\(^\text{145}\) These are all matters substantially diminishing the administrative independence of the judiciary.

**b) Financial independence**

A degree of interaction between the UN tribunals and the Administration is inevitable. Pursuant to Article 6(1) of the UNDT Statute, the Administration is responsible to make administrative

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\(^{136}\) Ibid, section 4.3(a); also see IJC 2017 Report (n 17), Annex II (Views of the UNDT), para 36.

\(^{137}\) IJC 2017 Report (n 17), Annex II (Views of the UNDT), paras 37-8.

\(^{138}\) UN Doc ST/SGB/2010/3 (n 131), section 4.1-2.

\(^{139}\) IJC 2017 Report (n 17), Annex II (Views of the UNDT), para 38.

\(^{140}\) Ibid, para 40.

\(^{141}\) Ibid, paras 41-2.

\(^{142}\) Ibid, paras 28 and 55; and Annex II (Views of the UNDT), paras 87-8, where it recommends that the location of the tribunals be changed.

\(^{143}\) Ibid, para 28.

\(^{144}\) Ibid, para 29 and 52-4.

\(^{145}\) Ibid.
arrangements for the overall functioning of the UNDT (including funding its operations).\textsuperscript{146} While the UN’s funding of the tribunals is in fact required, for operational independence to be ensured, the Administration must not unduly control the resources and finances of the tribunals so as not to breach the latter’s institutional independence.

The UNDT however cannot be said to be financially independent from the Administration. In addition to concerns expressed by that tribunal about the denial of its ‘role in deciding budget, training needs and staffing’,\textsuperscript{147} the most significant intrusion into the UNDT’s institutional independence is caused by equating UNDT judges with a Director level (D-2) staff member at the UN. Doing so not only has resulted in compromising operational independence generally, but also has an adverse impact on the individual independence of the judges; in particular cases, it has resulted in the UNDT remarkably declaring that it does not provide an independent and impartial forum for the complainant in question.\textsuperscript{148}

A significant structural deficiency at the UNDT concerns the Administration’s ability to affect changes to the emoluments of an UNDT judge by reference to the pay-scale applying to the Director-level (D-2) at the UN.\textsuperscript{149} This means that whenever the Administration affects a change to the salary of a D-2, the salary of an UNDT judge is also affected. This compromises the financial independence of the judiciary at large (for each UNDT judge is in a similar position); and creates a risk of apprehended bias in particular cases due to obvious conflicts of interest.\textsuperscript{150} Where a UN staff approached the UNDT contesting a reduction of her salary,\textsuperscript{151} the UNDT embarked on an analysis whether the judge seized of the case should recuse himself due to an obvious conflict of interest for the process reducing the complainant’s salary equally caused a reduction to the emoluments of the judge, giving rise to an apprehension of bias.\textsuperscript{152} Relying on human rights jurisprudence concerning the standards of independence and

\textsuperscript{146} UNDT Statute (n 127), art 6.
\textsuperscript{147} IJC 2017 Report (n 17), paras 29 and 50-1.
\textsuperscript{148} IJC 2017 Report (n 17), Annex II (Views of the UNDT), para 30.
\textsuperscript{149} Ibid, para 55.
\textsuperscript{150} As the UNDT has expressed: ‘A conflict of interest is inherent in the arrangement in which judges of the Tribunal, when subject to the Staff Rules regime, as augmented, modified and interpreted by the Office of Human Resources Management, are exposed to the risk of disputing those rules and interpretations in their own cases and taking positions which would then compromise their impartiality in all similar disputes’: IJC 2017 Report (n 17), Annex II (Views of the UNDT), para 48.
\textsuperscript{151} Lloret Alcaniz UNDT/Order No 113 (16 May 2017) GVA/2017 (‘UNDT Order No 113’), para 1.
\textsuperscript{152} Ibid, para 6, relying on the European Court of Human Rights in Harabin v Slovakia App no 58688/11 (ECHR, 20 November 2012), para 131.
impartiality,\textsuperscript{153} while Judge Downs concluded that ‘the Dispute Tribunal, as a whole, is not in a position to provide the Applicant the guarantees of independence and impartiality to which she is entitled under art. 19 of the Universal Declaration of Human Rights and art. 14(1) of the International Covenant on Civil and Political Rights’,\textsuperscript{154} the judge nevertheless decided not to recuse himself as doing so would have resulted in denying the applicant justice.\textsuperscript{155}

As no other jurisdiction could provide the applicant access to justice,\textsuperscript{156} based on the ‘principle of necessity’,\textsuperscript{157} despite the obvious structural deficits in the UNDT’s independence and impartiality, the judge had no choice but to retain carriage of the case. The approach taken by Judge Downs cannot be doubted for in order to ensure full compliance with one fair trial right (independence and impartiality), the judge was not willing to contravene another, i.e., the very right to access to a court that adjudicated her claim expeditiously.\textsuperscript{158} The structural deficiency identified by the UNDT is a matter of serious concern for it adversely impacts the judiciary’s independence generally; and creates a perception of bias in relevant cases. The UNDT itself offered a ready solution to ensure independence and impartiality, stating ‘[i]f the judges of the Dispute Tribunal had their conditions of service determined independently, not having their remuneration linked to that of staff members, this matter would not have arisen. It is noted that independence is not for the benefit of the judges of the Dispute Tribunal, but rather for the benefit of those they serve’.\textsuperscript{159}

Similarly, calling for ‘a revised compensation package for the Dispute Tribunal judges that negates the equivalency linkage to staff compensation’,\textsuperscript{160} the Internal Justice Council (IJC) noted ‘[w]hen remuneration for judicial service is expressly linked to staff remuneration, litigants may well perceive the judges as simply another branch of the staff, not the independent and impartial arbiters of justice that they are’.\textsuperscript{161}

\textsuperscript{153} Ibid, paras 6 and 14.
\textsuperscript{154} Ibid, para 22.
\textsuperscript{155} Ibid, paras 16 and 19.
\textsuperscript{156} Ibid, paras 26-7.
\textsuperscript{157} Ibid, at para 29, Judge Downs stated: ‘This situation forces the undersigned Judge to consider applying the doctrine of necessity, which enables a judge, who would otherwise be disqualified, to hear and determine a case where failure to do so may result in an injustice through an inability to adjudicate the matter’; also see Bangalore Principles (n 57), 2.5.
\textsuperscript{158} Ibid, paras 21 and 30.
\textsuperscript{159} Ibid, para 14.
\textsuperscript{160} IJC 2017 Report (n 17), para 57.
\textsuperscript{161} Ibid, para 56.
As the administrative and financial independence of the UN tribunals is significantly compromised, the answer to the question whether the UNDT and the UNAT can be said to satisfy the applicable standards for operationally independent justice mechanisms can only be answered in the negative. The UNDT judges have themselves tellingly concluded that in all aspects relevant to the tribunals’ operational independence, ‘international standards of judicial independence are being breached’.

6.1.2 Assessing against criterion 2 – decisional independence

a) Respect and enforcement of judicial orders and decisions

Moving on to whether the UNDT possesses the requisite decisional independence in terms of the enforceability of its decisions and the ability to determine its jurisdictional competence, the UNDT’s Statute provides for false assurances. On the enforceability of its decisions and orders:

As a matter de jure, its decisions and orders are binding on the parties.

In practice, significant issues with enforcement have been a prevailing feature of the UN internal justice system since its inception, rooted in a culture where the senior most members of the Administration do not seem to consider the UNDT and UNAT’s decisions as binding.

Where the UN failed to disclose documents pursuant to the UNDT’s orders in numerous cases, the then Secretary-General was reported as saying: ‘Sometimes there may be some cases of decisions which are not totally in line with what the Secretariat has been doing… But we will try to respect all the decisions.’ The use of such ambiguous language by the Chief Administrative Officer of the UN, the Secretary-General can only be regretted for it seriously undermines the decisional independence of the UNDT. Remarkably, at the end of his term as an UNDT judge, in 2010, Judge Adams (whose judicial orders were being openly defied by the Administration) reportedly said: ‘You have to look at the culture here. Someone in the position of undersecretary general is never confronted with the requirement that particular

162 Ibid, para 29.
163 See art 9(1) of the UNDT Statute (n 127) on the power of the UNDT to order production of documents; art 11(3) provides that the ‘judgements and orders of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the Statute of the United Nations Appeals Tribunal (24 December 2008), UNGA Res 63/253 (last amended 23 December 2016), UNGA Res 71/266 (‘UNAT Statute’). In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal. Case management orders or directives shall be executable immediately.’
164 See the discussion in Gulati (n 124), (especially jurisprudence cited at footnotes 178-82 of that work).
questions be answered.” Judges of the UN tribunals being equated with the rank of D-2 does not help the situation either for this can create a perception that staff members ranked D-2 or higher can simply ignore the decisions of the UN tribunals.

Perhaps the early issues faced by the internal justice system could be explained (but not justified) as teething problems. However, issues with enforceability have persisted until this day. On several occasions, the UN has failed to comply with the UNDT’s orders relating to protective measures aimed at preventing retaliation against witnesses, the production of documents (especially making full disclosure to the applicants), and the UN’s failure to follow-up on referrals for accountability by the UNDT where the tribunal has found that officials may have engaged in serious wrongdoing, including serious criminal activity (such as corruption and sexual assault). Such an attitude by the Administration defies the UNDT’s Statute, and is squarely contrary to the Effect of Awards rationale enshrining the doctrine of separation of powers within the UN’s internal justice system. While a litigant can apply to the UNDT for the execution of its orders, if the Administration refuses to comply, in the absence of a contempt power vested with the UN tribunals, there is little an applicant, or for that matter the relevant tribunal can do to seek enforcement, short of the applicant approaching an alternative forum. The de facto enforceability deficit means that the decisional independence of the UN tribunals is currently impermissibly limited.

**b) Jurisdictional independence**

As to the UNDT’s autonomy to determine its jurisdictional competence, Article 2(6) of the UNDT’s Statute gives it the competence to determine its personal and subject matter jurisdiction, with the latter being limited to employment disputes. Some commentators suggest that such provisions limit the subject matter jurisdiction of IATs impermissibly, creating a gap

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166 Ibid.
167 One article noted that the ‘judges were assigned an administrative rank that puts them below an assistant secretary general, so those who rank higher often feel that answering the tribunal is beneath them’: see New York Times (n 165).
168 IJC 2017 Report (n 17), para 27 pointed out that contractors are especially vulnerable in such situations.
169 IJC 2017 Report (n 17), Annex II (Views of the UNDT), para 59.
170 Ibid, paras 54 and 58; the UNDT’s power to refer cases to the UN to enhance accountability is provided for in art 10(8) of the UNDT Statute (n 127).
171 The separation of powers rationale was endorsed by the IJC in its report: IJC 2017 Report (n 17), para 3.
172 UNDT Statute (n 127), art 12(4).
relating to other private law claims that aggrieved personnel may wish to raise.\textsuperscript{173} IATs, including the UNDT, are employment tribunals as such, and not courts of general jurisdiction. Any other claims in private law that a staff member may have ought to be pursued elsewhere (although significant issues persist due to jurisdictional immunities).

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

5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:

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

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

A prohibition of exemplary damages would be permissible as a matter of policy set by the legislature; however, a two-year cap on compensation (subject to a discretion to grant greater compensation) is more problematic. It is notable that such limiting provisions are an accident of history stemming from the Effect of Awards saga where the organisation was unhappy with the extent of damages provided by the old UN Administrative Tribunal (see (2) above). That

history dictates that arbitrary caps on compensation ought to be treated with caution.\textsuperscript{174} Be that as it may, given the inbuilt discretion in Article 2(6), the situation \textit{de jure} would probably be by and large consistent with the concept of decisional independence but for the lack of good faith shown by the Administration. A three-judge bench in the case of \textit{Nakhlawi v Secretary-General of the United Nations}\textsuperscript{175} noted that:

\begin{quote}
[T]he reality is that in cases where the Tribunal found that a staff member had been wrongly separated, through no fault of his/her own but rather as a result of managerial error, the decision was systematically taken to pay compensation, instead of considering the reintegration of the staff member…There may, thus, be cases in which the career of staff members, who dedicated their entire professional life to the Organization and its mission, is completely ruined by an act carried out by the Respondent and found to be unlawful.\textsuperscript{176}
\end{quote}

The simplest and most effective option to ensure that the Administration implements the UNDT’s and the UNAT’s orders in good faith is to grant the tribunals the power to make specific orders that leave no choice concerning the applicable remedy. The IJC has in fact so recommended.\textsuperscript{177} At the very least, the provisions should be amended to ensure equality between the litigants where not only the Administration, but the applicant may also elect to receive compensation in lieu of rescission or specific performance; and there are discretionary criteria put in place that guide an election of a remedy by the Administration where a choice exists. As a matter of course, the applicant then will be free to approach the internal justice system should he or she considered that the discretion has been abused in a particular case. Without such amendments, the decisional independence of the UNDT and the UNAT continues to be compromised.

