

## ABSTRACT

*This Article examines the law applied by the administrative tribunals of international organizations when resolving disputes between international organizations and international civil servants. The analysis suggests that international administrative tribunals primarily rely on employment contracts and internal law of international organizations while only rarely referencing international law. This Article argues that international administrative tribunals should specifically define in their relevant statutes the sources of law applicable to international administrative disputes and that they should distinguish such sources from non-legal norms. The Article further notes the modern trend of international administrative tribunals of giving more weight to general principles of law. It ultimately argues that these tribunals should establish the supremacy of international law, particularly fundamental principles of international labor law, over the internal law of international organizations. The establishment of such a hierarchy will make international administrative law more legitimate, coherent, and predictable.*

## I. INTRODUCTION

When the International Court of Justice (ICJ) Statute was drafted, the majority of States considered it impossible to compel States to submit their disputes to a court of law without specifying the applicable law. According to the U.S. member of the drafting committee, “[I]t [was] inconceivable that a [g]overnment would agree to allow itself to be arraigned before a court which bases its sentences on its subjective conceptions of the principles of jus-

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\* Associate Professor, University of West London. LL.M. 2007, Harvard University; Ph.D. 2006, Moscow State Law Academy; Joint M.A. 2003, University of Utrecht and University of Nottingham; LL.B. 2002, St. Petersburg State University. Professor Kryvoi is the Immediate Past Co-Chair of the ABA Committee on International Courts and Tribunals. For several years, Professor Kryvoi practiced international dispute resolution with Morgan Lewis & Bockius LLP in Washington, D.C. and Freshfields Bruckhaus Deringer LLP in London. He also served as a consultant for the Economic Court of the Commonwealth of Independent States advising on issues of international administrative law. Professor Kryvoi's full curriculum vitae is available at <http://kryvoi.net>. The author wishes to thank professors Anne Peters, Spyridon Flogaitis, Ernst-Ulrich Petersmann, Judge Stephen Williams as well as Peter Quayle and Anna Petrig for their comments on earlier drafts of this Article.

tice.”<sup>1</sup> As a result, Article 38 of the ICJ Statute lists the applicable sources of international law.<sup>2</sup> Yet, statutes of most international administrative tribunals remain silent on the applicable law<sup>3</sup> when resolving employment disputes between international civil servants and international organizations.<sup>4</sup> For example, founding documents of many international organizations do not even explicitly mandate that the organizations respect human rights.<sup>5</sup>

International civil servants are hired, employed, trained, and fired not in accordance with national labor laws but in accordance with specially devised legal rules that apply only within a particular organization.<sup>6</sup> The number of people working in an international organization may rival the number of people living in some small States,<sup>7</sup> and therefore rules regulating international civil servants’ employment are not just a theoretical matter. Although international organizations’ tasks originally included only the preparation of documents for political meetings, they now engage in a range of varied activities—from the harmonization of law and the standardi-

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1. ADVISORY COMM. OF JURISTS FOR THE EST. OF A PERMANENT COURT OF INT’L JUSTICE, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE, JUNE 16TH–JULY 24TH 1920, at 309 (The Lawbook Exchange, Ltd. 2006) (1920).

2. Article 38(1) of the Statute of the International Court of Justice (ICJ) provides that the sources of applicable law include international conventions, international custom, general principles of law, as well as the judicial decisions and teachings of the most highly qualified publicist as subsidiary sources for the determination of the rules of law. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1 U.N.T.S. 993 [hereinafter ICJ Statute].

3. See I C.F. AMERASINGHE, *THE LAW OF THE INTERNATIONAL CIVIL SERVICE* 103–04 (2d ed. 1994).

4. “International organization” for purposes of this Article means an organization established by a treaty or other instrument governed by international law and which possesses its own international legal personality. Report of the International Law Commission, 61st Session (4 May–5 June and 6 July–7 August 2009), Draft Articles on the Responsibility of International Organizations art. 2, U.N. GAOR, 64th Sess., Supp. No. 10, U.N. Doc. A/64/10, at 19 (Sept. 25, 2009).

5. See Anne Peters, *The Constitutionalisation of International Organisations*, in *EUROPE’S CONSTITUTIONAL MOSAIC* 253, 267 (Neil Walker et al. eds., 2011).

6. See *infra* Part IV.

7. The U.N. International Civil Service Commission developed a common system of salaries, allowances, and benefits that applies to approximately one hundred thousand staff members serving at over 650 locations around the world. See UNITED NATIONS INT’L CIVIL SERV. COMM’N, *UNITED NATIONS COMMON SYSTEM OF SALARIES, ALLOWANCES AND BENEFITS* vi (2012), available at <http://icsc.un.org/resources/pdfs/sal/sabeng12.pdf>. The World Bank has over nine thousand employees and maintains over one hundred offices across the globe. *FAQs—About the World Bank*, WORLD BANK, <http://tinyurl.com/5hel2> (last updated June 2012).

zation of technical rules to international peacekeeping missions and the temporary administration of sovereign territories.<sup>8</sup>

Disputes arising out of employment relations between international civil servants and international organizations require specially designated dispute resolution bodies, such as the International Labour Organisation (ILO) Administrative Tribunal,<sup>9</sup> the U.N. Dispute Tribunal,<sup>10</sup> and the World Bank Administrative Tribunal.<sup>11</sup> However, the statutes of these tribunals often do not contain provisions outlining the applicable law, even though such tribunals are completely detached from domestic legal systems. Rather, these tribunals usually base their analyses solely on the interpretation of employment contracts or applicable staff regulations.<sup>12</sup> Moreover, international administrative tribunals, including the ILO Administrative Tribunal, which has one of the highest caseloads of employment disputes between international organizations and international civil servants,<sup>13</sup> fail to explicitly recognize the applicability of fundamental ILO conventions to their decisions.<sup>14</sup> Unsurprisingly, scholars point to a low rate of decisions made by international administrative tribunals in favor of employees.<sup>15</sup> Most of these employment disputes are decided on

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8. See, e.g., S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (establishing the U.N. Interim Administration Mission in Kosovo (UNMIK)).

