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Workplace Equality in International Organizations: A Way Forward

"*Clearly law is not just the sum of courts, legislatures, police, prosecutors, and other formal institutions with some direct connection to law. Law is also a normative system that resides in the minds of the citizens of a society*"[1]

Legal Scholars agree that the challenges to workplace equality are subtle and "structural" rather than overt and individual.[2] Gender, race, sex and others characteristics have and will continue to factor in employment decisions. Based on her findings from the social science literature,[3] Kristin Green demonstrated that there is a pervasive implicit bias in the workplace decision-making that is independent of the explicit bias. That bias can actually translates into a behavior in a group setting[4] and is influenced by the specific

[1] Thomas Carothers, 'Promoting the Rule of Law Abroad The Problem of Knowledge' (Working paper 44, Carnagie Endowment for International Peace, 2003) 8.
[2] Tristin K Green, 'A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong' (2007) 60(3) *Vanderbilt Law Review* 849.
[3] Mahzarin R. Banaji, 'The Opposite of a Great Truth is Also True: Homage to Koan #7' in John T. Jost et al. (eds) *Perspectivism In Social Psychology: The Yin & Yang Of Scientific Progress* (2003)127, 130-38 as cited in Green, above n 2, 854.
[4] John F. Dovidio et al., 'Implicit and Explicit Prejudice and Interracial Interaction' (2002) 82 *J. Personality & Soc. Psychol*. 62 as cited in Green, above n 2, 855.

contexts in which individuals operate.[5] So, demographic makeup of the workplace as a whole and of work groups, prominence of alternative in-group and out-group boundaries, distribution of power, institutional culture, and information availability affect the degree of unconscious bias and its effect on decision-making; that is what makes "structural discrimination".[6] Under structural discrimination, Green explains, discrimination becomes "more than a problem of bias in isolation at discrete moments of formal decision-making, it becomes a problem of the workplace structures and environments that facilitate bias in the workplace on a day-to-day basis".[7] Green argues that although these decisions may or may not be conscious biases, they are still stereotypes operating within a permissive institutional context and need to be addressed at the structural level of the institute.[8] In a recent article, Green proposed a legal framework to obligate employers to take structural measures to minimize discriminatory bias in workplace decision-making.[9]

In this contribution, I focus on the International Organizations (IOs) mainly the United Nations (UN), a public forum to all states political leaders to debate and advance their concerns, the World Bank, a financial organization that promotes economic development, mainly in developing countries, and the Consultative Group on International Agricultural Research (CGIAR), the eldest and largest global public program of the World Bank with a strategic network of diverse stakeholders that harnesses the best in science to produce

[5] Marianne Bertrand & Sendhil Mullainathan, 'Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination' (2004) 94 *Amer. Econ.Rev*. 991, 992 as cited in Green, above n2, 856.
[6] Tristin K. Green, 'Discrimination in Workplace Dynamics: Toward a StructuralAccount of DisparateTreatment Theory' (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 91.
[7] Green, above n 2, 857.
[8] Banaji, above n 2, 854.
[9] Green, above n 2, 873.

more and better food, reduce poverty and sustain environments. I am interested in how discrimination issues are manifested in employment relations in these organizations and what are the current organization practices. Considering the immunity and privileges granted to international organizations, what are the current available legal procedures, at the national or international level, for workplace equality? How accountable and transparent are they based on the practice of these organizations? Can discrimination biases that go beyond the known individual-based discrimination claims be identified? How can they be challenged and changed?

I begin by presenting a more general context in which these organizations were founded and their purposes evolved over the years. Following on the evolution and some intellectual interpretations for their purposes, in part II, I examine the granted privileges and immunities under international law and the impact they have had on the employment relations in general and employment discrimination in particular. To better understand the employment relations within the international organization context, in part III, I turn into the internal structure of the workplace and examine in details the entitlements for such a relationship with the staff and describe in part IV the various modalities of employment settlement disputes in these organizations. Drawing on the contextual knowledge, judgments in Administrative tribunals and reports, and mainly the practice of these international organizations, in part V, I relay and identify some of the structural discrimination biases that still persist and proliferate permissively in the international workplace and show that such a subtle and structural discrimination is enabled by discretionary decisions within the organization. In part VI and based on Kristin Green,

Margaret Thornton, and Joan Acker works, I reflect on these new forms of challenges and the way forward. Based of the special position of international civil servants in international organizations and the duty to protect their fundamental rights, I claim that the limitation of opportunity by discriminatory biases and the psychic burden on the individual staff member, on daily basis, qualify for a workplace wrong and call for independent and impartial legal procedures that would ensure due process and fair treatment.

I. The context

A. The Foundation of modern international organizations

Historically, to solve problems at a multilateral basis, various states had to convene international conferences. [10] Once agreements were reached, a formal treaty was adopted with defined obligations. The principle of equality was at the heart of the conference system.[11] Any substantive decision was subject to the rule of unanimity and not taken based on some majority vote. In the nineteenth century, however, these *ad hoc* conferences were becoming inefficient and limited in solving political issues, and so international associations among groups other than governments began to emerge and were followed by associations among government branches that are administrative rather

[10] Carol Lancaster, '*Foreign Aid: Diplomacy, Development, Domestic Politics'* (2006) Chapter 2.
[11] C. F. Amerasinghe, '*Priniciples of the Institutional Law of International Organizations*' (second edition, 2005) 2.

than political.[12] In particular, the second half of the nineteenth century witnessed further development of these associations into International Organizations (IOs).[13]

How did the new concept of international organizations compare to the original international conferences? In the new concept, the decision-making process became affected by two trends other than the unanimity rule; one that is based on the majority and the other that is based on building "consensus", allowing, thus, for substantive decisions to be taken either without a formal vote or by a weighted voting with a more influence from those allocating budgetary contributions, and various interest groups other than government bodies. [14] The retained institutional element along with a permanent administrative body gave IOs the assimilating potential for furthering "an interest common to numerous states without detriment to that of any concerned". [15]

After the Treaty of Versailles and the rise and collapse of the League of Nations at the onset of World War II, precedents in international institutional law were established to shape the new modern IOs. As a starting point for the creation of any new IO, a legally binding instrument, a charter, was proposed along with institutional frameworks that are replicates to those of the League and an international instrument that would limit the

[12] Ibid.
[13] Ibid 4.
[14] José Alvarez, '*International Organizations as Law Makers*' (2005) 10.
[15] Hyde, '*International Law*' (1947) vol I, p. 131 as cited in Amerasinghe, above n 11, 5.

State's "domestic jurisdiction".[16] As suggested by David Kennedy, the power of these institutes, when allied with the rule of law, become transformative.[17]

Today, IOs are diverse in nature, size of their membership, and impact. According to the latest edition of the Yearbook of International Organizations (2007/2008), the number of all known international organizations is 61,345; of these, 7759 are conventional inter-governmental bodies that include 36 federations of IOs, 502 with universal membership, 1083 with intercontinental membership, and 6138 with regional oriented membership.[18] With the departure from the principle of equality in decision making and the enormous proliferation of IOs, one can not but pose to reflect on the great potential of these institutions to impact world matters. However, Alvarez writes that "IOs are too complex to be reduced to typologies, their normative impact too broad to be limited to specialized branches of domestic or international law, their evolving nature too difficult to pin down to one character type". [19] So, for the sake of this article, I focus the discussion on the public international organization that deals with matters of global concern such as international peace and security, the UN, and the biggest financial institute that deals with development, World Bank and its eldest global program and science-based network in International Agriculture, the CGIAR.

B. *The purposes and their evolution*

[16] Alvarez, above n 14, 23.
[17] David Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo L. Rev*. 841 as cited in Alvarez, above n 14, 23.
[18] Union of International Association (ed) '*Yearbook of International organizations*' (vol 1B (Int-Z) 2007/2008), Appendix 3: Table 1a.
[19] Alvarez, above n 14, 12.

Whereas the central purpose stated in the UN Charter is the prevention of war, the Charter also recognized that collective actions to achieve security, economic, and social goals, including human rights for all equally, are essential and required to achieve peace. A broader perspective is illustrated in the Preamble.

"We the peoples of the United Nations determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

and for these ends

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,

have resolved to combine our efforts to accomplish these aims".[20]

[20] *UN Charter* Preamble < http://www.un.org/aboutun/charter/ > at June 12, 2008.