\textsuperscript{174} The Appeals Tribunal recalled in \textit{Hersh v Secretary-General of the United Nations} (2014-UNAT-433, 27 June 2014) what it had held in \textit{Mmata v Secretary-General of the United Nations} (2010-UNAT-092, 29 October 2010), namely that “art 10.5(b) of the UNDT Statute (n 127) does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation”.

\textsuperscript{175} \textit{Nakhlawi v Secretary-General of the United Nations} (UNDT/2016/204, 11 November 2016).

\textsuperscript{176} Ibid, paras 104-5.

\textsuperscript{177} Ibid, para 83.
6.1.3 Assessing against criterion 3 – the right and duty to render fair court proceedings

The task of delivering a fair hearing must be carried out without any inappropriate or unwarranted interference with the judicial process. This criterion may be discussed in respect of two categories of employees. Those having access to the UNDT and UNAT, and others who are not provided with such access.

a) The fairness/equality deficit in respect of consultants, contractors and interns

For purported reasons of resourcing, access to the UNDT and UNAT is provided to UN’s fixed and permanent staff only.\(^{178}\) With the UNDT unwilling to read the scope of its personal jurisdiction liberally and legislative reform not forthcoming, a significant equality deficit prevails.\(^{179}\) Indeed, one of the most prominent fair trial deficit in the UN’s internal justice system concerns the lack of access to UN officials described as so called non-staff personnel (such as consultants, contractors and interns) to judicial protection. Such individuals now constitute more than 45% of the UN’s workforce, and their job responsibilities are not materially different to fixed and permanent staff.\(^{180}\) The position of consultants, contractors and interns is already precarious as temporary workers.

While the UN recognises that it has the obligation to provide appropriate modes of dispute settlement to so called non-staff personnel, citing resource constraints, it so far has refused to provide access to the UN tribunals to that vast category of individuals.\(^{181}\) Restricting the right to access a fair trial for a particular group of persons based on resource constraints is impermissible.\(^{182}\) Making distinctions between members of an organisation’s workforce performing similar work on the basis of an individual’s employment status as a temporary worker in terms of the ability to access judicial protection is a manifest breach of the equality

\(^{178}\) The lack of access of consultants, contractors and interns to the UN's internal justice system is by legislative design: see Report of the Secretary-General, ‘Administration of justice at the United Nations’ (16 September 2010) (65th session, Items 131 and 142), para 179.

\(^{179}\) The UN tribunals have relied on a formalist understanding of the definition of a ‘staff member’ having access to the UN’s internal justice system, narrowly interpreting Article 3(1) of the UNDT Statute (n 127). The effect is that even if consultants and contractors perform materially the same work as individuals retained by the UN in the formal category of a permanent or fixed staff member under the relevant contract of employment, the former do not have access to the UN’s internal justice system. Several judges have stated that the lack of a remedy for such individuals is most ‘unfortunate’: see especially, \textit{El Moctar v Secretary General of the United Nations} Judgment No UNDT/2012/113 (24 July 2012), paras 13-36.

\(^{180}\) Sixth Committee, ‘Summary record of the 16th meeting’ (7 November 2016) (71st session), para 41.


\(^{182}\) General Comment No 32 (n 35), para 27.
principle. In this sense, the equality principle is breached both at the level of the judiciary, as well as the legislature.

The old UN Administrative tribunal did take jurisdiction over cases advanced by certain claimants on the basis that without its intervention, the complainants would suffer a denial of justice. The UNDT and UNAT have not taken the same approach. It bears mentioning that in respect of its consultants and contractors, the UN provides the possibility of arbitration. However, there is no evidence that such arbitrations are actually conducted. The record is poor. There is evidence of only two arbitrations ever being carried out. Tellingly, where a UN agency refused to appoint an arbitrator despite the presence of an arbitration clause, thankfully for the claimant, French courts came to the plaintiff’s rescue taking jurisdiction over the defendant organisation on the basis that IO immunities were waived. Fundamentally, unless consultants, contractor and interns are given access to the UN tribunals (through amendments to the UNDT Statute or UNDT reading its personal jurisdiction broadly), or an effective arbitral scheme implemented (see conclusion to this work), the right of such individuals to practically realise a fair trial on an equal basis will continue to be contravened.

b) The position of persons having access to the UN tribunals

For persons having access to the UNDT and the UNAT, the reformed UN internal justice system, subject to some caveats, provides robust protections in law, and increasingly in practice. The UNDT Statute and its Rules of Procedure require the provision of reasons, all

For an outline of the equality principle, see (3) above; also see Article 26 of the ICCPR (n 4) providing for a general right to equality before the law which prohibits an unjustifiable difference in treatment between similarly situated persons based on the ‘status’ of a person. Unjustifiable distinctions made between individuals based on their status as holding temporary employment compared to those holding more permanent employment, especially in the context of right to access to courts, is impermissible. The Inter American Court stated that the right to judicial protection must be granted to all categories of workers regardless of their status, concluding that the ‘status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature’: see Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion) OC-18/03 (17 September 2003, Inter-American Court of Human Rights), para 109 and conclusion 8.

Equality must be accorded before the courts (Article 14(1), ICCPR (n 4)), but legislation also must not be discriminatory: see Human Rights Committee, ‘General Comment No 18’ (10 November 1989), para 12.

See, Teixeira v the Secretary General of the United Nations Judgement No 230 (14 October 1977, UN Administrative Tribunal).


See art 11(1) of the UNT Statute; and art 25(1) of the UNDT’s Rules of Procedure which provides that ‘Judgements shall be issued in writing and shall state the reasons, facts and law on which they are based’.

183 For an outline of the equality principle, see (3) above; also see Article 26 of the ICCPR (n 4) providing for a general right to equality before the law which prohibits an unjustifiable difference in treatment between similarly situated persons based on the ‘status’ of a person. Unjustifiable distinctions made between individuals based on their status as holding temporary employment compared to those holding more permanent employment, especially in the context of right to access to courts, is impermissible. The Inter American Court stated that the right to judicial protection must be granted to all categories of workers regardless of their status, concluding that the ‘status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature’: see Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion) OC-18/03 (17 September 2003, Inter-American Court of Human Rights), para 109 and conclusion 8.

184 Equality must be accorded before the courts (Article 14(1), ICCPR (n 4)), but legislation also must not be discriminatory: see Human Rights Committee, ‘General Comment No 18’ (10 November 1989), para 12.

185 See, Teixeira v the Secretary General of the United Nations Judgement No 230 (14 October 1977, UN Administrative Tribunal).


188 See art 11(1) of the UNT Statute; and art 25(1) of the UNDT’s Rules of Procedure which provides that ‘Judgements shall be issued in writing and shall state the reasons, facts and law on which they are based’.
judgments are to be published; oral hearings are the norm, and the complainant can access a second instance UNAT to challenge UNDT decisions. However, issues remain concerning access to legal representation, engaging the principle of equality.

The Office of Staff Legal Assistance (‘OSLA’), based at the OAI faces significant underfunding. Some may argue that international civil servants are well remunerated, and strictly speaking, human rights law does not demand that they be always granted free legal assistance. The provision of legal assistance to staff however engages the doctrine of equality of arms, a fundamental rule of fairness.

The institution has available to it the vast resources of the organisation, and is invariably represented by the organisation’s lawyers. Relative to the individual applicant, the institution of course has considerably deeper pockets. Equality would demand that staff be accorded legal assistance not only to guarantee that the applicant can put forward his or her case in full equality with the Respondent, but also to ensure that other litigants can receive justice without undue delay. Unrepresented litigants ‘have a negative impact on the workload of the Tribunal… often do not understand the legal process and tend to file numerous irrelevant documents and submissions, inundate the Registries with unnecessary or inappropriate queries and requests and generally slow down the system, causing delays in proceedings’. This is why the creation of the OSLA was said to constitute one central plank of the administration of justice at the UN.

Whether representation is achieved through a body such as the OSLA, or through another mechanism, such as via legal insurance that can fund private lawyers, or staff contributions, is a matter for the organisation’s institutional preference. Given that the OSLA regime is the

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189 See art 26 of the Rules of Procedure of the UNDT regarding the publication of judgements, which requires that all judgements of the UNDT be published on the website of the UNDT; and personal data must be protected.
190 See art 7(e) and (f) that empower the UNDT to make rules of procedure regarding oral hearings and publication of judgments; art 9(3) require that oral hearings be held in public unless exceptional circumstances exist; and see Rules of Procedure, arts 16(1) and (2) giving the judge a discretion to hold an oral hearing; and providing that in disciplinary cases, ‘a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.
191 IJC 2017 Report (n 17), Annex II (Views of the UNDT), para 66.
192 There was a scheme introduced in 2014 opposed by the staff union regarding the opt-out contribution towards the OSLA: ‘New payroll deduction from staff to fund establishment of additional legal posts - SAY NO and OPT OUT’ (7 March 2014) <http://staffunion.unov.org/su/en/osla---voluntary-supplemental-funding-mechanism.html> accessed 30 May 2018.
principal way in which equality of arms at the UN’s internal justice system is currently maintained, it ought to be sufficiently funded. As the UNDT itself observed:

The right to representation, guaranteed by the Universal Declaration of Human Rights and enshrined in the principle of equality of arms, is an essential element of the new system of administration of justice, and the role of the Office of Staff Legal Assistance should continue to be that of assisting staff members not only in processing claims, but in representing applicants before the Tribunals.¹⁹³

The IJC noted that the OSLA suffers from serious underfunding; lacks sufficient staff, with the senior most official belonging to the P-3 category; and is in need of urgent budgetary and personnel enhancements.¹⁹⁴ No doubt the lack of resources prevents OSLA from providing representation to more aggrieved staff members than is presently the case. According to the most recent data available, in 2016, OSLA provided representation before the UNDT only in 79 of the 383 applications received, and staff were self-represented in 258 applications;¹⁹⁵ and during the same period, OSLA represented staff only in 70 of the 170 appeals received by the UNAT, with 63 staff members being self-represented.¹⁹⁶ If the UN’s internal justice regime is to be considered compliant with fair trial standards, enhanced legal representation for affected staff is necessary to ensure fairness of proceedings and the realisation of the right to equality of arms.

6.1.4 The assessment

The UNDT cannot be said to constitute a judicial institution that is sufficiently free from the control of the Administration so as to comply with international human rights law. The UNDT judges have stated:

The Dispute Tribunal judges have serious concerns about the persistent lack of institutional autonomy and independence of the Dispute Tribunal…The Administration appears to operate upon an assumption that independence is protected as long as it refrains from exerting pressure on the results in individual cases. Judicial independence

¹⁹³ IJC 2017 report (n 17), Annex II (Views of the UNDT), para 68.
¹⁹⁴ Ibid, para 79.
¹⁹⁵ Office of Administration of Justice, ‘Tenth Activity Report’ (1 January to 31 December 2016), para 23.
¹⁹⁶ Ibid, para 43.
in a broader, institutional sense of autonomy and independence is structurally and practically absent, and has the effect of impeding justice being done and being seen to be done.\textsuperscript{197}

Based on the analysis, the following table provides an assessment of the institutional independence of the UNDT.

\begin{center}
\begin{tabular}{|l|l|l|}
\hline
Criteria & Are legal standards in place & Are legal standards applied in practice \\
\hline
Operational independence & Not compliant & Not compliant \\
Decisional independence & Mostly compliant & Not compliant \\
Fairness of proceedings & Mostly compliant & Not compliant\textsuperscript{198} \\
\hline
\end{tabular}
\end{center}

\textbf{6.2 Individual independence}

\textit{6.2.1 Assessing against criterion 1 – judicial selection}

The system put in place at the UN’s internal justice system provides for arguably best practice. The judges of the UN tribunals are appointed by the General Assembly on the recommendation of an independent IJC chaired by a distinguished jurist.\textsuperscript{199} As opposed to states putting forward nominees, the IJC invites individual applications from potential candidates, and following a competitive examination, makes recommendations to the General Assembly suggesting two candidates for each available post.\textsuperscript{200} The General Assembly then elects one person out of the

\textsuperscript{197} IJC 2017 Report (n 17), Annex II (Views of the UNDT), para 27.