9. The International Labour Organisation (ILO) Administrative Tribunal is one of the oldest tribunals, functioning as a successor to the League of Nations Tribunal. The ILO Administrative Tribunal has decided over three thousand cases. In addition to having jurisdiction over disputes involving the ILO, the ILO Administrative Tribunal also has jurisdiction over disputes involving employees of other international organizations, such as the World Health Organization, the U.N. Educational, Scientific and Cultural Organization, and nearly sixty other organizations. See *Membership*, INT'L LAB. ORG., <http://www.ilo.org/tribunal/membership/lang—en/index.htm> (last visited Feb. 24, 2015).

10. The U.N. Dispute Tribunal evaluates complaints from the United Nations and the U.N. specialized agencies, such as the U.N. General Secretariat, the International Maritime Organisation, the International Civil Aviation Organisation, and nearly thirty other entities. In 2009, the U.N. Dispute Tribunal replaced the U.N. Administrative Tribunal, which had previously considered such employment disputes between 1949 and 2009. See *U.N. Dispute Tribunal Jurisdiction*, UNITED NATIONS, <http://www.un.org/en/oaj/dispute/jurisdiction.shtml> (last visited Nov. 24, 2014).

11. The World Bank, the International Monetary Fund, the European Bank for Reconstruction and Development, the Asian Development Bank, and several other organizations each maintains its own tribunal.

12. See Matthew Parish, *An Essay on the Accountability of International Organizations*, 7 INT'L ORGS. L. REV. 277, 285 nn.21, 23 (2010).

13. *Id.* at 287.

14. *Id.* at 287 n.31 (explaining that in 2009, none of the cases decided by the World Bank Administrative Tribunal provided applicants with a substantial award in accordance with the remedies sought).

15. *Id.* at 287.

the basis of written evidence, without discovery, and by judges without tenure who are usually appointed by the same organization against which an employee has filed a complaint.<sup>16</sup> Some scholars even refer to this system of administrative justice as “a fig leaf of justice, a woeful pretence of due process.”<sup>17</sup>

An illustrative example demonstrates the practical implications of this problem. Assume that the internal rules of an international organization provide that only male dependants can benefit from having their nondependent spouses travel on home leave at the organization's expense.<sup>18</sup> If a male employee brings a dispute to the administrative tribunal to cover the travel expenses of his female dependant, the tribunal will likely decide that the internal law of the organization should prevail over the general principle of nondiscrimination because the organization's rule is more specific. Such a ruling would clearly contradict the principle of gender nondiscrimination proclaimed in Article 8 of the U.N. Charter,<sup>19</sup> numerous human rights instruments,<sup>20</sup> and the ILO conventions and recommendations.<sup>21</sup> Yet, the international civil servant cannot challenge this judgment in the absence of an appeal procedure. In other words, a controversial internal regulation prevails over the internationally recognized principle of nondiscrimination.

This Article explains the need for a hierarchy of sources of law to avoid situations similar to the one described above. Specifically, this Article proposes a hierarchy between international law, including general principles of law, and the internal law of international organizations, in which international law prevails over conflicting provisions of an international organization's internal law. The

16. *Id.* at 288.

17. *Id.* at 290.

18. This example is based on the facts of the U.N. Administrative Tribunal's decision in *Mullan v. Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. 162, U.N. Doc. AT/DEC/162 (1972). The U.N. Administrative Tribunal refused to apply the general principle of nondiscrimination because a specific internal regulation permitted such discrimination.

19. U.N. Charter art. 8 (“The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.”).

20. *See, e.g.*, International Covenant on Civil and Political Rights pt. II, art. 3, Dec. 19, 1966, 999 U.N.T.S. 173; European Convention on Human Rights art. 14, Nov. 4 1950, 213 U.N.T.S. 222; American Convention on Human Rights art. 1, ¶ 1, Nov. 22, 1969, 9 I.L.S. 675.

21. *See, e.g.*, Convention Concerning Discrimination in Respect of Employment and Occupation pmbl., art. 1, June 25, 1958, 362 U.N.T.S. 32; *Discrimination (Employment and Occupation) Recommendation*, INT'L LABOUR ORG. (June 25, 1958), [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312444](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312444).

Article further argues that this proposed hierarchy will help to distinguish between legal and nonlegal rules that are applicable in international administrative proceedings and that it will help to limit administrative discretion—a primary goal of any administrative law.<sup>22</sup> A clear normative hierarchy will also enhance the clarity of the law, increase the coherence of principles and procedures, and establish the mechanisms needed to fill gaps in existing law.