To encourage full participation in the organization, the UN Charter had the United States at the core of the organization and its key organs, the Security Council from the outset, and the United States and four other powerful states were accorded special privileges such as permanent seats on the Security Council and veto powers.[21] While in most UN debates, "Sovereign equality" was at the heart of discussions, (see Article 2 of the Charter)[22], I guess, the riding element in the Charter was, one can argue, the centrality of power in the Security Council decisions by the 5 major states. Under the terms of Chapter VII of the Charter, these decisions, once adopted, could be imposed or even enforced on all members. [23] From1945 until 1992, the UN was seen as the main public forum or the "first stop" to security challenges, however, after the Cold War, the Council unity started to fragment and resolutions on conflicts in various regions of the globe were met with a limited success.[24] In 2000, and under General Assembly resolution 55/2,[25] member states renewed their commitments to promote freedom, equality for all, solidarity, tolerance, respect for nature, and shared responsibility were identified. Unfortunately, this vast project was halted by the events of September 11, 2001, and the invasion of Iraq in 2003. In 2005, and during 2005, The UN secretary General reported:

"16. Not only are development, security and human rights all imperative; they also

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[21] Simon Chesterman, Thomas M. Franck, & David M. Malone, '*Law and Practice of the United Nations*' (2008) 19.
[22] *UN Charter*, above n 20, Chapter I, Article 2 as also cited in Chesterman et al., above n 21, 599.
[23] *UN Charter*, above n 20, Chapter VII as cited in Chesterman et al., above n 21, 606.
[24] Chesterman et al, above n 21, 53.
[25] *Resolution adopted by the General Assembly*, GA Res 2, UN Millennium Declaration, 55th sess, UN doc A Res/55/2 (2000) < http://daccessdds.un.org/doc/UNDOC/GEN/N00/559/51/PDF/N0055951.pdf?OpenElement > at June 12, 2008.

reinforce each other.”……

“20. States, however, cannot do the job alone. We need an active civil society and a dynamic private sector. Both occupy an increasingly large and important share of the space formerly reserved for States alone, and it is plain that the goals outlined here will not be achieved without their full engagement.

21. We also need agile and effective regional and global intergovernmental institutions to mobilize and coordinate collective action. As the world’s only universal body with a mandate to address security, development and human rights issues, the United Nations bears a special burden. As globalization shrinks distances around the globe and these issues become increasingly interconnected, the comparative advantages of the United Nations become ever more evident. So too, however, do some of its real weaknesses. From overhauling basic management practices and building a more transparent, efficient and effective United Nations system to revamping our major intergovernmental institutions so that they reflect today’s world and advance the priorities set forth in the present report, we must reshape the Organization in ways not previously imagined and with a boldness and speed not previously shown.

22. In our efforts to strengthen the contributions of States, civil society, the private sector and international institutions to advancing a vision of larger freedom, we must ensure that all involved assume their responsibilities to turn good words into good deeds. We therefore need new mechanisms to ensure accountability — the accountability of States to their citizens, of States to each other, of international institutions to their members and of the present generation to future generations.

Where there is accountability we will progress; where there is none we will under perform. The business of the summit to be held in September 2005 must be to ensure that, from now on, promises made are promises kept." [26] Today the UN has 192 members and 14,000 employees spread around the globe."[27]

The World Bank was also established as part of the UN system,[28] however, since 1945 it has evolved into two separate but complementary development institutions; the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).[29] The Bank runs as a cooperative with 185 member countries as shareholders. The five largest shareholders, the United States, France, Germany, Japan, and the United Kingdom, appoint each an Executive Director and the rest of the members are represented by 19 Executive Directors. These 24 Executive Directors work at the bank and are responsible for the "approval of loans and guarantees, new policies, the administrative budget, country assistance strategies and borrowing and financial decisions".[30] By tradition, the Bank largest shareholder, the United States nominates the Bank president and so, a US national is always at the top of the hierarchy in the World Bank supervising about 10,000 employees from various nationalities spread

[26] *Report of the Secretary General, In larger freedom: towards development, security and human rights for all,* 59th sess, UN Doc A/59/2005 (2005) 7 < http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement > at June 12, 2008.
[27] <https://jobs.un.org/elearn/production/home.html> and http://www.un.org/News/Press/docs//2007/org1479.doc.htm.
[28] Chesterman et al, above n 21, 31.
[29] The World Bank, About us < http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> at May 30, 2008.
[30] Ibid.

over 100 countries.[31]

Under Article1 of the Articles of Agreement, the purpose of the World Bank, as an institution, is to "assist in the reconstruction and development of territories of members" mainly, war torn European territories, by providing international long-term loans and technical expertise.[32] With the introduction of the Marshall Plan and the implementation of US foreign aid policies in Europe, the Bank switched from reconstruction lending to "project lending" in developing countries and the main purposes of the Bank became the promotion of economic growth and the reduction of poverty.[33] The Bank achieves these goals by providing loans, guarantees, and technical assistance for projects in member countries. And by 1968, Robert McNamara, the 5th president of the Bank then, introduced a "people's basic needs" approach into the Bank, and once again, the investments shifted from a focus on the physical to the human part.[34] The shift was a reaction to the failure of rapid industrialization to produce benefits for most of the poor and the purpose expanded to the promotion of "distributional equity along with economic growth".[35] In the early 1970s, lending focused on improving agriculture, public health, and education.

Under these circumstances, the CGIAR was founded in 1971 mainly to use the best

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[31] The World Bank, Organization < http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040580~menuPK:1696997~pagePK:51123644~piPK:329829~theSitePK:29708,00.html > at May 31, 2008.
[32] *IBRD Articles of Agreement*, art. 1.1 < http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049557~menuPK:58863~pagePK:43912~piPK:44037~theSitePK:29708,00.html > at May 30, 2008.
[33] Sandra Blanco & Enrique Carrasco, 'The Functions of the IMF & the World Bank' (1999) 9 *Transnat'l L. & Contemp. Probs.* 67 accessed at http://www.uiowa.edu/ifdebook/ebook2/PDF_Files/Part_1_2.pdf at June 13, 2008.
[34] Ibid, 16; and Namita Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a theory of Horizontal Accountability' (2006) 12 *U.C. Davis J. Int'l L. & Pol'y* 331.
[35] Ibid.

science-based tools and technologies in advanced countries and adopt them for the benefit of food-deficit countries and populations.[36] It was and still is the first and the largest global public goods program to be supported by grants from the World Bank.[37] Initially, the CGIAR supported four already existing international agricultural research Centers that were established by the Ford and Rockefeller foundations: International Center for Tropical Agriculture (CIAT) in Colombia, International Maize and Wheat Improvement Center (CIMMYT) in Mexico, International Institute of Tropical Agriculture (IITA) in Nigeria, and International Rice Research Institute (IRRI) in the Philippines.[38]

Today, the CGIAR system grew to be an informal association of 64 Members (public and private) supporting 15 international Centers[39], " loosely connected" by a network of (a) the Consultative Group, its Executive Council and partners; (b) the Science Council, which helps to maintain the high quality of science in the CGIAR System; and (c) the independent international agricultural research Centers supported by the CGIAR, and Center committees. These are supported by the CGIAR System Office, which has a pivotal role in the integration and administration of the System.[40] CGIAR Membership include 21 developing and 26 industrialized countries, four co-sponsors as well as 13 other international organizations with more than 8,000 CGIAR scientists and staff spread

[36] The CGIAR at http://www.cgiar.org/who/index.html at June 1, 2008; World Bank, *The CGIAR at 31: An Independent Meta-Evaluation of the Consultative Group on International Agricultural Research,* Volume 1: Overview Report (2003) < http://www.worldbank.org/ieg/cgiar/> at June 13, 2008.
[37] Ibid.
[38] *The CGIAR Charter* §9< http://www.cgiar.org/pdf/charter%202007_main%20text.pdf> at June 1, 2008.
[39] Ibid, §1.
[40] Ibid, §2.

over 100 countries.[41] The World Bank, as the main co-sponsor, hosts the CGIAR secretariat and its staff, and the president nominates the CGIAR Chair who is usually the vice president overseeing the sectoral work in agriculture[42], who subsequently selects the CGIAR director who will also be a World Bank senior staff.[43] Maintaining its informal structure, the CGIAR was founded initially "without a charter, rules of procedure, or conditions or procedures for membership", however, as the system's activities expanded, a reform program was initiated in 2001 and a Charter was drafted in 2004 and amended in 2006 and 2007 and decision-making remains based on consensus rather than by vote.[44] The latest mission of the CGIAR is "to achieve sustainable food security and reduce poverty in developing countries through scientific research and research-related activities in the fields of agriculture, livestock, forestry, fisheries, policy and natural resource management".[45]

II. Immunity and granted privileges: impact on the workplace

IOs enjoy privileges and immunities only because they are needed for the fulfillment of their purposes and functions. Due to the enormous diversity of these purposes, diverse agreements can be encountered with or without provisions on privileges and immunities. In the case of the UN, the General Convention on the Privileges and Immunities of the UN of 1946 is applicable and Article 105 of the Charter is usually invoked.[46] In the case

[41] The CGIAR, above n 36.
[42] *The CGIAR Charter*, above n 38, §56.
[43] Ibid, §59.
[44] Ibid, §10.
[45] Ibid, §16.
[46] Amerasinghe, above n 11, 318.

of the World Bank, the Specialized Agencies Convention of 1947 is applicable, and as a financial institute, detailed provisions on the purposes of the privileges and immunities, the position of the Bank in regard to judicial processes, and all other matters are also dealt with extensively in the Articles of Agreement, mainly, Article VII.[47] It is critical to mention here that the Specialized Agencies Convention contains variations from the general provisions for each agency and they are attached in separate annexes.[48] As for the CGIAR, despite not having a legal personality, it was able to coordinate international agreements with the hosting countries mainly through the World Bank, United Nations Development Program (UNDP), and Food and Agriculture Organization (FAO).[49] Some of the autonomous 15 international centers, which each has special agreements with their host country, have gained a legal personality and were able to conduct their own agreements to gain privileges and immunities.[50] The agreements tend to be diverse and contain specific provisions to demark the privileges and immunities or employment policies between the internationally and nationally recruited staff. Access to the agreements, signed by each center may be obtained from the CGIAR core documents collection by searching under document types "legal records". [51]

According to Amerasinghe, four main privileges and immunities merit attention:

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[47] *World Bank the Articles of Agreements*, above n 32, Article VII < http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049696~pagePK:43912~piPK:36602,00.html#I4> at June 13, 2008.
[48] Amerasinghe, above n 11, 319.
[49]Curtis Farrar, 'The Consultative Group For International Agricultural Research', Case Study for the UN Vision Project on Global Public Policy Networks (1999), 5. For an example of specific agreement, check <http://untreaty.un.org/unts/60001_120000/21/14/00040655.pdf > at June 13, 2008.
[50] Core collection of Agreements <http://www.cgiar.org/corecollection/index.cfm> at June 13, 2008.
[51] Ibid.