\textsuperscript{198} This assessment is adversely affected due to the lack of access to consultants, contractors and interns.

\textsuperscript{199} See art 4(2) of the UNDT Statute (n 127); see also UNGA Res 62/228 (n 131), paras 35-8: which creates the IJC as a body aimed at enhancing the independence of the UNDT and the UNAT, and comprises of a staff representative, a management representative and two distinguished external jurists, one nominated by the staff and one by management, and chaired by a distinguished jurist chosen by consensus by the four other members, and makes recommendations to the General Assembly regarding candidates for vacancies in the UNDT and the UNAT.

two options presented. While judicial appointments through elections are said to adversely undermine independence, the mechanism at the UN internal justice system removes to a significant extent the influence of states in the appointment of judges. Concerning judicial appointments at the UNDT, Judge Memooda Ebrahim-Carstens pointed out extra-curially: ‘it is evident from the applications received that this procedure ensures a larger pool of global competitors who can apply independently and freely, ruling out state politics, bias, and favouritism, and also assures a more representative candidature.’

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

6.2.2 Assessing against criterion 2 – security of tenure

On security of tenure, with certain caveats, the UN internal justice system has taken significant steps, and in some respects constitutes best practice. The judges are to serve in their personal capacity and enjoy ‘full independence’; the judges of the UNDT are appointed for one non-renewable seven year term, enhancing structural independence to a significant extent, and a judge may only be removed in cases of misconduct or incapacity, although there remain issues whether an affected judge will be granted his or her fair trial guarantees relating to contesting his or her removal should the situation arise. The introduction of a Code of Conduct for the judges of both the UNDT and the UNAT (expressly incorporating human rights standards of independence and impartiality) has also strengthened the legal infrastructure in place, already bearing results in terms of the application of the code.

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202 Ebrahim-Carstens (n 200).
203 UNDT Statute (n 127), art 4(3).
204 Ibid, art 4(7).
205 Ibid, art 4(4).
206 Ibid, art 4(10).
207 The Mechanism for addressing Complaints Regarding Alleged Misconduct or Incapacity of the Judges of the UNDT and the UNAT was adopted through UNGA Res 67/241 (24 December 2012) UN Doc A/RES/67/241. ion 19(c)); for best practice concerning the processes that must be followed when removing a judge, see generally, J van Zyl Smit (n 101).
208 The Code of Conduct for the Judges of the UNDT and the UNAT was adopted through UNGA Res 66/106 (9 December 2011) UN Doc A/RES/66/106. It incorporates the principles of independence and impartiality as
Despite the above structural protections, significant deficits remain. Particularly, compromised institutional independence also impacts individual independence, and vice-versa. There is no better example of such an overlap than the deficits in the financial independence of UNDT judges caused by the lack of financial security of every judge. To remedy the compromise of each judge’s individual independence, the IJC recommended ‘in accordance with the United Nations standards on independence of the judiciary, the status of the judges of the Tribunal, including remuneration, be sufficiently “secured by law”’.

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

6.2.3 The assessment

Based on the above analysis, the following assesses the individual independence of UNDT judges.

INDIVIDUAL INDEPENDENCE

UNITED NATIONS DISPUTE TRIBUNAL

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Are legal standards in place</th>
<th>Are legal standards applied in practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial selection (method of appointment)</td>
<td>Compliant</td>
<td>Compliant</td>
</tr>
<tr>
<td>Judicial selection (are minimum Qualifications required)</td>
<td>Compliant</td>
<td>Compliant</td>
</tr>
</tbody>
</table>

provided for in human rights treaties and other instruments developed by the international community; also see UNDT Order No 113 (n 151) para 11, where a UNDT judge declared a conflict of interest due to the case raising issues that would affect the personal circumstances of the judge demanding disclosure under art 2(e) of the Code of Conduct.

209 IJC Report (n 17), para 49.
6.3 Impartiality

For those having access to the UN tribunals, strong protections to maintain impartiality prevail. The UNDT Statute provides for various de jure guarantees, including enshrining a litigant’s ability to seek a recusal on grounds of subjective or objective bias. Those provisions are further boosted by the Rules of the UNDT, and the Code of Conduct. The UNDT Rules of Procedure define a conflict of interest including within its meaning situations where a judge has a personal, familiar or professional relationship; previous involvement in a case, such as in the role of counsel or an expert; and any other situation that would objectively doubt the impartiality of the judge. The Code of Conduct further clarifies the meaning of a conflict of interest, including a requirement that a judge’s conduct inside and outside of the court must not indicate bias, by for example, the receipt of gifts or benefits creating a perception of impartiality.

Moreover, section 6 of the Code of Conduct requires judges to act ‘fairly’ within its scope, ‘fairness’ demands amongst other things, judges must: Observe the letter and spirit of the audi alteram partem (“hear the other side”) rule; Remain manifestly impartial; and publish reasons for any decision. Fairness also requires that ‘[j]udges must not conduct themselves in a

<table>
<thead>
<tr>
<th>Security of tenure (length of term)</th>
<th>Compliant</th>
<th>Compliant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Security of tenure (financial security)</td>
<td>Non-compliant</td>
<td>Non-compliant</td>
</tr>
<tr>
<td>Security of tenure (method of removal)</td>
<td>Compliant</td>
<td>Mostly compliant(^{211})</td>
</tr>
</tbody>
</table>

\(^{211}\) This issue has not arisen in practice.

\(^{212}\) Art 4(3)(a) of the UNDT Statute (n 127) states that a judge shall be of high moral character and impartial; art 4(6) avoids situations of perceived conflicts by disallowing a UNDT judge to be employed at the UN for a period of five years following his or her term of judicial appointment.

\(^{213}\) Art 4(8) of the UNDT Statute (n 127) states: ‘A judge of the Dispute Tribunal who has, or appears to have, a conflict of interest shall recuse himself or herself from the case. Where a party requests such recusal, the decision shall be taken by the President of the Dispute Tribunal;’ also see art 28(2) of the UNDT Rules of Procedure (n 127).

\(^{214}\) UNDT Rules of Procedure (n 127), art 27(2).

\(^{215}\) Code of Conduct, section 2.

\(^{216}\) Ibid, see especially section 2(h).

\(^{217}\) Ibid, art 6(a).
manner that is racist, sexist or otherwise discriminatory. They must uphold and respect the principles set out in the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Judges must not by word or conduct unfairly discriminate against any individual or group of individuals, or abuse the power and authority vested in them.218

Not only de jure guarantees ought to be enacted, there must be evidence that they work in practice if the right to an impartial court or tribunal is to be practically realised. At the UN, the trajectory is a positive one, with applications for recusal of a judge starting to constitute a regular feature of the jurisprudence, and judges making disclosures concerning conflicts of interests of their own accord pursuant to the Code of Conduct.219 As individuals can lodge complaints against judges for alleged breaches of the Code of Conduct, another important mechanism that could play a significant role in keeping the judiciary accountable is present within the UN’s internal justice system.

The UN internal justice system provides for significant guarantees of impartiality. However, bearing in mind the significant deficits in the institutional and individual independence of the judges, a real risk of the presence of apprehended bias in certain cases exists. It is because of these deficits that the assessment of impartiality of the UNDT suffers significantly. The following summarises the UNDT’s law and practice regarding compliance with the criteria relevant to measure impartiality.

**IMPARTIALITY**

**UNITED NATIONS DISPUTE TRIBUNAL**

<table>
<thead>
<tr>
<th>Are Legal Standards in place</th>
<th>Are legal standards applied in practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compliant</td>
<td>Mostly compliant</td>
</tr>
</tbody>
</table>
6.4 Final comments on the UN regime

Can it be said that the independence and impartiality deficits within the UN internal justice system on their own deny a complainant the right to a fair trial? While the answer to that question can only be conclusively answered following a consideration of the facts of a given case, some general observations are warranted. The judges of the UNDT ought to be lauded for forthrightly putting their views about the prevailing independence and impartiality deficit. The very fact that the UNDT has taken a stand on the issue; and of its own accord considered the issue of independence and impartiality; evidences the UNDT’s motivation to ensure that justice is not only done, but seen to be done. Such an attitude demonstrates that so far, on balance, the complainant’s right to access an independent and impartial tribunal is being practically realised.

However, if the UN tribunals do not continue to demonstrate the outstanding vigilance shown so far, the independence deficit may invariably lead to a situation where justice delivered at the UN falls foul of the fundamental right to access a competent, independent and impartial tribunal that renders justice fairly. Certain structural deficits with respect to the UNDT’s institutional and individual independence are matters of grave concern. Perhaps one of the most significant issues still lies in the culture prevailing at the organisation, which regularly allows judicial orders to go unenforced and unaddressed.

Addressing the deficiencies pointed out require significant structural reforms to ensure the institutional and individual independence of the judiciary. Should national courts be confronted with challenges impugning the UN internal justice system, very close scrutiny of the independence and impartiality deficits is warranted to avoid a failure of justice in particular cases. If the UN’s internal justice system is to avoid the risk of being impugned before national courts, immediate reforms must be undertaken.

Alarmingly, a vast number of individuals (consultants, contractors and interns) working for the UN have no access to the UNDT and UNAT. Those individuals are unable to access justice on an equal footing with those officials who perform materially similar work. With arbitration mechanisms not implemented in good faith by the UN (see conclusion to this work), claims by so called ‘non-staff members’ ought to trigger the secondary role of national courts to ensure access to justice. Given the structural deficiencies identified, and pressures already faced by
the UNDT, it is unwise to expand the scope of its work, especially in terms of its subject matter jurisdiction.

7 Assessing the ILOAT

The ILOAT, originally known as the League of Nations Administrative Tribunal, is the oldest IAT and, has been in operation for more than 90 years. Its need was made immediately apparent when the very first Director-General of the International Labour Office (as it was then known), Edward Phelan, the first official employed by the ILO, also happened to be the very first official to bring a complaint to the Tribunal in 1929. Since then, the ILOAT has no doubt played a significant role in the development of international administrative law. The ILOAT exercises jurisdiction over 58 international organisations; is open to more than 63,000 international civil servants; and has delivered more than 3900 judgments so far. Its significance to the realisation of the right to a fair trial for a vast number of international civil servants is obvious.

However, ILOAT's practices have changed little since its inception. It does not comply with modern standards of human rights law when it comes to the administration of justice. As will be demonstrated, it is largely structural reasons that prevent the ILOAT from delivering justice independently, impartially and fairly. Given its status, the well-known deficiencies regarding its objective independence and impartiality are all the more astonishing.

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220 The ILOAT succeeded the League of Nations Administrative Tribunal through a new name: see D Petrović, ‘Longest-existing international administrative tribunal: History, main characteristics and current challenges’ in D Petrović (ed), 90 Years of Contribution of the Administrative Tribunal of the International Labour an to the Creation of International Civil Service Law (2017) (‘90 Years of ILOAT’), 23.
221 90 Years of ILOAT, ibid, 16.
222 Organisations other than the ILO can join the ILOAT regime if they accept its jurisdiction pursuant to the provisions of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization; See ILO ‘ILO Administrative Tribunal’ <http://www.ilo.org/tribunal/lang--en/index.htm> accessed 3 June 2018 (the tribunal amongst others, is open to several UN Specialized Agencies), and currently exercises jurisdiction over at least 59 international organisations: see ibid, 25.
223 90 Years of ILOAT (n 220), 28.
225 The ILOAT’s Statute has been amended only seven times but its competences ratione materiae and ratione personae have not been modified; the three-year length of term has in Article 3 has never been amended: see 90 Years of ILOAT (n 220), 21-2.
with the ILOAT regime relate to the silence of its Statute and the Rules of Procedure on independence and impartiality, and the lack of transparency.