In order to create such a hierarchy, this Article proposes that administrative tribunals amend their statutes or change their jurisprudence to establish a rule that principles of international administrative law—such as nondiscrimination, nonretroactivity, proportionality, legitimate expectations, and fundamental labor rights recognized by the ILO—should prevail over conflicting rules of internal law prescribed by international organizations.

Part II of this Article introduces the concept of international administrative law and explains how it differs from the traditional branches of international public law. Parts III and IV then analyze the regulations and jurisprudence of various international administrative tribunals to demonstrate which sources of law these bodies apply to dispute resolution proceedings. Next, Part V explains how the proposed hierarchy between international law and the internal law of international organizations will enhance legal certainty, equality of the parties, and overall legitimacy of international administrative law. Lastly, Part VI briefly concludes by describing how to transform the idea of normative hierarchy into practice.

## II. THE EVOLUTION OF INTERNATIONAL ADMINISTRATIVE LAW

International administrative law<sup>23</sup> initially developed following the creation of the League of Nations Administrative Tribunal in the 1920s.<sup>24</sup> This branch of international public law determines the rights and obligations of international civil servants in their dealings with public bodies, primarily intergovernmental organiza-

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22. See generally DANIEL J. GALLIGAN, *DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION* (1990) (analyzing the extent to which legal values and institutions can be and are used to constrain the exercise of administrative discretion).

23. International administrative law should not be confused with global administrative law. Global administrative law is a relatively new concept much wider in scope than international administrative law. It comprises “the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies” including rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 17 (2005).

24. AMERASINGHE, *supra* note 3, at 49–53.

tions.<sup>25</sup> International administrative law imposes restraints on the exercise of power by international organizations vis-à-vis international civil servants providing accountability and legitimacy for the exercise of public power.<sup>26</sup>

The structure, scope, and content of administrative regulations appear surprisingly similar from one organization to another. International administrative regulations typically provide for the right of international civil servants to appear before international administrative tribunals and extend these tribunals' jurisdiction over disputes involving alleged violations of employment contracts or terms of appointment.<sup>27</sup> In addition, most statutes of international administrative tribunals and their rules of procedure describe in detail the composition of the administrative tribunals and their obligation to act independently and impartially.<sup>28</sup> These statutes usually confer on the relevant body the power to render binding judgments.<sup>29</sup>

Although the phrase *international administrative law* is well established in academic literature, the phrase may be somewhat misleading. Unlike States, which usually benefit from restricted immunity, international organizations enjoy absolute immunity,<sup>30</sup> and international civil servants employed by international institutions are therefore generally precluded from filing complaints in national courts against their employer organizations.<sup>31</sup> As a result, procedures of administrative tribunals often resemble court proceedings involving employment law rather than traditional administrative reviews. Furthermore, an international organization can prevent

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25. *Id.*

26. Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework of for Global Governance Activities*, 9 GERMAN L.J. 1375, 1380 (2008).

27. See, e.g., Statute of the Administrative Tribunal of the International Labour Organization, adopted Oct. 9, 1946, reprinted in 1 DOCUMENTS ON INTERNATIONAL ADMINISTRATIVE TRIBUNALS 31 (C.F. Amerasinghe ed., 1989); European Bank for Reconstruction and Development, Administrative Tribunal Statute and Rules of Procedure, available at <http://www.ebrd.com/downloads/integrity/appeals.pdf>.

28. See Statute of the Administrative Tribunal of the International Labour Organization, *supra* note 27.

29. See *id.*

30. *Accountability of International Organisations for Human Rights Violations*, ¶¶ 28–39, at 9–13, Doc. No. 13370 (Dec. 17, 2013), available at <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=20310>.

31. See, e.g., Appellant v. European Bank for Reconstruction & Development, Case No. 2006/AT/04, Decision on Remedy and Judgement (European Bank for Reconstruction & Dev. Apr. 4, 2007).

another court from scrutinizing an international administrative tribunal decision by simply asserting immunity from jurisdiction.<sup>32</sup>

International administrative law bears a number of distinctive conceptual features compared to traditional branches of public international law, such as international labor law. Unlike international administrative law, the primary instruments of international labor law include international conventions and recommendations,<sup>33</sup> case law of ILO committees,<sup>34</sup> and fundamental principles contained in the Declaration on Fundamental Principles and Rights at Work.<sup>35</sup> However, each of these sources only regulates the conduct of States, and in order for international labor standards to bind private parties, States must actually implement such standards by means of domestic legislation.<sup>36</sup> Unlike international labor law, however, international administrative law does not have a basis in any domestic legal system and actually creates rights and obligations that directly bind private individuals and intergovernmental organizations.<sup>37</sup> In a sense then, international administrative law represents a completely autonomous form of international labor regulation as it does not require implementing domestic legislation.

International administrative law also differs from other international dispute resolution regimes, such as international human rights law and international investment law where individuals bring direct claims against subjects of public international law, such as States. Similar to international human rights law, international administrative law involves disputes between private actors and subjects of public international law. International administrative law also engages disputes, which arise out of an exercise of public authority by a subject of international law. However, unlike international human rights law, international administrative law does

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32. The purpose of the immunity from jurisdiction enjoyed by international organizations is to preserve the independence of international organizations and international civil servants and to protect them from any undue interference by the host State. Isabelle Pingel-Lenuzza & Emanuel Gaillard, *International Organisation and Immunity from Jurisdiction: To Restrict or to Bypass*, 51 INT'L & COMP. L.Q. 1, 1 (2002).