"(i) immunity from jurisdiction; (ii) inviolability of premises and archives; (iii) privileges relating to currency and fiscal matters; and (iv) freedom of communications". [52] For its relevance to employment relations, here, I limit the discussion to the first immunity.

A. *Immunity from jurisdiction*

Section 2 of the UN Convention and section 4 of the Specialized Agencies Convention have a similar provision wherein IOs are granted immunity from "every legal process except in so far as in a particular case it has expressly waived its immunity".[53] However, for the World Bank, as a financial organization, the general immunity is qualified in the Articles of Agreement. Section 3 Article VII expressly permits actions to be brought against the bank in a national court:

"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."[54] Such a qualification presumes that the immunity of the World Bank is restricted to the circumstances described in Section 3 and the absence of general immunity is implied.[55] In practice though, the US court, in the famous case *Mendaro v World Bank* [56] interpreted the provision to allow only suits for the external activities and contracts of the bank rather

[52] Amerasinghe, above n11, 320.
[53] *Convention on the Privileges and Immunities of the United Nations*, adopted by the General Assembly of the United Nations on 13 February 1946 (entered into force on 17 September 1946), §2 accessed at http://www.vilp.de/Enpdf/e017.pdf at June 6, 2008.
[54] *IBRD Articles of Agreements*, above n 32, Article VII, section 3
[55] Amerasinghe, above n 11, 321.
[56] *Mendaro v. The World Bank*, 717 F.2d 610 (D.C. Cir. 1983) as summarized in Monroe Leigh, 'Mendaro v. The World Bank' (1984) 78(1) *The American Journal of International Law*, 221.

than for the internal administration of the employees since the later is necessary to protect the organization from unilateral interferences by the hosting state.[57] Where immunity is present, some courts tended though to distinguish between acts *iure imperii* (in sovereign authority) or acts *iure gestionis* (as a private person) to these Amerasinghe clarifies that the granted immunity to the IOs is distinct from that of the States and the distinction between acts *iure imperii* and acts *iure gestionis* will only become relevant if they are part of the test that determines whether the immunity from jurisdiction is necessary for the fulfillment of the organization's purposes and functions.[58] Amerasinghe and others though, acknowledge that the history of judicial precedent in many national courts around the world is still in favor of invoking the immunity of organizations in employment-related matters, even where explicitly the general immunity is restricted by conventional law, as the case of the World Bank.[59] Arguably, under international customary law, international civil servants or internationally recruited staff continue to lack access to national courts in their employment relations with IOs. In the next section, I show that the practice is not uniform and recently, more effective and adequate means for settling employment-disputes in IOs are being explored by courts, mainly in USA and Europe, signaling a greater consideration to human rights principles such as fair treatment and right to justice.[60]

B. *The recent development in case law of national courts*

[57] Ibid.
[58] Amerasinghe, above n 11, 322.
[59] Ibid, 323.
[60] August Reinisch, 'The immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals' (IILJ Working Paper 2007/11, Institute of International Law and Justice, New York University School of Law, 2007).

I discuss four important cases wherein immunity from suit in employment disputes was denied for IOs in national courts; the *Margot Rendall Speranza Case*,[61] decided by a US court of Appeals, *Waite and Kennedy v. Germany and Beer and Regan v. Germany,*[62] decided by the European Court of Human Rights (ECHR), *Drago A. v International Plant Genetic Resources Institute (IPGRI)*, Court of Cassation in Italy, and *Siedler v. Western European Union*,[63]decided by Brussels Labor Court of Appeal.

In the first case (1995-1997), Margot Rendall-Speranza, an employee of the International Finance Corporation (a subsidiary of the World Bank) alleged that she was injured in her workplace by a fellow servant, a supervisor. When she submitted to the corporation a Workers' Compensation Claim reporting the harassing acts, the response was that the supervisor was acting within the scope of his duties.[64] In the denial of immunity from jurisdiction to the corporation, the court held that : "when immunity protects a defendant from liability for an allegedly tortious act, and that act is the only act that occurred within the applicable limitation period, the statute of limitations bars a claim against the defendant."[65] In this case, the waiving of the immunity was justified by the liability of the organization that is due to a lack in a clear internal policy judgement for harrassment acts including the infliction of emotional distress.

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[61] Amerasinghe, above n 11, 327.
[62] *Waite and Kennedy*, Application No. 26083/94, European Court of Human Rights, 18 February 1999, [1999] ECHR 13; as cited in Reinisch, above n 60 and Press Release accessed at http://www.echr.coe.int/eng/Press/1999/Feb/waite,kennedy%20epresse.html at June 13, 2008.
[63]*Siedler v. Western European Union*, Brussels Labour Court of Appeal (4th chamber), 17 September 2003.
[64] *Margot Rendall-Speranza v. Edward A. Nassim*, Appellant United States Court of Appeals, District of Columbia Circuit. - 107 F.3d 913. Argued Nov. 12, 1996. Decided March 14, 1997 at http://cases.justia.com/us-court-of-appeals/F3/107/913/ at June 6, 2008.
[65] Ibid, §30.

In the second case, all four applicants contended a lack in a fair hearing with the international employer, the European Space Agency, in their contractual relationships in 1994/95.[66] By February 1999 when the case reached the ECHR, the court considered whether the applicants had available to them "reasonable alternative means" to protect effectively their rights under Art. 6 of the European Convention on Human Rights. The court held that "since the applicants had claimed the existence an employment relationship with ESA [European Space Agency], they could and should have had recourse to the ESA Appeals Board, which is "independent of the Agency", has jurisdiction "to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member" (Regulation 33.1 of the ESA Staff Regulations)."[67] Two major developments in case law can be highlighted from this case: 1) access to an independent and impartial judicial process was recognized as a fundamental right of an international employee and 2) the lack of reasonable alternative employment dispute settlements in the structure of IOs may qualify for a denial of immunity from jurisdiction. The immunity and privileges are granted for the "proper" functioning of an organization.[68] Although the term "proper" was not defined, however, one can argue that there is an implication to establish standards for IOs' immunity based on independent and impartial due processes.

Similarly in the third case, Mr. Drago, a former employee of IPGRI, one of the 15 autonomous International Agriculture Centers governed loosely by the CGIAR, launched an action with the Rome Tribunal invoking unfair dismissal in April 2000, the tribunal

[66] *Waite and Kennedy*, above n 62.
[67] Ibid.
[68] Ibid, §4.

upheld immunity from jurisdiction, which then lead to Mr. Drago challenging the judgment in the Court of Cassation in January 2004.[69] The Court examined first the compatibility of the treaty provisions granting immunity with Art. 24 of the Italian Constitution which "establishes that everybody has the right to institute proceedings to protect his or her rights".[70] On February 2007, the court held that considering that IPGRI did not fulfill its obligation, contained in Art. 17 of the 1991 Agreement with the host country "to provide an independent and impartial judicial remedy for the resolution of employment-related disputes", an infringement is noted on the fundamental principles of the Italian Constitution, therefore, immunity from jurisdiction is to be excluded.[71] This case is critical in asserting the supremacy of the fundamental principles of the host country's constitution law over the immunity from Jurisdiction. Considering that many of the IOs are located in developing countries, however, such implication may be difficult to apply. Nevertheless, the case affirms again the need for an independent and impartial judicial system for international staff members. Despite that IPGRI subscribed later to the International Labour Organization Administrative Tribunal (ILOAT) to resolve employment disputes (in 2001), the independence and impartiality of these tribunals have been questioned. [72]

The last case is very important, in my opinion, and as discussed by Reinisch, the Brussels labour court went a step further and investigated whether the internal appeals procedure for employment disputes within the Union "offered all of the guarantees inherent in the

[69] *Drago A. v International Plant Genetic Resources Institute (IPGRI)*, Court of Cassation, all civil sections, 19 February 2007, no 3718 (unpublished), ILDC 827 (IT 2007).
[70] Ibid, §H4.
[71] Ibid, §H1.
[72] Ibid, §H4.

notion of a fair trial". [73] The court's findings pointed to the following shortcomings: "there were no provisions for the execution of the judgments of the WEU [Western European Union] appeals commission; there was no public hearing and the publication of decisions was not guaranteed; the members of the commission were appointed by the intergovernmental Council of the WEU for a short time period (two years) which created an excessively close link with the organization itself [lack of independency]; and it was not possible to challenge a particular member of the commission [lack of impartiality]." [74] Considering these facts, the court held that the personnel statute lacks all the guarantees needed to secure a fair trial and the immunity from jurisdiction imposes a limitation on the access to the normal courts and therefore, such limitation is incompatible with Article 6(1) of ECHR.[75]