7.1 Institutional independence

7.1.1 Assessing against criterion 1 – operational independence

On the ILOAT’s operational independence, any meaningful *de jure* guarantees are absent; and the factual situation cannot be readily ascertained for there is a lack of transparency on its administrative and financial independence from the International Labour Office. Article 2 of The ILOAT Statute creates a Registry; and states that the Registrar is appointed by the Director-General of the International Labour Office.\(^{227}\) The Registrar and key officers of the ILOAT are ILO staff members – who report to the Director-General of an organisation who is a Respondent in more than 5% of its cases. Article IX of the ILOAT Statute simply provides that the ‘administrative arrangements necessary for the operation of the Tribunal shall be made by the International Labour Office in consultation with the Tribunal; Expenses occasioned by sessions of the Tribunal shall be borne by the International Labour Office’. The rules do not provide for any specifics that would guarantee the operational independence of the ILOAT.\(^{228}\)

As to the practice, the Amsterdam Report\(^{229}\) concluded:

The ILOAT is not transparent with regard to how it is funded and how those funds are paid out to judges and used for ensuring the proper functioning of the Tribunal. Cases are financed by the defendant in a given case. This means that all cases are financed by the international organization at bar. These concerns are increased when one considers the [very low] success rates of complainants before the Tribunal.\(^{230}\)

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\(^{227}\) Art 2, ILOAT Rules of Procedure.

\(^{228}\) Art X of the ILOAT's Statute empowers it to enact rules governing the conduct of proceedings; and any matters not covered by the Statute. However, the ILOAT's operational independence is not guaranteed by virtue of this somewhat narrow provision.

\(^{229}\) Amsterdam Report (n 87).

\(^{230}\) Ibid, 60-1, with the authors noting that the success rate of complainants in the previous 16 years from the date of writing was less than 25%; also see Report of the Staff Union of the European Patent Organization, ‘Managing the ILO Administrative Tribunal's workload - Current challenges and possible improvements’ (2015) (‘SUEPO Report’), information contained at footnote 17 of that report. It points out that between 2000-2014, complainants
Bearing in mind the silence of the ILOAT’s Statute; with no precise information on the budgetary matters concerning the ILOAT forthcoming; and the Registry not objectively independent from the ILO, or the organisations subscribing to its jurisdiction (the Respondents in any case before the ILO); it can hardly be said that the ILOAT constitutes an operationally independent judicial body. Not only there is a significant deficiency concerning operational independence which can only be cured by amendments to the ILOAT’s regulatory regime and enhanced transparency; significant deficits continue to prevail concerning decisional independence and the right and duty to provide a fair hearing.

7.1.2 Assessing against criterion 2 – decisional independence

The ILOAT exercises a reasonable degree of control on its jurisdiction, but its decisions are not always respected (with the ILOAT having no contempt powers). Focusing on the former, pursuant to Article VII(1) of the ILOAT Statute, there is a standard requirement that before approaching the ILOAT, a complainant exhaust all internal remedies in respect of the ‘final decision’ challenged, or else the complaint is not receivable. Article II provides for the ILOAT’s subject matter and personal jurisdiction/competence. The ILOAT is empowered to hear and determine cases that impugn the employment rights of an official as provided by the applicable international administrative regime, including disputes about the compensation to be paid for work-place injury; and in relation to claims about the execution of contracts to which the ILO is a party and where the ILOAT’s jurisdiction is recognised, presumably through a choice of jurisdiction provision in the disputed contract.

have prevailed in 30% of the cases. Moreover, in some years, the complainants prevailed in less than 15% of the cases.

231 Amsterdam Report (n 87), 1; also see OA Jefferson and I Epichev (n 226), 489-513.

232 Art VI (1) of the ILOAT Statute states: ‘The Tribunal shall take decisions by a majority vote; judgments shall be final and without appeal.’ The absence of the word ‘binding’ is to be noted. It is difficult to assess the rate of the enforcement of ILOAT decisions due to the lack of verifiable data. However, several examples of non-compliance would exist; Geoffrey Robertson pointed out: ‘Lack of effective enforcement power and of sanctions against employer organisations which refuse or fail to comply to the letter, with its decisions. ‘Some power to enforce its judgement is essential for any tribunal, and the ILO and other client organisations should be prepared to accept an addition to the statute providing it with power to fine (or order compensation against) a party for non-compliance with or contempt of its orders’: Robertson (n 226).

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

234 Art II (4), ILOAT Statute.
While the ILOAT’s subject matter jurisdiction is somewhat broader than a purely employment tribunal, in practice, the focus of its work has been on employment cases. Under Article II(6)(a), the ILOAT is competent or open to determine complaints from a subscribing organisation’s ‘official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death’. Moreover, compared to the UN’s regime, Article VIII grants the ILOAT broad powers to grant remedies, providing that ‘the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him’. The point of note is that the ILOAT does possess a degree of control on its jurisdictional competence in respect of employment disputes. The particularities of the determination of the scope of its own competence by the ILOAT are different matters altogether; different IATs have reached different conclusions on this issue.\textsuperscript{235} Ultimately consolidating to an extent the ILOAT’s control on its competence is Article II(7) of its Statute which provides: ‘Any dispute as to the competence of the Tribunal shall be decided by it’.

7.1.3 Assessing against criterion 3 – the right and duty to render fair court proceedings

For those officials having access to the ILOAT, there are present concerns relating to the lack of independent fact-finding by the ILOAT; the routine denial of oral hearings; delays in the administration of justice; and the breach of the principle of equality of arms.\textsuperscript{236}

\textit{a) ILOAT – a confused institutional role and the lack of independent fact-finding}

Generally, internal justice systems at IOs require that a complaint against an administrative decision is first filed with an arm of the Management (such as with the human resources department). If the complainant is not satisfied, he or she may appeal to a internal appeals body, which is a peer review body, such as a Grievance Committee or Appeals Committee/board.\textsuperscript{237} Such committees usually do not consist of professional judges (they are constituted by members of the Administration);\textsuperscript{238} and amongst other deficits, their recommendations are not

\textsuperscript{235} A discussion on such matters is outside the scope of this paper.
\textsuperscript{236} For consultants and contractors, the ILOAT’s jurisprudence is strange. I focus on persons having access.
\textsuperscript{237} See L Fauth, ‘Due Process and Equality of Arms in the Internal Appeal: New Developments From Judgments 3586 and 3688’ 184; 90 Years of ILOAT (n 220).
\textsuperscript{238} Some organisations have taken steps to appoint non-staff members and independent persons with relevant legal expertise to carry out administrative review internally, such as the OECD. For a discussion, see AM Thévenot,
binding. In such regimes, perversely, the ultimate decision maker is the very person whose
decision is often challenged, i.e., the executive head of an organisation. Regardless of the
presumable good intentions of the persons constituting such committees, these mechanisms
cannot and do not constitute independent judicial mechanisms for they are comprised of
members of management who do not have the power to render binding decisions. 239

The legal infrastructure employed by the relevant IO means that the responsibility to administer
justice to aggrieved officials is dealt with by the Administration/Management twice-over.
Should a complainant still be dissatisfied with the outcome following the completion of such
reviews, he or she may then approach the ILOAT. The ILOAT is thus the earliest opportunity
where a complainant can access a proper first instance judicial mechanism. The ILOAT’s role
is however somewhat confused – lying somewhere between a truly first instance court (that in
principle ought to make its own independent findings of fact which it does not do); and an
‘appellant court’, where in practice it gives ‘significant deference to the findings of fact and
conclusions on the merits of the internal appeal bodies’. 240 The ILOAT relies significantly on
the findings of peer review mechanisms for a multiplicity of reasons, including that of
efficiency. The ILOAT itself has said that it is ‘ill-equipped to act as a trial court’ or a first
instance court. 241 Stating that:

An internal appeal procedure that works properly is an important safeguard of staff
rights and social harmony in an international organisation and, as a prerequisite of
judicial review, an indispensable means of preventing the dispute from going outside
the organisation. In the event of a complaint it greatly helps the Tribunal in identifying
the material issues of fact and law... 242

239 Best Practices in Resolving Employment Disputes (n 238), 33.
240 Fauth (n 237), 184.
241 See Re Mr AR BB (2013) ILOAT Judgment No 3222, para 10, where the ILOAT said ‘[a]nother purpose of art
VII (1) of the Statute is to ensure that the Tribunal does not become, de facto, a trial court of staff grievances and
to ensure it continues as a final appellate tribunal. The Tribunal is ill-equipped to act as a trial court and its
workload could, potentially, become intolerable or unmanageable if its role was not confined in this way.’
The ILOAT’s approach is probably based on: its own perception about its role as an appellant court; and no doubt, reasons of practicality. The ILOAT has one Registry in Geneva where the judges meet for their sessions, with Respondent organisations and complainants spread around the world. Engaging in fact-finding in such circumstances would no doubt be an onerous exercise, even if electronic means to enhance access to justice are implemented (which they have not been so far). Given the convoluted role of the ILOAT, where in reality it ought to be a first instance court, but behaves like an appellant one; and the practical difficulties it would face in delivering justice as a first instance mechanism in any event; means that the ILOAT is not in a position to provide justice to aggrieved officials consistent with their right to access a truly first instance judicial mechanism that makes independent factual findings.

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

**b) The lack of oral hearings**

Since 1989, not a single request for oral hearing has been granted by the ILOAT.\(^{243}\) The provision in the ILOAT’s Statute and Rules of Procedure empowering it to hold oral hearings has been effectively negated, with the ILOAT routinely and in a cursory way dismissing requests for oral hearings or hearing witnesses.\(^{244}\) This practice raises even graver concerns given the ILOAT’s ‘Statute and Rules have no formal mechanism for discovery by a complainant of critical documentation or information in the hands of the defendant organisation, substantially hampering a complainant’s ability to meet his/her burden of proof or impairing their ‘right of defence when accused of misconduct’.\(^{245}\) In the absence of an oral

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\(^{243}\) Amsterdam Report (n 87), 1.

\(^{244}\) Flaherty identifies common phrases employed by the ILOAT to deny oral hearings: “Having examined the written pleadings, the Tribunal has decided not to order hearing for which neither party has applied”. “Having examined the written submissions and disallowed the complainant's application for hearings”. “Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses”; see EP Flaherty, ‘Legal protection in international organisations for staff—a practitioner’s view’ (undated), 4.

\(^{245}\) SUEPO Report (n 230), 9.
hearing, a complainant then has absolutely no opportunity to properly test the evidence in his or her case.

Presumably because it does not see itself as a fact-finder, the ILOAT refuses all applications for oral hearings. The routine denial of oral hearings is seriously problematic where there is a contest on the evidence regardless of the category of a complaint; and is especially concerning in disciplinary cases where the right to an oral hearing may become necessary due to the existence of disputed facts. Alarming it is that officials can suffer the most serious consequences, including loss of their employment and the destruction of their reputations, effectively based on factual findings made by mechanisms that are anything but independent an impartial. Experts have concluded that the ILOAT’s practice of denying an oral hearing is a contravention of the right to a fair trial and contrary to the statutory intention enshrined in the ILOAT’s Statute.246

With the UN system now providing oral hearings regularly, it also may be questioned whether different treatment in respect of the right to access an oral hearing from agency-to-agency can be objectively justified. Until such times that a truly independent and impartial first instance mechanism is made available to aggrieved officials; the one area where the ILOAT itself can enhance access to justice is to grant oral hearings regularly; and especially in cases where there exist disputed issues of fact.247 By not granting a single request for an oral hearing for approximately thirty years now, the conclusion that may be reached is that the right to a fair trial is being manifestly contravened at the ILOAT. Any argument that oral hearings are impracticable due to reasons of geography can be readily overcome by the use of technology, which the ILOAT seems reticent to adopt.

c) Delay

The legal infrastructure that has underpinned the ILOAT since its inception has also resulted in inordinate delays in the delivery of justice. Already, significant time may be taken to exhaust

246 Robertson (n 226), para 10.
247 Flaherty points out that the reform process undertaken by the ILO Staff Union in the early 2000s suggesting that the ILOAT be reformed did not provide any clear reasons as to why the ILOAT refuses to hold oral hearings: Flaherty (n 244).
internal remedies (which in some cases can take several years).