33. See Franz Christian Ebert & Claire La Hovary, *Labour Law, International*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 4, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e957?> (last updated Jan. 2013).

34. See, e.g., ILO, FREEDOM OF ASSOCIATION—DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO (4th rev. ed. 1996).

35. See ILO, *Declaration on Fundamental Principles and Rights at Work*, Int'l Labour Conference, 86th Sess., Geneva (June 1998).

36. MALCOLM SHAW, INTERNATIONAL LAW 129–39 (2008).

37. See, generally AMERASINGHE, *supra* note 3.

not directly intersect with domestic legal systems. The system of international human rights law, such as the European Convention of Human Rights, usually serves as a next step after exhausting all remedies in domestic litigation,<sup>38</sup> while intergovernmental organizations are typically immune entirely from jurisdiction in domestic courts.<sup>39</sup> As a result, if an individual sought to enforce the judgment of an international administrative tribunal in a national court, an international organization would likely respond by asserting an immunity defense.<sup>40</sup>

As many conceptual issues of international administrative law remain unaddressed, cross-regime comparisons with other fields, such as international investment law, international human rights law, or the emerging principles of European administrative law, could prove useful. One must understand, however, that international administrative law represents a unique self-contained system that must be distinguished from other international legal regimes.<sup>41</sup> A full understanding of this system requires a detailed examination of international administrative law, its sources, and its relationship with general international law.

### III. SOURCES OF INTERNATIONAL ADMINISTRATIVE LAW

#### A. *The Concept of Sources of Law*

In its 2004 report on the accountability of international organizations, the International Law Association recommended that international administrative tribunals refrain from adopting too restrictive an approach toward the sources of law at the tribunals' disposal.<sup>42</sup> Nevertheless, it appears that the opposite problem is

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38. SHAW, *supra* note 36, at 273.

39. *Id.*

40. In practice, international organizations almost always respect judgments of such tribunals. C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANISATIONS 793 (2005).

41. In a broader sense, self-contained regimes are inter-related wholes of primary and secondary rules that cover some particular problem differently from the way it would otherwise be covered under general law. Examples of other self-contained regimes include World Trade Organization law or the laws of diplomatic protection. *See generally* Rep. of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/L.682, at 65–69 (Apr. 13, 2006).

42. INT'L LAW ASS'N, BERLIN CONFERENCE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS, FINAL REPORT 48 (2004), available at <http://tinyurl.com/n6fk5pa>.



more serious, namely the lack of clarity on the applicable law governing decision making in international administrative law.<sup>43</sup>

According to the concept of sources of law, law is determined by its source and ultimately boils down to a pedigree test.<sup>44</sup> The very term *law* helps to avoid replacing usual binding norms with non-binding arrangements. The notion of *sources of law* presumes an exhaustive statement of the ways in which law can be established and changed.<sup>45</sup> The concept aims to ensure stability and certainty in the ascertainment of law.

Early positivists rooted the source theory in authority.<sup>46</sup> According to this construction, in order to ascertain a rule of law, one had to identify the authority of the legal norm's origin.<sup>47</sup> Later positivists believed that legal rules derived from social conventions rather than authority.<sup>48</sup> Yet, other schools of thought argued for the process-based identification of law, emphasizing the role of sociopolitical factors in blurring the distinction between law and nonlaw.<sup>49</sup> However, positivism remains the only school that refers to the structural foundation of law without referring to subjective perceptions, such as policy, liberalism, or feminism.<sup>50</sup>

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43. Most existing international dispute resolution regimes require that the tribunal render decisions on the basis of an applicable law. For example, under rules of the International Centre for Settlement of Investment Disputes (ICSID), the failure to apply applicable substantive law may constitute an excess of powers and lead to annulment of the award. Convention on the Settlements of Investment Disputes Between States and Nationals of Other States art. 52(1)(b), *adopted* Mar. 18, 1965, 575 U.N.T.S. 159 (1965). As a further example, the ad hoc committee in *Klöckner v. Cameroon* decided that the tribunal manifestly exceeded its powers when the award's reasoning seemed more like a reference to equity, rather than the agreed-upon applicable law of a Contracting State. *Klöckner v. Cameroon*, ICSID Case No. ARB/81/2, Decision, 2 ICSID Reports 124 (1994). In the commercial arbitration context, failure to comply with applicable law may result in the setting aside of an arbitral award under the New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. However, in international administrative law, the notion of applicable law plays a more modest role, if any.

44. JEAN D'ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW* 26 (2011).

45. See H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 39 (1972).

46. See D'ASPREMONT, *supra* note 44, at 41.

47. See *id.*

48. See *id.*

49. See, e.g., Hans Morgenthau, *Positivism, Functionalism and International Law*, 34 AM. J. INT'L L. 260, 261–62 (1940). See generally HAROLD LASSWELL & MYRES MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* (1992) (providing an overview of theories of law).

50. ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 53 (2008).

The question of legitimacy underpins the debate regarding sources of international administrative law. As with any other legal model, international administrative law should be legitimate. Standard features legitimizing legal systems include public accountability for the legislative process, public consultations, and media debates that shape national labor laws in democratic countries. International organizations, however, function in a different context. As extraterritorial autonomous bodies, intergovernmental organizations lack the same level of democratic legitimacy characteristic of their national equivalents.