III. The internal laws and structure of international organizations

Despite that there is still a debate on whether the internal rules of IOs form a law (with legal effects), the predominant view is that the internal law is part of international law.[76] The body of internal law includes taking decisions, making rules, establishing regulations and staff procedures and implementing the provisions of the constitutive instruments that have supremacy in law and are binding on all members of the

[73] Reinisch, above n 60, 15.
[74] Ibid.
[75] Ibid.
[76] Peter C. Hansen, 'The World Bank Administrative Tribunal's External Sources of Law: A Retrospective of the Tribunal's First Quarter-Century (1981–2005)' (2007) 6 *The Law and Practice of International Courts and Tribunals*, 1, 86.

organizations including the staff.[77] For IOs, there is no single body of employment law. Each organization develops its own internal employment law that contains both written and unwritten sources of law and the internal organization structure is immune from suit in national court. IOs employing widely varying nationalities and working at geographically dispersed locations around the world are entitled to independent governance for their employees.[78] In other words, these organizations have no duty under any national law to "refrain from gender discrimination and harassment of its staff members - or racial, religious, ethnic, age, or disability discrimination, for that matter."[79] In this section, I cross-examine the complex relationship between the organization and staff members in three different organizational contexts, elaborate on their perceived "terms of employment" or "conditions of employment" and the complex "discretion of power" entitlement as reflected in the practice of the organization.

A. *The contract between the organization and staff*

Whereas the relationship with private parties (other than employees) is based on a broad choice of potential applicable law, as recognized by the 1977 Oslo Resolution on "Contracts Concluded by International Organizations with Private Persons" by the Institut de Droit International[80], the relationship with the international staff is limited to the internal employment law or internal administrative law of the organization and

[77] Amerasinghe, above n 11, 274.
[78] Amerasinghe, above n 11, 272.
[79] Robert A. Gorman, 'The Development of International Employment Law: My Experience on International Administrative Tribunals at The World Bank and The Asian Development Bank' (2004) 25 *Comparative Labor Law & Policy Journal* 423, 423.
[80] Institut de Droit International " *Contracts Concluded by International Organizations with Private Persons*" (IDI Oslo 1977) (1977) 57(2) AnnIDI 333 < http://www.idi-iil.org/idiE/resolutionsE/1977_oslo_03_en.pdf> at June 13, 2008.

regularly exempted from the national law.[81] The employment relationship with the nationally recruited staff, as the case in the international agriculture organizations of the CGIAR for example, the applicable law is national law as per agreements drawn with the host country.[82] The employment relationship oscillates between being contractual or statutory, and with the exception of the EU and OECD, almost all other organizations claim a contractual relationship with their staff.[83] In the case of UN, a provision is made in the Staff Regulations and Staff rules for a letter of appointment that is based on an offer and an acceptance without a clear mentioning of a contract of employment, but, in several cases, The United Nations Administrative Tribunal (UNAT) has assumed that employment is based on a contract.[84]

The nature of the relationship in practice may not though be limited to the contract withdrawn between the staff and the organization. Once appointment is made, an employee receives an offer or a letter and by signing that letter, the employee accepts not only the terms of the contract but also all the other bits (explicit and implicit) of what makes the internal law of the institute. In *de Merode*, The World Bank Administrative Tribunal (WBAT) stated: "the fact that the Bank's employees enter its service on the basis of an exchange of letters does not mean that these contractual instruments contain an exhaustive statement of all relevant rights and duties. The two sides are agreed on this

[81] August Reinisch, 'Contracts between International Organizations and Private law persons' (2006), §13. < https://typo3.univie.ac.at/fileadmin/user_upload/int_beziehungen/Personal/Publikationen_Reinisch/contracts_ios_epil.pdf> at June 13, 2008.
[82] For an example, check *Agreement between Colombia and International Center for Tropical Agriculture* No. 26249 http://untreaty.un.org/unts/60001_120000/21/14/00040655.pdf at June 13, 2008.
[83] Amerasinghe, above n 11, 281.
[84] Ibid, and see *Kaplan* [1953] UNAT Judgment No. 19.

point. The contract may be the *sine qua non* of the relationships, but it remains no more than one of a number of elements which collectively establish the *ensemble* of conditions of employment operative between the Bank and its staff members."[85] In *Kaplan*, in establishing the legal position of staff members, WBAT distinguished between contractual elements and statutory elements; the personal status of each staff being contractual (nature of contract, salary, and position within the institute) and all other matters that affect in general the organization and its proper functioning being statutory. The Tribunal went on to add that while the contractual elements cannot be changed without the agreement of the two parties [private contract law], the statutory elements may change without further notice and the changes are binding on staff members.[86]

From a legal perspective, Amerasinghe clarifies that although statutory elements are not part of the contract of employment, they may govern the employment relationship, and therefore, "the power to alter the terms of conditions of employment" may be different in the two cases.[87] Based on the view that the legal position is generally recognized by most IOs,[88] one can argue here that the position [the right to use various statutory elements in the conditions of employment] may extract any equality base between the employer and the employee and diminishes her/his bargaining ability and instead strengthen the discretionary power of the management in altering the terms of employment. Therefore, it is critical to understand what internal justice system was introduced to counter balance

[85] *de Merode* [1981] WBAT Decision No. 1.
[86] *Kaplan* [1953] UNAT Judgment No. 19, §3.
[87] Amerasinghe, above n 11, 282.
[88] Ibid.

the discretionary power of the internal management, but we will get to that later. Now, let us look at what the ensemble of the conditions of employment looks like.

B. The ensemble

In *de Merode*, the WBAT stated that statutory elements can be found in the constituent instrument of the organization, Staff Rules and Regulations, and depending on their content, certain manuals, circulars, notes and statements issued by the various hierarchical management teams.[89]

i. Constituent instruments

The constituent instrument is regarded as the basic statute or constitution of the organization and it prevails on the hierarchical priority of the tribunal as was addressed and confirmed in *Howrani* judgment No. 4 by UNAT and in *de Merode*, by WBAT.[90] So, for example, the UN Charter or the Articles of Agreement of the Bank are the constituent instrument for these organizations. Article 1 of the Charter provides broad equal rights "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" whereas Article 8 acknowledges the principle of equality and particular antidiscrimination norms and rules out sex discrimination in employment at the UN.[91] IOs that lack such treaty-based norms adopted equivalent broad prohibitions against employment discrimination in their Staff

[89] *de Merode*, above n 85, §18.
[90] *Howrani* [1951] UNAT judgment No. 4; *de Merode*, above n 85 and others as cited in Amerasinghe, above n 11, 285-286; Access to UNAT judgments at http://untreaty.un.org/UNAT/Judgements_English_By_Number.htm at June 13, 2008.
[91] *UN Charter*, above n 20, Article 1 and 8.

Rules and Regulations. These pronouncements though leave many procedural and substantive aspects of discrimination law unaddressed, and in the lack of comprehensive legislation governing claims for employment discrimination such as Title VII of the U.S. Civil Rights Act of 1964, the UK Race Relations Acts of 1968, or the Canadian Human Rights Act of 1976, broad constitutional provisions and general principles remain the primary protections against employment discrimination.[92] Apart from referring to "the general principle", the tribunals have not considered claims that rely on international human rights conventions or other conventions.[93] Some contend that they are persuasive law but non-binding[94] including Article 26 of the International Covenant on Civil and Political Rights (1966),[95] Article 2 of the Universal Declaration of Human Rights,[96] and Article 14 of the European Convention on Human Rights.[97]

ii. Organization rules and policies

The rules and policies are decisions taken in an exercise of power accorded to the executive branch to conduct the functions and purposes of the organization.[98] Formally, they are the by-laws that the staff member needs to refer to. In addition, the administration of the organization, in the exercise of powers derived from the constitution

[92] Brian D. Patterson, 'The Jurisprudence of Discrimination as Opposed to Simple Inequality in the International Civil Service' (2007) 36 *Georgia Journal of International and Comparative Law* 1, 4.
[93] *Agodo* [1989] WBAT Decision No. 76, *Sharpston* [2001] WBATDecision No. 251 as cited in Hansen, above n 76, 8.
[94] Patterson, above n 92, 5.
[95] *International Covenant on Civil and Political Rights,* art. 26 G.A. Res 2200A(XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 http://www1.umn.edu/humanrts/instree/b3ccpr.htm at June 13, 2008.
[96] *Universal Declaration of Human Rights*, art. 2, G.A. Res. 217A (III), U.N. GAOR, Supp. No. 16, U.N. Doc. A/810 (Dec. 10, 1948) http://www.un.org/Overview/rights.html at June 13, 2008.
[97] *European Convention on Human Rights,* opened for signature Nov. 4, 1950, Europ. T.S. 5, 213 UNTS 221, art 14 as cited in Patterson, above n 92, 5 http://conventions.coe.int/treaty/en/Treaties/Html/005.htm#FN1 at June 13, 2008.
[98] Amerasinghe, above n 11, 286.