On one analysis carried out by the Staff Union of the European Patent Office, it could take up to six years before the ILOAT could address its backlog. The ILO points to the ever-increasing case-load of the tribunal pointing out that it is working at maximum capacity (rendering around 150 judgments per year); and it does not have capacity to enhance its output without compromising on its quality. Meaning that cases may take anywhere between 4-6 years to be processed from their inception at an internal appeals process until the ILOAT decision is rendered, assuming that the ILOAT maintains its higher output achieved since 2014, and no further backlogs are created.

The length of proceedings in terms of compliance with fair trial standards depends on various factors, such as the complexity of a case, and the attitude of the parties. Bearing in mind the employment context, the time it takes a case to be processed at the ILOAT is so excessive that it most certainly breaches the right to access a court without undue delay. Similar delays within the UN’s internal justice system that proceeded the 2009 reforms were found to be ‘egregious’. It is also contrary to the ILOAT’s ‘case law that a staff member is entitled to an efficient means of redress and to expect a decision on an appeal to be taken within a reasonable time. The ILOAT has found delays of even a few months that cannot be objectively justified.

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

249 SUEPO Report (n 230), 1-2. The SUEPO pointed out that as of July 2015, the ILOAT had 450 pending cases; and it could take up to six years for the back-log to be cleared, assuming no new backlogs are created; also see ILO, ‘Matters relating to the Administrative Tribunal of the ILO Workload and effectiveness of the Tribunal’, (325th session, ILO Geneva, 2015) (‘ILOAT Workload and Effectiveness Report’), paras 7 and 14.

250 ILOAT Workload and Effectiveness Report, ibid, para 14.

251 See General Comment No 32 (n 35), para 27 where the Human Rights Committee states that ‘[a]n important aspect of the fairness of a hearing is its expeditiousness... [delays] that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in [art 14(1) of the ICCPR].’

252 A delay of three years in processing of claims in the old UN internal justice system was said to constitute an ‘agregious delay’: Redesign Panel Report (n 80), para 67.

253 See *Re Mr JA C* (2013) ILOAT Judgment No 3168, para 13 (and cases cited there); In ILOAT Judgment No 3688 (n 248), where there was a three-year delay attributable to the organisation for delay in the administration of justice, the ILOAT awarded moral damages for the delay breached the complainant's due process rights (see paras 5-12. In that case, even an unexplainable delay in one aspect of the internal appeals process amounting to eight months that could not be explained by the organisation was considered unjustified (para 6); also see ILOAT Judgment No 3092 (n 248), para 15: where the WHO did not process a claim for a service-incurred injury within 42 months, the ILOAT awarded moral damages for the delay was said to be manifestly unfounded; it is also apparent that any delay (of even a few months) that cannot be explained or justified due to the complexity of the case, etc., will be 'undue'. The tribunal has also said that an organisation has a positive obligation to ensure that internal appeal procedures move forward with 'reasonable speed': see ILOAT Judgments No 2197, para 8 and ILOAT Judgments No 2904, para 15.
due to the complexity of the case or the behaviour of the complainant to be unreasonable.254 Domestic employment tribunals that determine analogous disputes in national systems are required to determine employment disputes within months and not years generally; with harassment claims triggering urgent attention (sometimes within 24 hours of a complaint being raised) particularly.255 In a comparative study of employment tribunals deciding the kinds of disputes that IATs would usually determine (although applying a different law), a recent study by the ILO observed:

In 2013-14, Australia’s [Fair Work Commission] rendered decisions within eight weeks of a hearing in almost 84 per cent of cases, and within 12 weeks in over 93 per cent of cases. In Germany, the importance of speedy procedures at all levels of labour court matters is explicitly referred to in the Labour Court Act. In addition, the Act provides that disputes concerning the existence, non-existence or termination of the employment relationship must be dealt with as a matter of priority. In 2012, more than 85 per cent of all cases lodged were settled within six months. Japan’s Labour Tribunal Act requires the tribunal panel to complete its procedures within three hearing sessions. Average disposal time was nearly 75 days in 2013, while under the first-instance civil procedure it was just over 13 months. In the United Kingdom, the average disposal time for a single claim at the [Employment Tribunal] is 27 weeks...In Sweden, cases adjudicated through the labour courts took around 12 months...256

Even a delay of mere months in the determination of an employment claim ought to attract very close scrutiny vis-à-vis compliance with the right to a fair trial. Resource constraints are no excuse for not rendering justice without undue delay. It is the responsibility of the authorities charged with setting up the justice system to ensure that enough resources (in terms of number of judges, registry staff, and budgetary allocations) are made so that the individual right to a fair trial without undue delay can be practically realised. The ILOAT has found so with respect to internal appeal procedures; and there is no rational reason why the same principle should not

254 See ILOAT Judgment No 3092 (n 248), para 15: where the WHO did not process a claim for a service-incurred injury within 42 months, the ILOAT awarded moral damages for the delay was said to be manifestly unfounded. In that same case, it is also apparent that any delay (of even a few months) that cannot be objectively justified will be undue; in ILOAT Judgment No 3168 (n 253), para 18, where there was an unjustifiable delay of approximately 9 months, it was found to be undue.
apply to the delivery of justice at the ILOAT itself.\textsuperscript{257} The ILOAT’s case-load has exponentially increased.\textsuperscript{258} Such an increase has not been matched with enhanced resources so far. Until this fundamental flaw is remedied, a failure of justice is likely at the ILOAT.

In sum, the ILOAT does not engage in a fact-finding exercise; does not hold oral hearings; there is no oral testimony given; and thus the undue delay in the completion of a case is remarkable. Some say that the vast personal jurisdiction of the ILOAT can cause delays. The perception that the extent of the personal jurisdiction of the ILOAT is the cause for delays has been debunked for there are only a small number of organisations that form the majority of the ILOAT’s case load, with the European Patent organisation (‘EPO’) constituting a significant percentage.\textsuperscript{259} Indeed, the EPO has been blamed as a main reason for excessive delays by the ILO. Be that as it may, the EPO continues to subscribe to the ILOAT’s jurisdiction, creating 30\% of its caseload despite only constituting less than 16\% of the staff; and the existing backlog will no doubt continue to cause delays.\textsuperscript{260} That is why it has been concluded that ‘it is difficult to see how the Tribunal could continue under its current configuration and arrangements to cope with both its accumulated backlog and increasing workload’.\textsuperscript{261}

The real reasons behind the delay in the administration of justice are perhaps based in systemic issues with the ILOAT’s approach to certain decision-making; and of course resource-deficits. On the former, the ILOAT does not allow claims from staff associations on behalf of staff members (narrowly interpreting Article 2(6) of its Statute), a matter that results in barriers to access to justice as well.\textsuperscript{262}

\begin{addendum}
\item It is the organisation's responsibility to appropriately staff the internal appeals processes so that justice can be rendered without undue delay: ILOAT, Judgment No 3168 (n 253), para 13. The right to a fair trial also demands that authorities appropriately finance justice mechanisms to ensure that no ‘undue delay’ is caused in the administration of justice: se General Comment No 32 (n 35), para 27.
\item As the current Registrar of the ILOAT points out: in the whole period of its operation as the L&T Administrative Tribunal, it rendered 37 judgments. Since 2010, the Tribunal has been regularly receiving more than 200 complaints per year: see 90 Years of ILOAT (n 220), 29.
\item ILOAT Workload and Effectiveness Report (n 249), para 24; at para 10, it is noted: ‘the EPO has been concerned by 761 judgments out of a total of 3,560 judgments delivered by the Tribunal since its creation. By way of comparison, the Tribunal’s second oldest member organization - the World Health Organization - with similar staff numbers has been concerned by 447 judgments in 66 years of membership, that is an average of seven judgments per year’.
\item Ibid, para 10.
\item Ibid, para 24.
\item Robertson (n 226), para 15; also note that in most jurisdictions/national systems as ‘individual workers are often reluctant to voice their claims, fearing retaliation or the inability to proceed alone against their employers. In order to reduce this barrier to access, most adjudication systems provide that a claim can be pursued on a claimant’s behalf by another individual’ etc.: ILO: Resolving Individual Labour Disputes (n 255), 26-7. In another blow to the exercise of collective rights and access by staff associations to a court, in EPO v. VEOB et al (20
\end{addendum}
staff rights has attracted inconsistent jurisprudence, with the ILOAT not allowing for such challenges in recent times. A vast number of claims that could be determine in one proceeding) or test cases supported by a staff association) then end up being subjected to multiple challenges. A prime example of this is provided by the litigation against the EPO. The EPO Staff Union pointed out that the inability of challenging general decisions may mean that thousands of further claims may be triggered in the coming years. If this eventuates, delays would be further entrenched.

On the latter, while it is difficult to determine issues of resourcing in the absence of transparency, the seven ILOAT judges meet for approximately two months a year, several of whom are still in the service of their respective domestic judiciaries for the remaining time. One may thus explain why excessive delays occur despite the judges’ best efforts, including holding longer and extra sessions.

To counter the criticism, the ILOAT has taken some marginal steps to address the delays in the administration of justice. A fast-track procedure was recently introduced providing for a more expeditious procedure in cases where the dispute concerns only a question (or questions) of law, identified by agreement between the parties, and the main facts are uncontested. There is a lack of evidence-base to conclude as to how successful the fast-track procedure actually has been. The ILOAT has also increasingly relied on its power to summarily dismiss a complaint, although this has led to the criticism that such a practice further undermines the right of an official to a determination on the merits of his or her claim. Despite the efforts

January 2017) Dutch SC, First Chamber, paras 3.3, 5.2 and 5.7, the Dutch Supreme Court reversed the decision of the Hague Court of Appeal in VEOB et al. v. EPO (17 February 2015) Case No 200.141.812/01 AC of The Hague, which breached the immunities of the EPO for it did not provide the staff their collective rights in accordance with the European Convention on Human Rights.

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

ILOAT Workload and Effectiveness Report (n 249), paras 9 and 14.

See 90 Years of ILOAT (n 220), 29, where it is noted to deal with the work-load, the tribunal recently organized an extra session and extended the duration of its regular sessions from three to four weeks. This enabled the ILOAT to increase its work-load from 50 to 80 judgments per session.

ILOAT Rules of Procedure, art 7Bis.

SUEPO Report (n 230), p 1 (at footnote 3). That report points out that: 'The summary procedure provided for in art 7 of the ILOAT Statute was used 18 times between 1945 and 2014; since July 2014 (as of 2015): it has been used in at least 58 cases.'
that have been, or can be undertaken to enhance the delivery of justice, it is unlikely that without systemic reform, the deficit can be properly and comprehensively resolved. On the estimates available, the backlog of cases remains significant, and it will take several years for it to be cleared. Given that more and more claims are filed every year, as the ILO has said, it is unlikely that the present situation is sustainable. Unless drastic reforms are introduced, it is suggested that just based on the breach of the component fair trial right to access justice without undue delay, for no fault of the judiciary, the ILOAT is not rendering justice consistently with the right to a fair trial.

d) Breach of the equality principle

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

In so far as equality before the ILOAT itself is concerned, two significant deficits prevail. Firstly, similar to the situation prevailing at the UN system, international civil servants categorised as non-staff members (such as contractors) may not possess access to the ILOAT if that tribunal is not expressly selected as a choice of forum in the employment contract. In its case law, where no alternative mechanisms for such individuals exist, the ILOAT has taken jurisdiction to ensure that access to justice is maintained. However, where an arbitral mechanism purportedly exists for contractors of IOs, the ILOAT refuses to take jurisdiction. This, the ILOAT does without satisfying itself that the arbitral mechanism is in fact implemented. Such an approach has resulted in the bizarre outcome that an IO can oust the jurisdiction of the ILOAT by simply incorporating an arbitration clause in the contract of services/employment, with no intention of ever subjecting any dispute that may arise to an arbitral process. As a result, a significant equality deficit exists at the ILOAT when it comes to the right to equal access to the courts and tribunals.