Additionally, the hierarchical review of higher courts, public opinion, and the professional reputation of administrators and regulators limit any discretion in the implementation of national law. Nonetheless, these controls do not exist in international administrative law.<sup>51</sup> Unlike other international dispute resolution regimes or domestic legal systems, the international administrative legal system remains truly self-contained. This weakens the link with the original source of power, the State. Moreover, civil society involvement is not available to the same extent as in a domestic setting because international organizations are detached from the domestic context. In the absence of an effective and fair dispute resolution procedure, the threat of leaving the organization may remain the only option for international civil servants.

According to Rüdiger Wolfrum, authority in an international context can be legitimized through its original source of power (for instance, the consent of States to international treaties), through the use of fair and adequate procedures, or by satisfactory outcomes in its decisions.<sup>52</sup> Therefore, to remain legitimate and accountable, international organizations must subject themselves to the rule of law. It is important to establish a hierarchy of international law for international organizations through which all acts conform to the organization's constituent treaty or founding act.<sup>53</sup>

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51. In most jurisdictions, administrative dispute resolution decisions are subject to judicial review. See, e.g., SUSAN ROSE-ACKERMAN & PETER LINDSETH, *COMPARATIVE ADMINISTRATIVE LAW* 5 (2010).

52. Rüdiger Wolfrum, *Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organisation (IMO) and International Fisheries Organisations*, in *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS* 917, 919 (Armin von Bogandy et al. eds., 2010).

53. See Peters, *supra* note 5, at 266.

Finally, an international administrative tribunal's primary task is to apply the law to disputes, not to create law.<sup>54</sup> The ICJ in the *Fisheries Jurisdiction* case explained that a court of law "cannot anticipate the law before the legislator has laid it down."<sup>55</sup> The tribunals were not established to function as lawmakers<sup>56</sup> but rather as adjudicators with their powers restricted by international law.

### B. Importance of Defining Sources of Law

Every legal system aims to predict the conduct of other parties and distinguish between permissible and impermissible conduct.<sup>57</sup> Some scholars argue that it is more important for a rule of law to be certain rather than just.<sup>58</sup> Yet, those engaged in international administrative legal disputes may find it difficult to build expectations regarding their rights and obligations. In the absence of stipulated sources of law, it remains difficult to establish coherent, noncontradictory rules that can be predicted and reasonably followed.

In addition to increasing the legitimacy of international administrative law already discussed above,<sup>59</sup> a clarification of the sources of law applicable in international administrative proceedings and the establishment of a normative hierarchy will also make international administrative law more predictable. Predictability in the law is imperative, as it remains unreasonable to leave to one's judgment the decision of whether a court will approve certain actions.<sup>60</sup> As the ICJ observed in the *Gulf of Maine* case, legal regulation is produced by "any convincing demonstration of the existence of the rules that each had hoped to find established by international law" rather than by "preconceived assertions."<sup>61</sup> Similarly, Lion Fuller argued that law should correspond to the requirements of public-

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54. See HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 373–74 (1933).

55. *Fisheries Jurisdiction (U.K. v. Ice.)*, Merits, 1974 I.C.J. 1, ¶¶ 23–24 (July 25).

56. Jan Wouters & Philip De Man, *International Organizations as Law-Makers*, in *RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS* 190 (Jan Klabbers & Åsa Wallendahl eds., 2011).

57. LARS VINX, *HANS KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY* 43 (2007).

58. H.W.R. Wade, *The Concept of Legal Certainty: A Preliminary Skirmish*, 4 *MOD. L. REV.* 183, 187 (1941). Ludwig von Mises famously wrote, "The worst law is better than bureaucratic tyranny." LUDWIG VON MISES, *BUREAUCRACY* 76 (1946).

59. See *supra* Part III.A.

60. Lutz-Christian Wolff, *Law and Flexibility—Rule of Law Limits of a Rhetorical Silver Bullet*, 11 *J. JURIS.* 549, 553 (2011).

61. *Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 298 (Oct. 12).

ity, nonretroactivity, clarity, consistency, and noncontradiction and that the actual administration of law should be congruent with the "rules as announced."<sup>62</sup> Indeed, law represents equilibrium between certainty and justice, and it is important to leave the discretionary element within the narrowest possible limits.<sup>63</sup>

Additionally, every legal system must have clear criteria separating legal norms from politically desirable rules or moral rules of courtesy.<sup>64</sup> Otherwise, the absence of such criteria may facilitate a decline in the normative power of the law.<sup>65</sup> In the past, parties in international dispute resolution have invoked various notions ranging from class interest to democracy and human rights in efforts to manipulate international law.<sup>66</sup> Therefore, it is important to distinguish between binding legal norms and other social regulators, such as morality, religion, or political necessity.<sup>67</sup> Greater transparency in the decision-making process and rules outlining the hierarchy of international administrative legal sources will help address accountability and legitimacy problems.

The absence of clear applicable law also affects the equality enjoyed by civil servants vis-à-vis their employers. According to Article 14(1) of the International Covenant on Civil and Political Rights, "All persons shall be equal before the courts and tribunals."<sup>68</sup> The U.N. Human Rights Committee noted in *Perterer v. Austria* that the guarantee of equality before courts under Article 14(1) encompasses impartiality, fairness, and equality of arms regardless of whether a particular judicial body is specifically tasked with imposing disciplinary measures on civil servants.<sup>69</sup>

While international organizations usually staff their legal departments with experienced experts, international civil servants (particularly nonlawyers) may lack the ability to understand previous legal decisions impacting their employment rights or even to access such

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62. David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law* 13 (Inst. for Int'l Law & Justice, Working Paper 2008/7), available at <http://www.iilj.org/publications/documents/2008-7.Dyzenhaus.pdf> (summarizing LION FULLER, *THE MORALITY OF LAW* (1969)).