or delegated by the executive organ, establish staff rules and even some manuals, circulars, notes, public statements of the organization are also considered sources of law.[99] Some tribunals have held that the rules need to conform not contradict with staff policies.[100] As for public statements, there is no clear rule to confirm them as *opinio juris*, or even more critical, a "codicil" to the contract, in *de Merode*, the tribunal stated that it would determine on case-by-case basis whether these statements are binding on the staff based mainly on their consistent practice within the organization.[101] While this may seem facially reasonable and potentially expand the power of the tribunal to interpret the Bank's rules, the implication that the rules can change unilaterally in the organization and are binding without discussion with the staff can be confusing and misleading to the staff themselves.

iii. General principles of law

All administrative tribunals held that general principles including the principle of equality in employment relations, are applicable and they were consistently invoked to control the exercise of administrative powers and discretions.[102] Through specific judgments of the international administrative tribunals, the principle of equality and the right to equal treatment became part of the internal employment law of international organizations.[103] Whether they are derived from national law, international law or other administrative tribunal judgments, the tribunals have been averse to find support for their sources. They may include "contract or conflict of laws", the contractual "force

[99] Ibid.
[100] Ibid.
[101] Hansen, above n 76, 6.
[102] Amerasinghe, above n 11, 288.
[103] Patterson, above n 92, 4.

majeure", the principle of "good faith", the principle of "unjust enrichment", and the principle of estoppel.[104] The application of various principles led to a lack in the consistency and uniformity of tribunal decisions on discrimination issues and therefore, the cases for employment discrimination are unpredictable in tribunals.

iv. Practice of the organization

The organization own administrative practice is considered an unwritten source of law and may give rise to legal rights and the "general principles" of international administrative law.[105] There is a strict requirement by the tribunals that the practice of the institute is consistent and not arbitrary because of the conviction that it represents a legal obligation on the part of organization towards its employee.[106] In the practice of the organization, the constant and uniform usage element is critical for rules to be accepted as law.[107] In *de Merode*, the WBAT stated:

"The practice of the organization may also, in certain circumstances, become part of the conditions of employment. Obviously, the organization would be discouraged from taking measures favorable to its employees on an ad hoc basis if each time it did so it had to take the risk of initiating a practice which might become legally binding upon it. The integration of practice into the conditions of employment must therefore be limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation, as was recognized by the International Court of Justice in its

[104] Amerasinghe, above n 11, 290.
[105] Patterson, above n 92, 5.
[106] Amerasinghe, above n 11, 286.
[107] 1950 ICJ Reports as cited in Amerasinghe, above n 11, 291.

Advisory Opinion on Judgments of the Administrative Tribunal of the ILO (ICJ Reports 1956, p. 91)."[108]

IV. Modes of employment dispute settlements

Article VIII section 29 of the Convention on the Privileges and Immunities of the UN provides:

"The United Nations shall make provisions for appropriate modes of settlement of:
a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General"[109]

For the first three years in the UN's life, a joint administrative team was settling disputes leading to a final and ultimate decision by the Secretary-General and clearly, the staff were not satisfied with this process.[110] The internal remedies, such as the Job Appeals Board, do not rely on judicial processes and their decisions are not based on legal rules of principles. When the Universal Declaration of Human Rights was adopted in December

[108] *de Merode,* above n 85, §23.
[109] *Convention on the Privileges and Immunities of the United Nations*, above n 53, art VIII, Section 29.
[110] C.F. Amerasinghe, 'And what about international civil servants? - UN Administrative Tribunal' (1998) *UN Chronicle*, 1 http://findarticles.com/p/articles/mi_m1309/is_4_35/ai_54823727 at June 13, 2008.

1948, the scope of section 29 came under questioning because Article 8 of the Declaration states:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."[111]

In 1949, The UN General Assembly responded to such inadequacy by establishing an administrative tribunal, UNAT, as an independent court with binding power within the organization.[112] The decision was recognized and approved by ICJ in *Effect of Awards of Compensation* case.[113] The Statute of UNAT was not part of the Staff Regulations and was not meant to be as an advisory organ or a subordinate branch of the Assembly, instead it was enacted as a distinct instrument by the General Assembly to be an independent and truly judicial body capable of making final judgments without appeal and based on a well-established and recognized principle of law in the field of employment relations. [114] The Tribunal is qualified to deal with any matter related to employment relations with present and past UN employees.[115]Amerasinghe confirmed that the judgment is *res judicata* and binding on both the individual complainant and the UN and must be carried out by it.[116] However, Article 10.1 of UNAT Statute implies that the final decision seems to rest not with the tribunal but with the Secretary General who

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[111] *Universal Declaration of Human Rights,* above n 96, art 8.
[112] Establishment of a United Nations Tribunal, GA/RES 351 A(IV) of 24 November 1949 http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/051/70/IMG/NR005170.pdf?OpenElement at June 13, 2008.
[113] *Effect of Awards of Compensation* case [1954] ICJ Reports 47 as cited in C.F. Amerasinghe (ed), '*Documents on International Administrative Tribunals'* (1989) Introduction.
[114] Amerasinghe, above n 110.
[115] *UNAT Statute* (last amendment was on the 13th of April, 2005 by resolution 59/283) art 2 http://untreaty.un.org/UNAT/Statute.htm at June 6, 2008
[116] Amerasinghe, above n 110.

"in the interests of the UN" will approve the final decision.[117] In recent years, the ICJ confirmed that there is no procedure for the enforcement of judgments of UNAT within the organization, to this Judge Amerasinghe replied that if organizations do not honor the tribunal judgments, a culture of mistrust instead of a full and undivided loyalty will be exercised by the staff, a situation the UN can not afford to have."[118] Because UNAT as with the other administrative tribunals such as WBAT, are perceived as international tribunals entrusted to administer justice in employment relations, members of the tribunal need to be real judges not "judges in practice". [119] The law applied is the internal law of the organization and the general principles of law that are derived from various sources mainly international law and the French administrative law system of the Civil law which also provides for equality before the law, essential individual liberties, and the judicial review principles.[120] Since its inception, the Statute has been amended several times, however, Article 10.1 still stands. [121] It is important to note here that the jurisprudence developed by UNAT or any other Tribunal is a prime source for the general principles of international administrative law. This means that one administrative tribunal is not bound to follow the same approach as taken by another tribunal let alone the final decision of another tribunal.[122]

"Susana Mendaro, a citizen of Argentina, was hired by the World Bank in 1977, and took up work as a researcher in Washington, D.C. She became part of a workforce of

[117] *UNAT Statute*, above n 115, art 10.1.
[118] Amerasinghe, above n 110, 3.
[119] Ibid.
[120] Ibid, 3; and check Patterson, above n 92, 5.
[121] *UNAT Statute,* above n 115
[122] Patterson, above n 92, 6.

some 6,000, overwhelmingly based in Washington but recruited internationally so as to reflect the wide range of member nations, then 140 in number. Soon after her appointment, Ms. Mendaro fell victim - so she believed - to a pattern of gender discrimination and harassment by her supervisors and fellow workers: fewer assignments than her male counterparts, obstruction in her work, unwanted verbal and physical advances, denial of a promotion, disinclination to investigate her grievances when she raised them, and ultimately unwarranted termination of employment in 1979. She commenced a lawsuit in federal court against the World Bank for violation of the U.S. statute that forbids workplace discrimination and harassment based on gender - known as Title VII of the 1964 Civil Rights Act - but her case was summarily dismissed, without her being given an opportunity to present any proof of the Bank's wrongdoing." [123]

Based on this case, *Mendaro v World Bank*, Robert Gorman, Judge and former President of WBAT, described the potential internal environment of the World Bank as " literally a lawless environment, in which it [the World Bank] is free to treat its employees without fear of statutory or contractual liability, or even of liability in tort."[124] Gorman went on to add that the recognition of such a legal vacuum in the internal organization structure lead to the establishment in 1980 of an international employment arbitration court to which employees of an international organization may take their grievances that arise within the workplace, for a final determination that is binding on the organization. The World Bank President Robert McNamara wanting "to bring the rule of law to the Bank's internal operations, to regulate the behavior of management so as to assure fair treatment of staff members, and as a result to enhance the morale of the staff and to make the Bank

[123] *Mendaro v World Bank,* above n 56.
[124] Gorman, above n 79, 2.

a desirable and efficient place to work" established voluntarily the WBAT.[125] Other underlying reasons for the establishment of WBAT was the different nature and object of the World Bank as a financial institution carrying out its purposes through financial activities rather than through consultation or policy recommendation and wanting to be independent from political organizations such as the UN.[126] Similar to the Statute of UNAT, WBAT empowers the tribunal to "hear and pass judgment upon any application by which an individual member of the staff alleges non-ob non-observance of the contract of employment or terms of appointment of such staff member."[127] The "contract of employment" and "terms of appointment" are though defined under Article II (1) of the Statute to "include all pertinent regulations and rules in force at the time of alleged non-observance."[128] Under Article II (2), The Statute imposed two jurisdictional prerequisites; the exhaustion of internal remedies that allow the aggrieved staff member or her representative to present their case first to the Appeals Committee and if the staff member remains unsatisfied, she has 120 days post the final management decision to submit the application before the tribunal.[129] Under Article II (3), the Statute calls for an enforcement of an individual contract between the Bank and its individual employee, implying no allowance for a collective bargaining representation by a union or association on behalf of the employee and the governing staff rules are usually solely of