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270 See the broad interpretation given to the term ‘staff member’ by the ILOAT (an approach not adopted at the UN tribunals) in the well-known case of Re Chadsey v World Postal Union Judgment No. 122 (15 October 1968, ILOAT).
271 See for example Mr J.-D. v ILO, Judgement No. 2888 (3 February 2010, ILOAT) para 6.
Secondly, for those officials possessing access to the ILOAT, the most significant deficiency arises due to the routine denial of oral hearings. On one view, where both parties are denied an oral hearing, the equality principle is not breached. It is important to however take into account that whereas the organisation is in possession of all the documents and information relevant to the determination of a case, the complainant may be denied access to such documents. In such circumstances, without access to oral hearings; and the chance to test the evidence: it can hardly be said that the principle of equality is being practically realised.\textsuperscript{272} The equality deficit is further exasperated due to the absence of any provision in the ILOAT’s Statute or Rules of procedure allowing a complainant to seek discovery of documents:\textsuperscript{273} meaning that the complainant is at the mercy of the Respondent to a case; or the ILOAT; for full disclosure. Given how the ILOAT procedurally functions, with no case management hearings facilitated where interlocutory issues critical to the just determination of a dispute may be ventilated, the principle of equality is seriously compromised.

Moreover, the defendant institution will invariably be represented by counsel. There is little information available about the possibility for staff members of the 58 different organisations subscribing to the ILOAT’s jurisdiction to secure legal representation.\textsuperscript{274} Leaving to one side the complexity of international administrative law requiring legal expertise in the preparation of claims, with the ILOAT’s onerous processes requiring significant expense just to file and dispatch a claim to its Geneva Registry, the equality deficit is in fact starker than what may appear to be the case at first glance. Of course, the Respondent will almost always will be in possession of superior financial and human resources.\textsuperscript{275} When the existing factual inequalities are considered in light of the deficient legal infrastructure in place, the demands placed on aggrieved officials to undertake international litigation without structurally enshrined access to legal representation must not be underestimated.

\textsuperscript{272} The ILOAT itself has stressed the central role of the principle of equality of arms in international administrative procedural law: see for example, ILOAT Judgment No 3688 (n 248), para 29; see generally, Fauth (n 237); 90 Years of ILOAT (n 220).
\textsuperscript{273} See Robertson (n 226) noting a lack of discovery procedures at the ILOAT.
\textsuperscript{274} Art 5 of the ILOAT Statute entitles a complainant to appoint privately retained counsel; but no right to guaranteed legal representation is enshrined.
\textsuperscript{275} IFAD Advisory Opinion (n 32) (Judge Greenwood), para 6.
7.1.4 The assessment

Save for some due process protections, such as the provision of reasoned judgments, the ILOAT regime is significantly deficient. The following table assesses the ILOAT regime concerning institutional independence.

### INSTITUTIONAL INDEPENDENCE

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<thead>
<tr>
<th>Criteria</th>
<th>Are legal standards in place</th>
<th>Are legal standards applied in practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operational independence</td>
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<td>Not compliant</td>
</tr>
<tr>
<td>Decisional independence</td>
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<td>Mostly compliant</td>
</tr>
<tr>
<td>Fairness of proceedings</td>
<td>Not compliant</td>
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7.2 Individual independence

7.2.1 Assessing against criterion 1 – judicial selection

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

More recently, the process was explained as follows:

While the original text of the Statute adopted in 1927 provided that three judges and three deputy judges would be appointed by the Council of the League of Nations, which would be equivalent to the ILO Governing Body, the ILO decided that judges should be appointed by the International Labour Conference. By entrusting the task of appointing judges to the Conference, which is not only the highest body of the

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276 Amsterdam Report (n 87), 38.
Organization but, more importantly, is a tripartite body entrusted with the mandate of dealing with international labour issues, the ILO pre-empted any serious challenge to the judges’ legitimacy. Who else would be better placed than the “World Parliament of Labour” to choose judges for this type of jurisdiction?

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

The lack of *de jure* standards does not mean that ILOAT judges are not selected from amongst the brightest judicial minds in practice. So far, 56 judges and deputy judges of 29 different nationalities have sat on the ILOAT since 1946. The practice whereby only existing judges of superior courts are appointed to the ILOAT tempers to a significant degree the opaque nature of the selection process. Be that as it may, without *de jure* guarantees, regardless of the prevailing practice, the perception of an independence deficit remains.

### 7.2.2 Assessing against criterion 2 - security of tenure

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

> [T]he Tribunal members are “contract judges”, whose well-remunerated employment is contingent upon the regular approval of the very body which is a defending party to

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277 See 90 Years of ILOAT (n 220), 29.
279 Ibid, 27. It is also noted that: Several former Presidents of the Tribunal - Judges Gentot, Ba, Gaudron and Rouiller, for instance - stayed with the Tribunal for between 10 and 15 years each.
their proceedings. This position is plainly incompatible with the rule that requires the judiciary to be independent …\textsuperscript{280}

Not only there is a complete lack of transparency on how the renewal process works; how many terms a judge can be appointed for (this could be potentially unlimited); there are no provisions guaranteeing financial security of the judges; or the process of the removal of judges. The ILOAT cannot said to constitute a body whose judges can be considered to be individually independent. As the Amsterdam report concluded ‘the ILOAT must take substantial steps in order to meet judicial independence standards…The ILOAT Statute is completely silent on independence issues concerning reappointment, security of tenure, conflicts of interest, discipline, disqualification, improper influence, and financial independence’.\textsuperscript{281}

7.2.3 The assessment

For no fault of the judiciary; but due to the institutional laxity, the assessment of the ILOAT with standards of individual independence can said to be very poor.

INDIVIDUAL INDEPENDENCE

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<th>Criteria</th>
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<th>Are legal standards applied in practice</th>
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<tr>
<td>Judicial selection (method of appointment)</td>
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<tr>
<td>Judicial selection (are minimum Qualifications required)</td>
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<td>N/A</td>
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<tr>
<td>Security of tenure (length of term)</td>
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<td>N/A</td>
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<tr>
<td>Security of tenure (financial security)</td>
<td>Not compliant</td>
<td>N/A</td>
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\textsuperscript{280} Robertson (n 226), para 6.  
\textsuperscript{281} Amsterdam Report (n 87), 61.
7.3 Impartiality

Following a similar pattern to the lack of de jure protections regarding independence, there exist no rules concerning the possibility of recusal either by application of a party, or by the judge him or herself when issues of subjective or apprehended bias are engaged. In fact, the party to the proceedings do not even know the identity of the judge determining the case. Until judgment is rendered, for all intents and purposes, the trial is before a faceless court.\textsuperscript{282} Further, the fact that there exists an equality of arms deficit; oral hearings are not provided; and there exists no right of appeal: means that no protection is provided to a party to address questions of impartiality before a higher appellant tribunal either.

As is now evident, the ILOAT demonstrably does not provide for an objectively impartial dispute resolution mechanism.

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<th>IMPARTIALITY</th>
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<td>Not compliant</td>
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7.4 Final comments on the ILOAT regime

The ILOAT is not rendering justice consistently with the right to a fair trial. Leaving alone the significant independence and impartiality deficits, the excessive delays in the delivery of justice on their own are egregious contraventions. The idiom ‘justice delayed is justice denied’ rings true for the ILOAT. Remarkable though it may be, unless significant changes to the ILOAT’s law and practice are made, it is unlikely that the individuals having access to the ILOAT can

\textsuperscript{282} Ibid, 49 and 55.
receive justice in compliance with fair trial standards. Blame for this lowly state is largely attributable to the ILO and the IOs responsible to set up the justice machinery. So far, the broader regime provided by the ILOAT is being spared the ignominy of rejection at the international level not because it is compliant with the right to a fair trial, but because regional human rights courts have failed to examine it with the proper scrutiny that is warranted.

The ILOAT still relies on antiquated procedures. With no e-filing in place at the ILOAT, and the absence of the use of technology to conduct proceedings, the delivery of justice is cumbersome and slow. Without significant reforms to its regulatory regime, and how justice is actually delivered, it is unlikely that the ILOAT can deliver justice in compliance with human rights standards. It is remarkable that a tribunal bearing the name of the ILO itself is unable to deliver justice to the labour hired by IOs consistently with the right to a fair trial. It is suggested that the likelihood of failure of justice at the ILOAT is high. According to the approach suggested in this work, national courts should take jurisdiction over an IO where an international civil servant has faced a failure of justice at the ILOAT.

8 Conclusion

Three conclusions may be drawn from the analysis carried out in this chapter. First, the two principal internal justice regimes consisting of the UN tribunals and the ILOAT, in varying degrees, fall short of rendering justice consistently with fair trial standards. The right to access an independent court or tribunal for a vast number of international civil servants is being undermined. Despite the incorporation of fair trial rights at the institutional level, its implementation remains a challenge. To make matters worse, increasingly, IOs rely on temporary workers, such as consultants or contractors, to perform roles traditionally performed by fixed or permanent staff members. This category of worker does not have access to the UNDT and the UNAT; or the ILOAT, as the case may be. Where a failure of justice occurs at an IAT, or there is a real possibility of a failure of justice occurring, a national court ought to take jurisdiction over a defendant IO. For those having no access to IATs, and where other alternative means such as arbitration are not implemented in good faith, it is suggested that a national court must take jurisdiction for a manifest failure of justice has occurred at the institutional level.
Second, as a practical matter, IATs are already significantly overburdened. At this stage, it would be unwise to enhance their personal or subject matter jurisdiction for it would only cause even more delays in the delivery of justice vis-à-vis employment disputes. Expecting an IAT to resolve mass tort claims, significant commercial claims, the variety of global administrative law disputes, is too much to ask. The priority should be to ensure that IATs perform their existing mandates better. IATs must not be burdened with further work for which they neither possess the expertise, nor the resources.

Finally, if access to justice for private parties who are the victims of IO conduct without resort to national courts is to be realised, enhancing dispute resolution at the IO level becomes crucial. If IOs comply with their access to justice obligations, the secondary intervention of national courts will not be required. Just relying on an IO to deliver justice to private parties is unwise. A fair trial cannot be ensured for the victims of institutional conduct unless the regulatory arbitrage exposed in this work is done away with.
CONCLUSION:

DOING AWAY WITH THE REGULATORY ARBITRAGE

1 A way forward

The discussion so far has demonstrated the need to implement robust mechanisms so that the exploitation of the prevailing regulatory arbitrage can be brought to an end. The best way to address the arbitrage would be by ensuring that IOs comply with their access to justice obligations at all times, meaning that a national court’s secondary intervention is never needed. How IOs can fulfil this obligation is the first matter addressed in this concluding chapter.

Experience has shown that it would be foolish simply to rely on IOs to ensure access to justice. The cost of exploiting the arbitrage must be made high enough that IOs do not abuse uncertainties and inconsistencies in the law. Without implementing a PIL-based mechanism to coordinate between the national and IO legal orders, the exploitation of the arbitrage will continue, and the denial of justice age will be perpetuated. The second part of this conclusion calls for implementing a PIL-based framework to better coordinate between the IO and national legal orders. This thesis ends with the suggestion of the negotiation of a multilateral treaty to achieve a definitive end to the prevailing regulatory arbitrage.

2 IOs and compliance with their access to justice obligations

If IOs comply with their access to justice obligations, then the presumptive appropriateness of IO courts will be triggered. The secondary intervention of national courts is not needed in such a situation. This is of course the ideal way in which the adverse impact of the regulatory arbitrage can be addressed. IOs may comply with their access to justice obligations in various ways, of which two are considered here.

2.1 Creating judicial bodies

IOs may create full-fledged judicial mechanisms within their own institutional orders or delegate the judicial function to a tribunal possessing the expertise and the possibility of exercising personal jurisdiction over the IO. This has been done in the employment context. For example, some IOs create an IAT within their own legal orders (such as the IATs operating
at the UN and the MDBs). Others have joined the ILOAT regime allowing their staff members to approach that tribunal to air their employment grievances.