63. Wolff, *supra* note 60, at 562–63.

64. G.M. DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 16 (1993).

65. *Id.* at 16–17.

66. *Id.* at 18.

67. Allain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTRALIAN Y.B. INT'L L. 22, 25 (1988).

68. International Covenant on Civil and Political Rights, *supra* note 20, art. 14(1).

69. United Nations, Human Rights Comm., 90th Sess., July 9–27, 2007, Communication No. 1454/2006, U.N. Doc. CCPR/C/90/D/1454/2006, ¶ 7.2, at 17 (Sept. 11, 2007).

decisions.<sup>70</sup> The classical reason behind the separation of employment law and contract law is to address inequality in an employee's bargaining power vis-à-vis an employer.<sup>71</sup> Employees bear the risk of being exploited by an employer, and employment law attempts to protect the vulnerable employee from such employer abuse.<sup>72</sup> Therefore, vagueness or difficulty in researching employment regulations places an unsophisticated employee in a difficult position, even when an employee has access to a staff association specifically tasked with supporting employee interests.<sup>73</sup>

The lack of clear standards dictating the hierarchy of applicable international legal sources also affects international civil servants' incentive to use such tribunals. As in any other dispute resolution system, when the rules are unclear, an individual has little incentive to refer the matter to a tribunal for resolution.<sup>74</sup> Political maneuvering or efforts to maintain the status quo may replace a legal process that would otherwise lead to an improvement in the legal system.

Furthermore, in the absence of binding international administrative legal norms articulated with reasonable clarity, individuals are unable to know the bounds of legal activity and unable to adjust their behavior accordingly. In the United States, statutes that lack clear standards are deemed "unconstitutionally vague" and unenforceable.<sup>75</sup> According to U.S. constitutional law, notions

70. Rep. of the Joint Inspection Unit on the Administration of Justice at the United Nations, ¶¶ 136–43, U.N. Doc. A/55/57 (June 12, 2000); August Reinisch & Christina Knahr, *From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal—Reform of the Administration of Justice System Within the United Nations*, 12 MAX PLANCK Y.B. U.N. L. 447, 452 (2008).

71. See International Labour Conference, 95th Sess., May 31–June 16, 2006, Report V(1): *The Employment Relationship*, ¶ 100 (2005) (noting that some legal systems rely on indicators to identify whether a relationship is one of employment, including "compliance with the employer's instructions, being at the employer's disposal, and socio-economic inequality between the parties").

72. See generally THE IDEA OF LABOUR LAW (Guy Davidov & Brian Langille eds., 2011) (examining the idea of labor law in the historical context, its purposes, justifications, and legal bases).

73. JOSÉ MARÍA BENEYTO, ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS FOR HUMAN RIGHTS VIOLATIONS ¶ 17, at 7 (2013) ("[U]ncertainty as to the precise source of obligation renders it particularly difficult to define the exact scope of the obligations incumbent on the international organization. This is unwelcome from the perspective of legal certainty—both for the organisations themselves and for third parties."). International organizations may nurture or take advantage of uncertainty regarding the applicable law in order to preserve their freedom of action.

74. THIRLWAY, *supra* note 45, at 34–35.

75. If a statute is too vague for the average citizen to understand, the statute is void for vagueness and unenforceable under the U.S. Constitution. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 970 (4th ed. 2011).

of fair notice and control of arbitrary enforcement underpin the vagueness doctrine. The U.S. Supreme Court explained that a statute must define the prescribed conduct “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement,”<sup>76</sup> as arbitrary enforcement violates the principle of equal protection.<sup>77</sup> This logic is equally relevant within the context of international administrative law.

Lastly, other disciplines, such as political science or sociology, may marginalize international administrative law in the absence of rules governing the applicable law. Therefore, in response to each of the concerns addressed above, a clarification of the sources of law applicable in international administrative proceedings will make the system more predicable, enhance its legitimacy, and help strike a balance between the interests of international organizations, their member States, and international civil servants.

#### IV. SOURCES OF LAW IN THE PRACTICE OF INTERNATIONAL ADMINISTRATIVE TRIBUNALS

In practice, international administrative tribunals rely on several sources, including the employment contract, internal law of international organizations, and generally recognized principles of international administrative law. Tribunals also sometimes refer to their own internal law and the jurisprudence of other tribunals<sup>78</sup> and occasionally cite to writings of legal scholars.<sup>79</sup>

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76. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also Gillian Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CALIF. L. REV. 541, 542 (1994) (describing how the relationship between actual liability and official discretion links the vagueness issues of notice and arbitrary enforcement).

77. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 753 n.3 (1985). According to the Fourteenth Amendment to the U.S. Constitution, known as the Equal Protection Clause, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

78. See Hansen Peter Hansen, *The World Bank Administrative Tribunals External Sources of Law: The Next Chapter (2006–2010)*, 11 LAW & PRAC. INT’L CTS. & TRIBS. 449, 490–91 (2012) (discussing reliance on the jurisprudence of other tribunals).

79. Most often, tribunals quote C.F. Amerasinghe to demonstrate the existence of certain principles of international administrative law.