[125] Ibid.
[126] Amerasinghe (ed), '*Documents on International Administrative Tribunals'* (1989).
[127] *World Bank Administrative Tribunal Statute* (1980), art II http://wbln0018.worldbank.org/crn/wbt/wbtwebsite.nsf/(resultsweb)/Statute+&+Rules?opendocument at June 13, 2008.
[128] Ibid, art II (i).
[129] Ibid, art II (ii).

the unilateral making of the Bank i.e. not formulated in consultation with the staff representative.[130]

As for the CGIAR and its 15 international organizations, under paragraph 103, the Charter recognizes the independence of each organization in the matters of staff management. The Staff Rules and Regulations of each organization has its own internal Grievance or Appeal Committee to settle employment disputes and details of the procedure remains within the Human resource office of the organization.[131] Dispute resolution proceeds hierarchically by meetings with the supervisor first then with the other branches of the executive management team with no reference to a right of access to court or independent evaluation by external reviewers.[132] None of the15 international organizations of the CGIAR has its own separate administrative tribunal but as we have seen in the previous section, individual organizations may subscribe to the ILO administrative tribunal.[133]

V. Discretion of power and the permissive rise of alternative forms of discrimination

Over the years, the three organizations have indeed grown in many ways. From a few hundred employees, the UN has 14,000 this year,[134] the World Bank also started with a

[130] Gorman, above n 79, 3.
[131] *Staff Rules and Regulations* (IITA, November 2004) 23 http://intranet.iita.org/resources/IRS%20policy%20manual.pdf at June 6, 2008.
[132] Ibid.
[133] Drago, above n 69.
[134] United Nations, https://jobs.un.org/elearn/production/home.html at June 13, 2008.

few hundred in 1940 and now there are 10,000 employees[135], and in the CGIAR, there are almost 8000 scientists and staff[136] after a modest start of also a few hundred. The hierarchical bureaucracy persisted or even initiated if it was lacking, the workplace expanded with potential news comers, implicit contracts for long term job security flagged, modified, or terminated and most importantly, a legitimacy of freedom from national court was maintained to senior executives at the organizations due to the granted privileges.

Amerasinghe argues "the immunity from jurisdiction relates only to the absence of a judicial system for deciding disputes arising from such relationship and does not necessarily mean that the relationships are outside the pale of law".[137] In his opinion it is, "the special position of the international civil servant within international society that makes it important that he have some independent system of law to protect him". In this section, I seek to show that it is the special position of the centered discretionary power of executives (mainly men) that limits opportunities in the workplace and enable subtle and new forms of discrimination.

A. *The UN experience: inequalities "in action"*

In 2004, a series of events shook the UN. In the words of the retired head of legal services in the UN, François Loriot, "never in its history has the credibility and relevance of the UN been so heavily damaged by a series of corruption, mismanagement and sexual

[135] World Bank, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20101240~menuPK:1697052~pagePK:51123644~piPK:329829~theSitePK:29708,00.html at June 13, 2008.
[136] CGIAR, http://www.cgiar.org/who/index.html at June 13, 2008.
[137] Amerasinghe, above n 11, 278.

harassment scandals, reaching the highest levels of authority".[138] An independent survey carried out throughout the UN system revealed that the staff had no trust in the senior UN officials, the UN staff unions protested the lack of compliance by the senior management with its own *Nine Global Compact Principles*, and in 2005, an independent investigation the oil-for Food-Programme uncovered "major procurement irregularities, gross negligence in contract administration and misconduct by top UN officials.[139]

Loriot's report reveals an important organization practice in the UN; "law and accountability of enforcement at the UN is almost nil, being applied mostly at the lower levels, and rarely at higher levels".[140] Such an acknowledgment indicates that not only a discriminatory bias exists between the staff members in the UN, but also by adopting impunity as a policy tool, the bias is perceived and/or accepted as a legitimate practice of the organization. Loriot offers a pyramid structure to the class-based inequality present in the organization; the higher you are in the rank, the more discretion you possess, and if or when there is a threat, an action can be ordered internally on the subordinates, which may take 4-5 years in the UN, enough time "to turn around the situation, manipulate the evidence and get off the hook".[141]

The report also provides evidence on the many ways class inequality can enable the perpetuity of discriminatory biases and even control compliance by lower rank staff

[138] François Loriot, 'Accountability at the United Nations-in Need of a Genuine External Enforcement Body', 66, Chapter 3; in Chris de Cooker (ed) ' *Accountability, Investigation and Due Process in International Organizations*' (2006).
[139] Ibid.
[140] Ibid, 67.
[141] Ibid, 68.

members in the organization. In *Levy*, UNAT found Mr. levy guilty for falsifying documents and he was dismissed by UNDP although none of his supervisors were approached then or now.[142] During the proceedings, Mr. Levy raised an interesting argument about 1) the presumed legality of the instructions received from supervisors and the "scapegoats" concept and 2) the hostile workplace environment that prevents people from expressing reservations or from reporting supervisors' improper acts so that control and compliance are ensured by the organization.[143]

The substantive harm to the individual, financial and emotional, caused by "discretionary power" of the senior management was even documented in Mr. Bangoura's case. In January 1997, a Washington Post's article reported that Mr. Bangoura, a staff member fighting drug traffic operations in Africa, embezzled UN funds and committed sexual harassment towards a female colleague in Africa.[144] Within 4 days, the secretary General issued a statement to the Press indicating that such a misconduct will not be tolerated and the employee will be severed from service and so in April 1997, Mr. Bangoura filed an appeal before the Joint Appeals Board claiming his innocence. [145] In July 1998, the Board recognized the improper use of discretion, the arbitrary decisions, and the denial of due process for the Appellant by the office of the Secretary General and submitted its recommendations stating so to the Secretary General Office, however, it took another 7 months (February 1999) for the Secretary General decided on the Board's report by

[142] *Levy* [2002] UNAT Judgment No. 1034.
[143] Loriot, above n 138, 70
[144] Ibid, 71.
[145] Ibid, 72.

rejecting a public apology to Mr. Bangoura and compensating him only for $20,000.[146] By that time, Mr. Bangoura was not only without a job for almost two years, he was a refugee, and with a ruined reputation. By late February 1999, he filed an appeal before UNAT and eventually after almost 5 years from 1997 event, he was granted judgment; the Tribunal endorsed the Appeal Board findings of a major breach of due process by the administration and a violation of the rule of presumption of innocence.[147] Although the Tribunal awarded him 2-year-base salary (the maximum under tribunal Statute), Mr. Bangoura has incurred a loss of employment for 5 years and a psychic burden for the rest of his life.

B. *The World Bank experience*

The original design of the World Bank is fascinating and revealing. Not only that all Bank Presidents to date have been white male and US citizens, they also have held the ultimate power in employment relations.[148] Internally, the Bank runs as a cooperative owned by 185 countries with each represented at the Board of Governors that meets annually to oversee the operations of the Bank.[149] However, for the day-to-day operations, the Board delegates its function to the 24 Executive Directors who sit on the Executive Board, meet twice a week to run the affairs of the Bank.[150] Each Executive Director represents either a single country, as discussed earlier, such as the case for France, Germany, Japan, the United Kingdom, and the United States, or a group of countries, such as the case for the rest of the countries (for example, the Ethiopian

[146] Ibid.
[147] Ibid.
[148] World Bank, above n135.
[149] Ibid.
[150] Ibid.

Executive Director represents 21 countries).[151] Such a disparate treatment on country representation impacts every aspect of the internal affairs of the Bank which includes making decisions regarding lending, approving loans and guarantees, setting new policies and developing administrative budget, and most importantly, selecting and potentially dismissing the World Bank President. [152] Besides this class-based bias, the voting power in the Bank is weighted and based on a country's quota.[153] Under the current quota formula, each member has a base of 250 votes, to which depending on the size of their economies, additional votes can be received. [154] For example, as of December 2007, The USA has 16.38% of the votes while Ethiopia has 0.08%.[155] The visibility of the inequality in the foundation structure is striking and applied even at the level of amending the Articles of Agreements. For any amendment to take place, 85% majority to the total voting power is required. [156] With the USA holding the highest voting power, the answer becomes clear who is indeed holding the business helm of the organization and how disparate treatment is legitimized within the Bank internal affairs.

As for the selection of the president, who is in charge of the management and the staff,

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[151] World Bank, http://siteresources.worldbank.org/BODINT/Resources/b-eds.pdf at June 6, 2008.
[152] Kristina Kaluza & Mari Kaluza, 'Governance and Accountability of the World Bank', 3 in The University of Iowa Center for International Finance and Development, '*Governance and Accountability in International Finance: The Bretton Woods Institutions and Regional Development Banks*' (2008) http://www.uiowa.edu/ifdebook/issues/accountability/accountability.shtml at June 13, 2008.
[153] World Bank, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:20124831~isCURL:Y~menuPK:64020035~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html at June 7, 2008.
[154] Kristina Kaluza, above n 152.
[155] World Bank, above n 153.
[156] Kristina Kaluza, above n 5.

there is no formal selection procedure. Based on Section 5 (a) of the Bank's Articles of Agreement, the Executive Directors have the authority to select the president and by tradition, all the World Bank Presidents have been United States nationals, I guess as the largest shareholder, the United States, nominates the President who is then elected for a 5 year renewable term by The Board of Governors.[157] In a recent report by the Government Accountability Project (GAP), the office of the president and its established Department of Institutional Integrity (INT) were implied and evidence presented for breaching established due process procedures and confidentiality, conflicting imperatives, and biases towards US nationals for higher ranking positions and remuneration of the INT staff.[158] Similar to what we have seen in the UN, the misconduct is associated with the top level of the executive branch. While Robert Gorman and other colleagues at WBAT were developing the principles of "*détournement de pouvoir*" and "due process" in the organization administrative law[159], the senior officials were exploring the limits of their discretionary power privileges.