An IAT would constitute an available and adequate forum of dispute resolution, but this will only be the case where there exists no failure of justice at the level of the IAT. As chapter 3 explained, while the UN tribunals seem to be delivering justice consistently with due process standards in individual cases (although structural deficits remain), the ILOAT is not delivering justice consistently with the right to a fair trial. IOs can remedy these deficits by reforming the operation of the relevant IAT. Should reforms be implemented, the presumptive appropriateness of an IAT in relevant employment disputes would be triggered.

However, IATs are only granted limited personal and subject matter jurisdiction. As chapter 3 showed, even in employment cases, a vast proportion of international civil servants do not have access to IATs. Potentially, the jurisdiction of IATs could be expanded so that they can hear all manner and form of claims arising against IOs (all employment related claims, contract, tort, GAL, international law based claims, etc.). For the reasons that have already been discussed, given that IATs are already under immense pressures, unless the cumbersome task of amending their statutes is undertaken and the resources allocated to IATs exponentially increased, expanding the scope of an IAT’s work is unwise at this time. Thus, alternatives must be found.

2.2 Implementing an arbitral regime

Arbitration is typically understood as a ‘non-judicial process for the settlement of disputes where an independent third party – an arbitrator – makes a decision that is binding.’¹ The resolution of disputes through arbitral processes dates back to ancient Greek and Roman times, and has been practiced in one form or another in all cultures around the world.² In modern times, especially when it comes to resolving international disputes, the arbitral process has been highly institutionalised and judicialised. It is now mostly administered by well-established

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² L Kidane, The Culture of International Arbitration (OUP 2017), 24-6.
arbitral institutions,\(^3\) with arbitrators performing their role in a manner similar to judges, with heavy reliance on past cases.\(^4\)

One possible solution for IOs to ensure the delivery of justice to victims of IO conduct is to implement an arbitral framework. Commentators tend to be either strong supporters of arbitral processes (the pro-arbitration lobby),\(^5\) or strongly oppose it, referring to it as a ‘mafia’ comprising of a limited number of repeat players that arbitrate most major commercial and investment disputes.\(^6\) Putting emotion to one side, whether arbitration is a desirable mode of dispute resolution depends on how an arbitral scheme is implemented.

In the context of dispute resolution involving IOs specifically, existing works highlight the limited role arbitration has played, but without critically analysing its effectiveness.\(^7\) It is not my intention to recapitulate their discussion here. The present aim is to put forward the benefits that arbitration can yield, but also to sound a note of caution.

### 2.2.1 The benefits arbitration can yield

An arbitral process can form an adequate mode of dispute settlement. As early as 1954, in its *Effect of Awards* Advisory Opinion the ICJ said that private persons affected by IO conduct (in that case it was employees) may be delivered justice through a judicial mechanism or through arbitral means, drawing a functional equivalence between courts and arbitration.\(^8\) In more

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\(^3\) The International Chamber of Commerce is one prominent arbitral house; for investment arbitration, the International Centre for the Settlement of Investment Disputes is best known: for a discussion of the role of global and regional centres, see A Stone Sweet and F Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017), 49.


\(^5\) Advocates of international arbitration point to the enforceability of awards across jurisdictions, avoidance of national jurisdiction, flexibility and ability to select arbitrators as its key advantages: Kidane (n 2), 26.


\(^7\) See P Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Edward Elgar Publishing 2017), 180-3; in an employment context, see A Zack, 'The Step Below: Can Arbitration Strengthen Administrative Tribunals?' in O Elias (ed) *The Development and Effectiveness of International Administrative Law: On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal* (Queen Mary Studies in International Law 2012), 265 and 268-9. The author generally points to the benefits arbitration can provide, such as speed, flexibility and access to expert decision makers, also pointing to the potential of the reduction of the work-load of IATs should arbitration be implemented.

recent times, the European Court has accepted that arbitration can satisfy the IO’s obligation to provide for reasonable alternative means of dispute resolution.\(^9\)

From the perspective of the IO, there are strong incentives to select arbitration as a forum of choice. The unavailability of a suitable dispute resolution forum and/or the desire of the parties to stay out of each other’s national courts fearing real or perceived bias against foreign parties constitute the key reasons why arbitration has been the forum of choice in resolving international disputes, regardless of their subject matter.\(^10\)

Since IOs generally wish to stay out of national courts, adopting an arbitral mechanism should be an ideal vehicle for IOs to fulfil their access to justice obligations. Moreover, given that for most disputes (contract, tort, GAL and ones pursuing international law claims), no IO courts exist at all, IOs can access the arbitral facilities that already exist in various global and regional arbitration hubs without creating brand new courts.\(^11\) Further, where IO courts exist (IATs), arbitration can be a much needed supplement. It may be adopted as a replacement for the often deficient first instance review mechanisms available to staff members at IOs.\(^12\) The possibility of arbitration is especially relevant to the large number of international civil servants (contractors and consultants) who do not have access to IATs at all. If arbitral mechanisms are implemented for all categories of international civil servants (where needed),\(^13\) and IATs (especially the ILOAT) are left to perform a statutorily enshrined appellant role only, the equal administration of justice may become a reality.

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\(^9\) Klausecker v Germany App no 415/07 (ECtHR, 6 January 2015), para 76.

\(^10\) Kidane (n 2), 99-100; DD Caron, SW Schill, A Cohen Smutny, and EE Triantafilou, Practising Virtue: Inside International Arbitration (OUP 2016), 1.

\(^11\) Arbitral houses exist in every major commercial centre. Notably, while the Permanent Court of Arbitration (‘PCA’) traditionally is engaged in inter-state dispute resolution, it has opened up its facilities to resolving disputes between IOs and private parties adopting specialised arbitral rules. Some IOs have chosen to seek its services, including in relation to GAL disputes. INTERPOL agreed as a default mechanism that any dispute should be settled in accordance with the Optional Rules for Arbitration between International Organizations and Private Parties of the PCA by a Tribunal composed either of one or three members to be appointed by the Secretary-General of the PCA. This was enacted in Article 24(1) of the revised Headquarters Agreement concluded between France and INTERPOL, which entered into force on 1 September 2009.

\(^12\) See generally, Zack (n 7). The idea of arbitral awards being reviewed by an appellant body is not unknown to international dispute resolution. See Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1967) 575 UNTS 159 (‘ICSID Convention’) which creates ‘Ad Hoc Annulment Committees’ that can perform a review function respect of ICSID Awards.

\(^13\) Of course, where a two tier justice mechanisms already exists (such as the UN), there may be no need to provide for arbitral mechanisms for persons having access to the UN tribunals.
Finally, any suggestion that arbitration may not be suitable to address the breadth of subject matter disputes that arise against IOs may be immediately dismissed. International arbitration has been used to resolve all manner and form of claims, ranging from typically private disputes (including large scale commercial disputes), to disputes having a public dimension (especially in the context of investor-state arbitration between states and private parties), as well as employment disputes. Arbitration is a neutral and flexible framework which can provide for a powerful mechanism to resolve claims against IOs. Whether arbitration can fulfil its potential depends on how any arbitral scheme is implemented. The experience so far inspires little confidence.

2.2.2 The experience so far

The IO experience with arbitration has been characterised by an apparent lack of good faith. Issues can arise in relation to the enforcement of the award, and the plaintiff may need to approach national courts to achieve enforcement. Courts take inconsistent approaches on whether a consent to arbitrate also results in a waiver of immunities from enforcement. Recent developments have however indicated that where an IO enters into an arbitral agreement, any resulting award may be enforced against the IO’s assets if waiver can be shown. Be that as it may, given the inconsistency of approach to the issue, a private party can have little confidence that arbitration will be an effective way to resolve claims against IOs given the

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14 International commercial arbitration is a forum of choice for resolving large scale cross-border commercial disputes. Parties can include states and IOs as well. Investment arbitration (such as pursuant to the ICSID Convention (n 12)) is a forum of choice to resolve investment claims (having significant public law elements) between private persons and states: S Menon, ‘The Transnational Protection of Private Rights Issues, Challenges, and Possible Solutions’ (2015) 5 Asian Journal of International Law 2, 219-245, 230. Employment disputes are also increasingly being subjected to arbitration where a claim has connections with more than one legal order: see generally, Permanent Court of Arbitration, ‘Internationalization of Labor Dispute Settlement’ (Kluwer Law International 2003).


16 See H Fox and P Webb, The Law of State Immunity (3rd edn, OUP 2015), 394-400; also see chapter 2, section 4.1.2(a) on the inconsistent treatment of IO immunities and existence of agreements to arbitrate.

lengths to which they may be required to seek enforcement. Apparent bad faith on part of the IO is also confirmed and demonstrated by the arbitration experience in the employment sphere.

In one case, the defendant IO (UNESCO) refused to appoint an arbitrator despite entering into an arbitration agreement with one of its personnel. The French courts came to the rescue of the plaintiff by exercising jurisdiction over the IO, holding that the arbitration agreement waived its immunities.\(^\text{18}\) However, in another case, national courts did not come to the victim’s aid. In a case that went to the European Court, it was uncontested that a candidate was denied a job at the EPO based on his disability.\(^\text{19}\) The aggrieved party approached the EPO’s internal review mechanism to challenge his discriminatory treatment, however, the EPO dismissed his claims for lack of standing.\(^\text{20}\) The EPO suggested to the complainant that he may approach the ILOAT even though it was clear that the complainant did not possess standing for he was not an EPO employee, a pre-condition to standing before the tribunal.\(^\text{21}\)

The complainant approached German courts arguing that his right to access to a court had been breached for he could neither access justice within the EPO, nor at the ILOAT (for lack of standing); and that the EPO had unlawfully discriminated against him.\(^\text{22}\) German courts refused to lift the EPO’s immunities.\(^\text{23}\) The complainant then filed a claim before the ILOAT. The tribunal unsurprisingly determined that the complainant did not possess standing for it was only open to individuals already employed at the organisation. However, it took a dim view of EPO’s conduct, urging it to submit the dispute to arbitration given the legal vacuum that the complainant faced.\(^\text{24}\) Following the ILOAT’s decision, after two years of litigation, the EPO offered the complainant the possibility to arbitrate.\(^\text{25}\) While the complainant was willing to enter into an arbitration that protected his due process rights (right to a public hearing without

\(^{19}\) Klausecker v Germany (n 9), paras 4-8. The organisation stated that at some unknown time in the future, the applicant may not be able to perform his job due to his disability, and that purportedly justify refusing the candidate the relevant job for which he was found to be otherwise suitable.
\(^{20}\) Ibid, para 10.
\(^{21}\) Ibid, para 11.
\(^{22}\) Ibid, para 12.
\(^{23}\) Ibid, paras 14-16.
\(^{24}\) Ibid, paras 19-20.
\(^{25}\) Ibid, paras 21-2.
undue delay), he did not agree to do so on the terms the organisation offered. The arbitration never eventuated.

The applicant subsequently approached the European Court lodging a claim against Germany on a *Waite and Kennedy* rationale. Without analysing the overall circumstances of the claims where significant delays had already occurred (more than three years had passed since the aggrieved individual first approached the EPO), the European Court dismissed the applicant’s claims holding that the belated offer of arbitration constituted reasonable alternative means. In the final analysis, over a period of 10 years, an individual who had faced manifest discrimination by the IO approached four dispute resolution forums (the IO, German courts, ILOAT and the European Court), being rejected at each one of them. It is unfortunate that the belated offer to arbitrate was considered a reasonable alternative means given the delays that had already occurred.

The apparent bad faith shown by IOs in implementing arbitration becomes more apparent when IO practice in employment cases is considered. Taking the example of the UN, on the bases of only two arbitrations, the UN determined that arbitration is not financially viable. Yet, it continues to include an arbitration clause in its general conditions of contracts. In those conditions, the UN also includes a provision that submission to arbitration does not amount to a waiver of UN immunities. Whether or not courts will hold this provision to be valid is a separate matter – the point being that a private person can have little confidence that even if they succeed in an arbitration (assuming the organisation intends to participate in it), the award will be enforced.