### A. *The Employment Contract*

Most international organizations hire civil servants through an employment contract or a legal act of the organization.<sup>80</sup> As a matter of practice, employment contracts and the internal regulations of international organizations contain the most detailed provisions with respect to the rights and obligations of international organizations and their civil servants.<sup>81</sup> Very often in practice, however, both the letter of appointment and the letter of acceptance collectively constitute the employment contract rather than any single written document.<sup>82</sup> The World Bank Administrative Tribunal in the *de Merode* case explained, “The [employment letters] may be *sine qua non* of the relationships, but it remains no more than one of a number of elements which collectively establish the *ensemble* of conditions of employment operative between the [international organization] and its staff members.”<sup>83</sup> Similarly, the U.N. Administrative Tribunal has also observed that the relations between the United Nations and its staff members are not solely contractual in nature but also involve statutory elements.<sup>84</sup>

### B. *Internal Law of International Organizations*

The internal law of international organizations includes constitutions, procedural rules, decisions, regulations, and other enactments adopted by the organization.<sup>85</sup> In its judgment in the *de*

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80. While most international organizations use employment contracts, some international organizations, most notably the European Union, use statutory employment as a primary hiring method for international civil servants. JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 244 (2009).

81. See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 53; *Darricades v. United Nations Educational, Scientific and Cultural Organization (UNESCO)*, Judgments ILO Admin. Trib. No. 67, at 166 (1963); *Kaplan v. Sec’y-General of the United Nations*, Judgment No. 19, U.N. Admin. Trib. 71, 73 (1953); *Mortished v. Sec’y-General of the United Nations*, Judgment No. 273, U.N. Admin. Trib. 426, 431 (1981).

82. See, e.g., WORLD HEALTH ORGANIZATION, *STAFF REGULATIONS AND STAFF RULES* ¶ 440.3 (2013), available at [http://www.who.int/employment/staff\\_regulations\\_rules/EN\\_staff\\_regulations\\_and\\_staff\\_rules.pdf](http://www.who.int/employment/staff_regulations_rules/EN_staff_regulations_and_staff_rules.pdf).

83. *de Merode v. World Bank*, World Bank Admin. Trib. Rep., Decision No. 1, ¶ 18 (1981).

84. See *Howrani v. Sec’y-General of the United Nations*, United Nations Appeals Tribunal (UNAT) Judgment No. 4, at 21 (Aug. 25, 1951).

85. Under the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, “Rules of organization” include, in particular, its constituent instruments, relevant decisions, resolutions, and established practice of the organization. Vienna Convention on the Law of Treaties art. 2(j), May 23, 1969, 1155 U.N.T.S. 331; see also Draft Articles on Responsibility of International Organizations, *supra* note 4, art. 2(b).

*Merode* case, the World Bank Administrative Tribunal held that in order to determine the respective rights and duties of the World Bank and its staff, one must look not only to the Articles of Agreement of the World Bank and its By-Laws but also “to certain manuals, circulars, notes and Statements issued by the management of the [World] Bank as well as to other sources.”<sup>86</sup>

There is usually a hierarchy of internal laws of international organizations: constituent instruments (primary law)—often adopted in the form of international treaties—prevail over staff regulations<sup>87</sup> and staff rules,<sup>88</sup> which in turn trump manuals,<sup>89</sup> circulars, and similar documents<sup>90</sup> (secondary law).<sup>91</sup> One must note, however, that in order for an international administrative tribunal to regard secondary law as a source of law, the secondary law must have a general effect.<sup>92</sup> In other words, while internal law of international organizations has the force of general law for other cases decided by the same tribunal, administrative decisions are applicable only to those individuals whom they address. Secondary law of international organizations remains subordinate to the primary law of international organizations, and in this respect, its relationship with general international law should be similar to the relationship between the internal law of States and general international law.

The power to regulate legal relations between international organizations and their staff through rulemaking is often delegated from the plenary organ of the organization to its administration.<sup>93</sup> Additionally, the instruments establishing international administrative tribunals provide the tribunals with the power to

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86. *de Merode*, ¶ 18.

87. In the United Nations and its specialized agencies, the Staff Rules define the status of staff while Staff Regulations usually prescribe broader principles.

88. See, e.g., RENE-JEAN DUPUY, A HANDBOOK ON INTERNATIONAL ORGANISATIONS 234 (1988).

89. Although in *Robinson* the U.N. Secretary-General contended that the Administrative Manual merely constituted a statement of policy without any legal effect whatsoever, the tribunal disagreed, explaining that “the Administrative Manual, being binding upon the Administration and the staff, is a document which the Tribunal must apply under the terms of Article 2 of the Statute,” thus clearly regarding it as a source of law. *Robinson v. Sec’y-General of the United Nations*, Judgments, UNAT Judgment No. 15, at 45–46 (1952).

90. KLABBERS, *supra* note 80, at 245; M.B. AKEHURST, THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANISATIONS 68–69 (1967); see also *de Merode*, at 3.

91. The term secondary law refers to all legal enactments of international organizations that are not constituent instruments.