C. *The CGIAR: Old traditional hierarchy*

The class power of the CGIAR is mainly derived from the fact that it is a US-based enterprise and although, it does not have a legal personality, the World Bank's sponsorship and provision of the chairmanship give the Group an international legitimacy.[160] Until recently, CGIAR had no Charter or constitution, by-laws, or written

[157] *IBRD Article of Agreements*, above n 32, Section 5 (a).
[158] Government Accountability Project, Washington D.C. , *Review of the Department on Institution Integrity at the World Bank* (2007).
[159] Hassen, above n 76, 33 and 66.
[160] Farrar, above n 49, 5.

rules of procedures and relied on informal procedural guidelines,[161] and as they say, the old boys' network to achieve its mission. The Bank has been the largest donor in the system and it contributes to its management and research programs of its individual centers.[162] The internal structure of the system remains fragile due to 1) a funding situation that is ad hoc (voluntary donations not entitlements)[163] and restrictive (donors tie their funding to their own research, personnel, or institution), 2) a consensus decision-making (or no decision-making because of the wide constituency of member States, private sectors, and NGOs) that leaves the Chairman, or this year, the Chairwoman, the World Bank vice-president, with the ultimate responsibility to "declare and articulate" that consensus position, 3) the fragmentation of and competition among the 15 centers for resources, and 4) its perceived political bias.[164] The fragility of the system structure impacts employment relations in individual centers at various levels. Due to the restricted and project-based funding, individual centers undergo various hiring and retrenchment cycles at all levels but substantively at the base level employees, short-term instead of long-term contracts are the norm, and to ensure continuity and flexibility of research programs, substantive resources remain consolidated under the discretion of the senior managers of individual centers.

As noted above, individual centers are autonomous, possess a legal personality based on

[161] Anderson, Jock R. & Dana G. Dalrymple, *The World Bank, the Grant Program, and the CGIAR: A Retrospective Review* (Washington, D.C., World Bank Operations Evaluation Department OED working paper series No 1, March 1999), 3.
[162] Ibid.
[163] Ibid, 62.
[164] Ibid, 4; and Independent Evaluation Group, 'The CGIAR at 31: Celebrating Its Achievements, Facing Its Challenges' (2003) Précis; in World Bank Document, '*The CGIAR at 31: An Independent Meta-Evaluation of the Consultative Group on International Agricultural Research*' (2004) http://www.worldbank.org/ieg/cgiar/ at June 13, 2008.

their functions and purposes, and are self-governed by a board of trustees.[165] Out of the 15 centers, 11 are located in developing countries wherein strong class, gender, and race powers intersect due to structural differences in employment relationships between internationally and nationally recruited staff. Whereas rules and policies for nationally and internationally recruited staff may vary between individual centers, employment relations with nationally recruited staff are generally covered by national employment laws or as agreed upon in individual treaties signed between the center and the hosting state.[166] The rights and obligations of the staff are subject to the specific terms of the treaties. Such agreements may also guarantee that the governance of the employment relations with internationally recruited staff is solely the responsibility of the organization and its internal laws due to the accorded immunities and privileges of international organizations.[167] None of the individual centers has its own administrative tribunal to settle employment disputes with their staff. In the lack of any subscription to other administrative tribunals, rights to fair treatment and due process through an independent and impartial judicial review are not guaranteed. Considering the stressful dynamics of such a workplace, the constant movement of senior executives between states, the pressure to deliver, the ambition and prejudices of senior managers, and their privileges with the "discretionary power", arbitrary procedures and hasty decisions are not uncommon and discriminatory biases, intentional or unintentional, are more often encountered among internal groups and between groups.[168] Under the current system, the

[165] World Bank, above n 36; Anderson, above n161, 4.
[166] *Agreement between Colombia and International Center for Tropical Agriculture* , above n 82.
[167] Ibid.
[168] Gelaye Debebe & The Center for Gender in Organizations, 'Inspiring Transformation… Lessons from the CGIAR Women's Leadership Series' (Working paper 47, 2007) http://www.genderdiversity.cgiar.org/publications/WorkingPaper47.pdf at June 13, 2008.

only available remedy for employment disputes for internationally recruited staff at the centers is through an internal Appeals Committee.[169] Staff rules and regulations guarantee the right of the staff to bring their grievances to the committee but the rules are silent on the procedural guarantees for fair treatment. As Amerasinghe pointed out earlier, the Appeals Committee does not rely on judicial processes and the decisions taken are not based on legal rules of principles.[170] The international staff is at the mercy of the leader of the day!

National recruited staff account for 85% of the workforce (6,800) with a wide range of employment categories, covering mainly the basic managerial and technical services needed for the day-to-day operation of the organization.[171] Until recently, almost all internationally recruited staff hold higher positions than nationally recruited staff and are better paid due to their international status and granted privileges and immunity. Beside the highly visible and strained class bias between the two categories of staff members, gender, as a social construction,[172] is very salient in these organizations. Because of the gender performative character and its parallelism to the performative and discursive nature of race as well, individuals act according to certain prescribed notions of what it

[169] IITA, 'Personnel Policy Manual for Internationally Recruited Staff' (November 2004) http://www.googlesyndicatedsearch.com/u/IITAsite?q=Staff+rules+and+regulations+IITA&Submit=++Site++&search=&btnG=&site=&client=&proxystylesheet=&output=&domains=iita.org&sitesearch=iita.org&sa=Google+Search at June 13, 2008.
[170] Amerasinghe, above n 11.
[171] CGIAR Review of Total Compensation, *Summary of Results for Phase 3 - Review of Total Structures for Nationally Recruited Staff* (2003), 2 http://www.cgiar.org/who/structure/executive/exco9/PDF/exco9_comp_study_phase3.pdf at June 13, 2008.
[172] Joan Acker, 'Inequality Regimes: Gender, Class, and Race in Organizations' (2006) *Gender & Society* 441 http://gas.sagepub.com/cgi/content/abstract/20/4/441 at June 13, 2008.

means to be a "man" or a "woman" reflecting norms of behavior of the outside society.[173] Similar to the stereotypes and inflexible racial labeling with a maintained white supremacy, rules of conduct, implicit and explicit, and other enforcement organizational mechanisms regulate gender performance and ensure conformity with mainstream norms.[174] Indeed, 73% of the staff members in the CGIAR are male and all key senior positions are still male-dominated whereas women's positions dominate the secretarial, the administrative, and scientific support services.[175] Half of the internationally recruited women in senior positions leave the institute within 3-5 years of their employment[176] and the latest figure on women's participation in the Center management is only 9% despite an almost 18 years of coaching efforts by the CGIAR Gender and Diversity program to bring about some gender diversity into the system[177]and even with a closer look on the 9% figure, Women's role is more of support rather real decision making. [178] Taken together, the class relations along with gendered and sexualized assumptions not only shape the selection of executives in the individual centers but also supervisory practices, wage-setting processes in the workplace, and its routine day-to-day operations.[179] Discriminatory biases are legitimate for the purposes and functions of these

[173] Johanna Bond, 'International Intersectionality: A Theoretical And Pragmatic Exploration Of Women's International Human Rights Violations' (2003) 52 *Emory Law Journal* 71, 98.
[174] Ibid.
[175] Gayathri Jayasinghe & Bob Moore, 'First *the* good news…Staffing In The CGIAR 2003' (Working Paper 40, 2003) http://www.genderdiversity.cgiar.org/resource/default.asp at June 13, 2008.
[176] Eva Rathgeber, 'Female and Male CGIAR Scientists in Comparative Perspective' (Working Paper 37, 2002) http://www.genderdiversity.cgiar.org/publications/genderdiversity_WP37.pdf at June 13, 2008.
[177] http://www.genderdiversity.cgiar.org/ at June 13, 2008.
[178] Jayasinghe, above n 175, section 5.5; and check Allen, below n 179.
[179] Nancy Allen, 'Executive Selection in the CGIAR: Implications For Gender And Diversity' (Working paper 30, 2001) http://www.genderdiversity.cgiar.org/publications/genderdiversity_WP30.pdf at June 13, 2008.

organizations.

VI. A way forward

In this contribution, I examined three variants of an international workplace and their complex dynamics of employment relations with their own staff. In all three organizations, the relationship between an individual and the organization extends beyond just a contractual agreement between two equal parties (private contract law) to a relationship that is dependent on written and unwritten sources of law within the specific boundaries of the internal structure of the one of the parties, the employer. This *de facto* inequality of bargaining power for the employee with the employer is compounded by a granted immunity from jurisdiction of national courts to these organizations. In other words, legally, some of the most important employment rights, the right for a fair hearing, independent and impartial judicial review, and "due process" are denied and until recently, most world's national courts regularly invoked immunity in employment disputes. However, as discussed above, some of European courts have begun to limit such immunities under national laws. The *Siedler v Western European Union* Case[180] is worth revisiting since the Court not only waived the immunity for the international organization, but established a precedent for the need of international organizations to have alternative dispute settlement mechanisms that guarantee the real and effective not theoretical and illusive rights of employees, as articulated under Article 6 of the European

[180] *Siedler v Western European Union,* above n 63.