26 Ibid, para 25.  
27 Ibid, para 76.  
29 See the General Conditions of Contracts for the Services of Consultants and Individual Contractors (19 December 2013) UN Doc ST/Al/2013/4, section 16, (annex I) Administrative Instruction, Consultants and individual contractors (‘UN General Conditions’).  
30 This is the case regardless of the subject matter of the dispute. For the purported applicability of UN immunities even where arbitration is entered into, see ibid, UN General Conditions, section 17; for other cases, a standard clause used by the UN in all its contracts was noted in the 1995 Secretary general report – ‘Review of the efficiency of the administrative and financial functioning of the United Nations, Report of the Secretary-General’ (24 April 1995) UN Doc. A/C.5/49/65, para 6: ‘Nothing in or relating to this Contract shall be deemed a waiver of any of the privileges and immunities of the United Nations, including, but not limited to, immunity from any form of legal process.’
Finally, IOs may choose to agree on an arbitration clause simply to oust the jurisdiction of an IAT. Unfortunately for the victims, as we saw in chapter 3, the approach of IATs to refuse jurisdiction where an arbitral clause is present without inquiring whether arbitration was ever resorted to, has given IOs confidence to enter into arbitration agreements for iniquitous purposes. The effect of IAT jurisprudence is that an IO may agree to an arbitration clause with no intention of ever arbitrating the dispute, and at the same time, excluding the possibility for the affected party to seek justice at an IAT. It may be concluded that the inclusion of arbitration clauses by IOs is simply done for appearances as opposed to a genuine attempt to provide access to justice. If arbitration is to ever constitute an adequate forum, it must be underpinned by a legal infrastructure which ensures that any arbitral mechanism is capable of delivering effective justice.

2.2.3 Some suggestions to implement a robust arbitral regime

Arbitration can in principle constitute an effective and desirable vehicle for IOs to comply with their access to justice obligations and ensure the delivery of a fair trial to the victims of institutional action. However, if arbitration as a mode of dispute resolution is to succeed in providing an adequate alternative to national courts, several matters need to be resolved. These include dealing with the challenges that arbitration presents in general and ensuring that the arbitration process is carried out in good faith in particular. I raise four matters of special significance.

First, as a general point, where IOs and private parties enter into an arbitration agreement, the arbitral process must run as per its usual course. The existing international arbitral infrastructure (that includes the New York Convention) should operate effectively. An international arbitration award must be enforceable in all member states to the New York Convention regardless of the identity of the party. However, as the New York Convention

\[\text{\textsuperscript{31} See chapter 3, section 7.1.3(d).} \]
\[\text{\textsuperscript{32} The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) 7 ILM 1046 ("the New York Convention"), provides both for the international recognition and enforcement of agreements to arbitrate (Article 2) and for the international recognition and enforcement of arbitral awards (Article 3): 'It is the foundation stone of modern international arbitration': Caron, Schill, Cohen Smutny, and Triantafilou (n 10), 1.} \]
does not address the issue of immunities, the trend of the jurisprudence holding that an arbitral award can be enforced against the IO’s assets should be prescribed in a treaty for the avoidance of doubt.\textsuperscript{34} Without an enforcement regime, an arbitral process is toothless, and where an arbitral award cannot be enforced, a denial of justice may result.

Second, arbitration has been much criticised for constituting a closed community where serious questions about independence and impartiality are raised. This happens most frequently when individuals act as counsel as well as arbitrators potentially resulting in ‘issue conflicts’.\textsuperscript{35} There is little point choosing arbitration as a preferred forum if it is incapable of providing an independent and impartial forum of dispute resolution. If arbitral rules do not enshrine guarantees relating to the independence and impartiality in how an arbitral process is conducted, then the entire exercise would be pointless. It is suggested that for any arbitral scheme to be implemented successfully, careful consideration must be given to the details of the legal infrastructure and rules necessary to allow arbitral processes to be conducted competently, independently, impartially and fairly. To achieve that end, incorporating fair trial guarantees in the procedural rules is necessary for an arbitration to be ‘adequate’.\textsuperscript{36}

Third, where arbitration concerns IAL, GAL, or IHRL or IHL, transparency of the arbitral process is crucial. Such claims are inherently of a public character, and the confidentiality relevant in commercial relationships is not valid in such disputes.\textsuperscript{37} Here, the broader interest is served by the awards being published. We must learn lessons from the backlash against investor-state arbitration that has been slow to catch up with modern demands of transparency and legitimacy.\textsuperscript{38} Any arbitral scheme implemented to resolve an inherently public claim must incorporate enhanced rules of transparency in the conduct of arbitrations, such as the ones that

\textsuperscript{34} Inspiration may be taken from Article 54(1) of the ICSID Convention (n 12) which prescribes that the courts of ‘each contracting state’ are to enforce the Centre’s awards ‘as if [they] were a final judgment in that State’.

\textsuperscript{35} Menon (n 14), 231-2.

\textsuperscript{36} See for example, the IBA Guidelines on Conflicts of Interests in International Arbitration (23 October 2014) (Principle 1 enshrines that arbitrators must be independent and impartial); Menon (n 14), 239, notes that establishing accreditation procedures and creating arbitrator databases, can enhance transparency in arbitrator choice.

\textsuperscript{37} Menon (n 14), 232.

\textsuperscript{38} This is a topic that has raised much controversy: see Menon (n 14), 232-4; Sweet and Grisel (n 4), 4-5; and Kidane (n 2), 286. Treaty action has also recently sought to enhance transparency in investment arbitration: see United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) A/RES/69/116 (New York)
have now been adopted by the United Nations Commission on International Trade Law (‘UNCITRAL’) in the context of investment arbitration.39

Finally, if a carefully crafted arbitral mechanism is adopted to resolve claims against IOs, PIL will then not only need to coordinate between the IO and the national legal orders, but also between both those orders and the arbitral order, which is best described as belonging to the transnational legal order.40 This, I suggest, is best accomplished through a treaty.

3 Doing away with the regulatory arbitrage – a call for a treaty

Relying on the IO to provide access to justice under existing conditions is unrealistic. As things stand, a secondary intervention from national courts would often be needed to ensure a fair trial for the victims of IO conduct. Without such a secondary role for national courts, the exploitation of the arbitrage will continue. The PIL framework suggested in this thesis can go a long way in addressing the regulatory arbitrage.

The question becomes how such a PIL-based framework ought to be implemented. There are three ways to achieve such implementation. I refer to them as the ‘comity approach’, the ‘domestic PIL approach’ and the internationalist ‘treaty approach’.

The first approach, the ‘comity approach’, is where national courts simply rely on the concept of international comity to address issues of competent court, applicable law and recognition and enforcement.41 The advantage of this approach is that courts of their own initiative can manage the regulatory arbitrage without the need for relatively time consuming legislative action. This is however the least desirable solution. So far national courts have lacked the willingness to take jurisdiction over IOs. Unless there is a remarkable shift in practice, there is little chance that national courts will change their approach of their own accord. The comity approach is also less desirable for it may create further inconsistencies due to the difficulty in precisely defining what comity actually means.

39 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (entered into force 1 April 2014) (see especially Article 3 requiring publication of all case related documents, including the award).
40 Sweet and Grisel (n 4), 10-1.
41 See chapter 2, section 2. For a recent analysis of the concept, see T Schultz and N Ridi, ‘Comity and International Courts and Tribunals’ (2017) 50 Cornell International Law Journal 3, 578-608, 586.
The ‘domestic PIL approach’ is where a national legal order applies its own rules of PIL to address claims against IOs. The advantage of this approach is that it does not require multilateral action at the international level, which is time-consuming and involves challenging negotiations. Although it would provide more certainty and direction to courts when compared to the comity approach, the domestic PIL approach is only a marginally better solution. While the PIL rules followed in a state may be sufficiently certain for that particular jurisdiction, the domestic approach fails to deal with the particularities of the IO legal order where PIL rules need adjustment. Moreover, as IOs tend to perform their functions in multiple jurisdictions, a comprehensive multilateral framework becomes necessary.

I suggest that the most effective strategy to manage the prevailing regulatory arbitrage is through the negotiation of a multilateral treaty open to both states and IOs (the ‘treaty approach’). A multilateral agreement is superior to bilateral treaties in this sphere of regulation due to the number of states that a dispute involving IOs may have connections with, requiring coordination amongst multiple national and IO legal orders. A treaty approach reflects the internationalist perspective to PIL taken in this thesis. A treaty enshrining carefully calibrated PIL rules has potential to better coordinate between the IO and national legal order, end the exploitation of the prevailing regulatory arbitrage, take into account the interests of each legal order, and ultimately, help bring to an end the denial of justice age.

I end this thesis by briefly reflecting on what a modern robust PIL framework should incorporate. PIL’s three key components – jurisdiction, applicable law and recognition and enforcement – must be reflected in any future treaty which could be negotiated under the auspices of the HCCH. The HCCH has extensive experience in facilitating the negotiation of treaties relating to PIL, and could be the ideal organisation to help negotiate a future convention that may be entitled the ‘Hague Convention on Access to Justice in Disputes Involving International Organisations’. This convention should incorporate the rules on the existence and exercise of jurisdiction, choice of law, and recognition and enforcement. The discussion carried out in chapter 2 could provide for a starting point.

Given the significance of the rules on the exercise of jurisdiction over IOs, I present below a potential treaty text, which would inevitably require much refinement. Implementing the forum non conveniens approach, the rules on the exercise of jurisdiction may for example state:
Article X

1. A national court must not exercise jurisdiction over a defendant IO unless the IO:
   a. consents to jurisdiction; or
   b. …; or
   c. does not provide for an available and adequate justice mechanism, including the possibility of arbitration, to the plaintiff in respect of the relevant claim.

2. If a court determines that no alternative dispute resolution forum is available to a plaintiff, it must exercise jurisdiction over an IO irrespective of any claims of immunities advanced by or on behalf of the IO.

3. If a court determines that an alternative forum exists, but it nevertheless finds that:
   a. The plaintiff has suffered a ‘failure of justice’ at the alternative forum, or
   b. that there exists a real possibility of the occurrence of a ‘failure of justice’ at the alternative forum, then
     the court seised must exercise jurisdiction over the IO irrespective of any IO immunities asserted by or on behalf of the IO.

4. In determining whether an alternative forum is adequate, a court must have reference to the provisions of Article 14 of the International Covenant on Civil and Political Rights 1966.

A multilateral negotiation can be cumbersome and often challenging. This brief conclusion simply aims to present a very small and simplistic sample of the kind of provisions that could be negotiated in respect of the three key PIL components. Finally, it would be remiss to make no reference to the increasing importance of PIL’s fourth pillar, i.e., international cooperation in civil and commercial matters.\(^{42}\)

I have legally represented several claimants at various domestic and IO forums. Based on that experience, to a complainant’s great frustration, in most claims, it is unclear who in an IO

\(^{42}\) T John and R Gulati, ‘The “One Belt One Road” strategy – the role of private international law in combatting and strengthening anti-corruption standards transnationally’ in P Sooksripaisarnkit and S Ramani Garimella (eds) China’s One Belt One Road Initiative and Private International Law (Routledge 2018) 184.
should be approached to lodge a claim. Moreover, where justice mechanisms exist, several of those mechanisms still adopt outdated methods for the service of process, and the taking of evidence. Both those things are critical aspects of mutual cooperation in civil and commercial matters.

Through the Hague Service and Evidence Conventions,43 via a network of state central authorities, much has been achieved to ensure the effective and efficient conduct of transnational proceedings. Any treaty on access to justice and IOs should also create similar mechanisms to enhance coordination between the national and IO legal order. Potentially, IOs could be allowed to join existing mutual cooperation treaties. However, it would be desirable that one comprehensive treaty prescribes the rules that coordinate the relationship between national and the IO legal orders with a view to bringing an end to the denial of justice age.

We live in times where the backlash against international law generally, and IOs specifically, is intense. The international law optimism of the 1990s has ended. If the regulatory framework surrounding IOs is not reformed in the 21st century, there would be a strong basis for radically altering the way in which countries presently cooperate through the creation of IOs. If the denial of justice age is not brought to an end soon, the international community could be justified in asking whether IOs are even fit for purpose. The answer to that question is best left for another day.

43 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (concluded 15 November 1965, entered into force 10 February 1969) HCCH (see especially Article 2 requiring the setting up of central authorities); and Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (concluded 18 March 1970, entered into force 7 October 1972) HCCH (see especially Article 2 requiring the setting up of central authorities).
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