Convention on Human Rights and Fundamental Freedoms.[181] The Court stated "Those guarantees relate to the right of access to an independent and impartial tribunal, established by law, the right for the case to be heard fairly (which implies, *inter alia*, the equality of arms, an adversarial system, a statement of reasons on which decisions are based, and the right to appear in person), the public nature of the proceedings and of the decisions, and a reasonable period of time for the rendering of decisions."[182] Legal scholars such as August Reinisch and others are optimistic that more national courts will be investigating the availability and adequacy of alternative dispute settlement mechanisms. Reinisch reported that some courts are even denying immunity if international organizations do not have an administrative tribunal or the level of protection provided by the organization is inadequate.[183] I guess, cautious is due here because of the more challenging situations with organizations, such as the international centers of the CGIAR that do not have their own administrative tribunals and wherein the majority of the centers are located in developing countries where the courts are just developing. Staff rules and regulations, which are accessible from some of these centers, are silent on the procedural guarantees for the right of a fair hearing or "due process", the scope and nature of the Appeals committee, the public transparency in committee decisions, and on whether the employee has a right even to an administrative tribunal.[184]

On the other hand, with the UN and the World Bank, having their own judicial courts or administrative tribunals to provide remedies for employment disputes in their perspective

[181] *European Convention on Human Rights and Fundamental Freedoms,* art 6 http://www.pfc.org.uk/node/328 at June 11, 2008.
[182] *Siedler v Western European Union*, above n 63, 10.
[183] Reinisch, above n 60.
[184] IITA, above n 169.

organizations, only a contract of employment is enforced between an individual and the organization thus, the right of employee to collective bargaining is not applicable before the tribunals in these two organizations. It is important to remember that there is not a single employment law for international organizations. In *de Merode,* the tribunal discussed whether the Bank's "conditions of employment" incorporate those conditions defined by other tribunals to be "common to all international organizations" and which can then become a "common *corpus juris* shared by all international officials", however it refrained from adopting such a *corpus* of international administrative law, and concluded that the tribunal is restricted to decide its cases within the organized internal legal system of the World Bank.[185] Through specific judgments by the administrative tribunals, nevertheless, general principles such as the principle of equality and the right to equal treatment became incorporated across the various tribunals.[186] Considering the fact that the tribunals are not bound by each other's precedents, the judgments in sensitive employment issues such as discrimination, differ and the claims remain lacking consistency and uniformity in usage, two important elements to be accepted as law. [187]

The current practices in the UN and World Bank, as documented by François Loriot and the GAP project, indicate a major deficit in compliance with principles of "due process" and fair treatment by the senior executive branch of the organization, a lack in accountability or transparency before even the administrative tribunals, and a disparate impact liability on the staff members. While the intent of the founders of administrative tribunals may not have been to create a skewed judicial court, I argue that the current

[185] *De Merode*, above n 85.
[186] Patterson, above n 92, 24 and other cases discussed.
[187] Ibid.

structure of the tribunals or as a matter of fact, the structure of the organization is permissive to or does not account for the new forms of abuses for the discretion power by senior managers. Indeed, there are heated debates on whether these tribunals actually meet the standards of an independent and impartial judicial review due to the lack of total independence from the executive branch of the organization, their restrictive jurisdiction to the internal laws of the organization, the nature, qualifications, and duration of judges tenure, as well as in some tribunals, the lack of enforcement procedures on the organization part (UNAT).[188] Such debates enforce the sayings of Carothers that affecting the rule of law in a place is a complex task, mainly because of the uncertainty of whether rule-of-law providers should focus on organization building or instead attempt intervening in ways that would affect how individuals understand, use, and value law. In employment law context in the IOs, Amerasinghe insisted that focusing on the judicial gap in IOs can be misleading, the main issue, in his opinion, is whether the specific position of the international employee can be guaranteed rights by an independent and impartial law to achieve workplace equality and he proposed the development of new independent law.[189] Considering the reality and extent of the perpetuated inequality regimes and their established legitimacy in the various international contexts, I hold a pessimistic view.

Joan Acker, a sociologist with an expansive experience in organization workplace dynamics, confirms that all organizations embed, at varying levels, inequality regimes, defined as "loosely interrelated practices, processes, actions, and meanings that result in

[188] For various opinions, check http:/www.ilo.org/public/English/staffun/info/iloat/ at June 11, 2008.
[189] Carothers, above n 1, 8.

and maintain class, gender, and racial inequalities within particular organizations."[190] However, by examining the practical day-to-day work of the organization and the interplays in decision-making processes, realistic and complex inequality regimes, which enable the perpetuity of discriminatory biases in an organization, become identifiable and a potential target for change. In addition, looking at the pattern of changes within the organization and the oppositions it encountered can be as powerful for our understanding to affect change.[191] In this contribution, all three organizations embedded a strong class inequality with a male supremacy and complex race-based inequality regimes, especially in the international centers of the CGIAR. The salient class inequality was visible at various levels of the hierarchy, intersectioned with strong gendered and racial assumptions, and was modulated by a centered tightly knit decision-making power. In the international CGIAR centers, the disproportionate impact of such inequality regimes on women's employment is more alarming and can be deduced from 1) the low participation number of women in senior positions (9%), 2) the high percentage of women's departures (>25%) within a few years of employment, 3) the consolidated decision-making power by the top few male managers, 4) the self-governed structure that lacks public transparency and accountability and 5) the lack of any judicial review for employment cases or procedural guarantees to internal hearings, the right to fair treatment remains contingent on the leader of the day. When women venture into such a traditional male-dominated positions, within a few years, a large majority seem to leave voluntary and the few stubborn ones who try to resist, are eased out by careful planning, established paper trail for their incompetence, and 'fair' treatment dismissal

[190] Acker, above n172, 443.
[191] Ibid.

procedures.[192] The male domination of that workplace can then be reinforced and the traditional gender segregation is reassured for more years to come.

Based on several years of staff surveys in these organizations and the consistent low participation of women in senior positions, questions were raised regarding the reasons for such a failure by the CGIAR centers and their policies to attract the best of women.[193] I can only echo what Margaret Thornton said about the Australian legislation on sex discrimination: "the commitment to equality is lukewarm, the ambit of operation is narrow, its procedures tortuous, and its exceptions legion"[194] as well as many of the justified reluctance of women to come forward and describe their discriminatory experiences or disparate treatments. However, due to the substantial psychic and practical barriers in such rigid workplaces, such reluctance is justifiable. To complain formally means being exposed as "the victim," a humiliating and disempowering position as that enduring the harassment itself, sometimes more so, particularly for senior women.[195] Discriminatory harassment such as sexual harassment and other forms of discrimination in the international workplace is still perceived as individual pathological behavior based on a sexual content in the workplace, rather than about sexism. The double *de facto* inequality position of women allow for many forms of sex-based discrimination in these organizations. Women can face harassment from supervisors because they are not sufficiently docile and compliant or bullied because they are too vulnerable. The harassment could be a simple interpersonal hostility, a"ganging up" on a

[192] Rathgeber, above n 176; Jayasinghe, above n 175.
[193] Ibid.
[194] Margaret Thornton, 'Feminism And The Changing State The Case Of Sex Discrimination' (2006) 21(50) *Australian Feminist Studies* 151, 156.
[195] Ibid, and Thornton as cited in Parkes, below 196, reference124.

co-worker, or an emotional abuse. The subtlety of these actions is part of the normal day-to day operations of the workplace and it is very difficult to challenge them legally.[196]

Tristin Green offers a hope, a way forward, and a legal framework, based on a structural approach, to address discrimination. Using a structural approach, which identifies the moderation of discriminatory bias in workplace decision-making, as a form of discrimination, would establish a norm or a legal obligation on the employer not to facilitate discriminatory decision-making in the workplace.[197] She builds on the established civil right laws and argues that "employer facilitation of discriminatory bias in workplace decision-making violates the longstanding norm against different treatment in employment on the basis of protected characteristics, and thus inflicts a moral wrong on individuals in the employment relationship, regardless of whether the employer or the decision maker acts with *animus* or intent to harm."[198] Using a structural approach eliminates the labeling and branding of the discrimination actors and focuses more on the acts of discrimination in a contextual structure based on the differential impact liability.

Employers, simply engage in wrongful discrimination through organizational decisions that concern "workplace policies, operations, culture, decision-making systems", all the bits of a structure that shape our perceptions and prejudices.[199] With this approach, one hopes that even the most traditional organizations would be comfortable enacting policies

[196] Debra Parkes, 'Introduction To The Symposium On Workplace Bullying: Targeting Workplace Harassment In Quebec: On Exporting A New Legislative Agenda' (2004) 8 *Employee Rights and Employment Policy Journal* 423.
[197] Green, above n 2, 852.
[198] Green, above n 2, 883.
[199] Green, above n 2, 854.

to hold employers wrong acts for structural discrimination and the activists may cherish a small step forward on social equality.