92. AKEHURST, *supra* note 90, at 71.

93. See, e.g., EUROPEAN ORG. FOR NUCLEAR RESEARCH, STAFF RULES AND REGULATIONS, at ii (11th ed. rev. 2013), available at <https://hr-docs.web.cern.ch/hr-docs/stf/StaffRulesAndRegulations.pdf> (adopting proposed rules for staff); INT’L TELECOMM. UNION, STAFF REGULATIONS AND STAFF RULES 1 (2013 ed.), available at <https://www.itu.int/en/careers/>



make rules concerning their own procedure and internal organization.<sup>94</sup> Obviously, in the case of a conflict between these two sources, the former instruments override the latter. Nonetheless, international organizations adopt their internal law on the basis of constituent documents created by States.<sup>95</sup> This suggests that the internal law of international organizations, relevant resolutions, and decisions of the organization are entirely distinct from general public international law created by States.<sup>96</sup>

As the judges of the ICJ noted, “[T]he fact that an act is done under authority contained in an instrument which is itself a treaty . . . does not give the resulting act treaty character.”<sup>97</sup> Internal rules of international organizations cannot be regarded as *lex specialis* and overrides general rules of international law for two reasons.<sup>98</sup> First, this principle can apply only when both the special and the general rules have the same subject matter.<sup>99</sup> Second, a “special rule could not prevail over a general unless the two rules had the same status.”<sup>100</sup>

Internal regulations of international organizations certainly do not constitute domestic law of States, but at the same time, such internal regulations do not constitute a source of international law. Sources of international law, as illustrated by Article 38 of the ICJ Statute, usually result only from the interaction of subjects of international law, such as the conclusion of treaties or state practice, which crystallizes into international custom.<sup>101</sup> Internal regulations create rights and obligations for international organizations and their employees rather than States and therefore form a sepa-

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Documents/SRR-e.pdf; FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, STAFF REGULATIONS ¶ 301.0 (2000), available at <http://www.fao.org/docrep/meeting/X7949e.htm>.

94. See, e.g., Statute of the United Nations Appeals Tribunal, art. 6, G.A. Res. 63/253, Annex, U.N. Doc. A/RES/63/253, at 10 (Mar. 17, 2009) (telling tribunal to establish its own rules of procedure); Statute of the Administrative Tribunal of the International Labour Organization art. x, adopted Oct. 9, 1946, reprinted in 1 DOCUMENTS ON INTERNATIONAL ADMINISTRATIVE TRIBUNALS 31 (C.F. Amerasinghe ed., 1989).

95. SHAW, *supra* note 36, at 1303–06.

96. PHILIPPE SANDS & PIERRE KLEIN, BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS 448 (2009).

97. South West Africa (Eth. v. S. Afr.) (Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 465, 491 (Dec. 21) (joint dissenting opinion of Judges Spender and Fitzmaurice).

98. See M.B. Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT’L L. 273, 273 (1975).

99. *Summary Records of the 948th Meeting*, [1968] 1 Y.B. Int’l L. Comm’n ¶ 24, at 31, U.N. Doc. A/CN.4/Ser.A/1968.

100. *Id.*

101. ICJ Statute, *supra* note 2, art. 38.

rate autonomous legal order from traditional international public law.<sup>102</sup>

### C. *General Principles of Law*

In the *de Merode* judgment, the World Bank Administrative Tribunal, for the first time, extensively discussed the principles of international administrative law applicable by international administrative tribunals. The tribunal explained that in addition to the internal law of the organization, a wider body of international administrative law remains relevant.<sup>103</sup> Specifically, the tribunal noted, “Some . . . judgments [of administrative tribunals] . . . speak of general principles of international civil service law or of a body of rules applicable to the international civil service.”<sup>104</sup>

General principles of international administrative law include principles inherent in any legal order, including domestic law and international relations<sup>105</sup> such as principles of interpretation (for example, the spirit and object of written provisions, and the intention of the parties reflected in the *travaux préparatoires*), principles concerned with the functioning of the tribunals themselves (for example, the representation of the parties, time limits for bringing claims, and measure of damages), and general principles of administrative law (for example, withdrawal of administrative decisions and the principle of equality for officials in the same position).<sup>106</sup> Increasingly, general principles of law result in not only relations between States but also relations between States and private subjects.<sup>107</sup>

The substance of the “general principles of law recognized by civilized nations” mentioned in Article 38 of the ICJ Statute differs from the “general principles of international administrative law.”<sup>108</sup> By definition, general principles of public international law outlined in Article 38 are those principles recognized in the municipal

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102. AMERASINGHE, *supra* note 40, at 274.

103. *de Merode v. World Bank*, World Bank Admin. Trib. Rep., Decision No. 1, ¶ 13 (1981).

104. *Id.* ¶ 28.

105. See Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 28, 28 (Stephan W. Schill ed., 2010).

106. For a more detailed discussion of the classification of general principles of law, see AKEHURST, *supra* note 90, at 72–73.

107. FABIÁN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 1–6 (2008).

108. ICJ Statute, *supra* note 2, art. 38.

laws of States.<sup>109</sup> However, general principles of international administrative law develop from the practice of international administrative tribunals.

It must be noted that case law of other tribunals does not represent an independent source of law<sup>110</sup> but rather a storage of general principles of international administrative law. Article 38(d) of the ICJ Statute defines case law and scholarly writings as subsidiary means of international law, sometimes referred to as “the store-house,” from which primary rules of international law can be extracted.<sup>111</sup>

Some international administrative tribunals recognize general principles of administrative law as implied terms of employment contracts. For example, an ILO Administrative Tribunal in the *Awoyemi* explained, “A firm line of precedent says that the rights under a contract of employment may be express or implied, and include any that flow from general principles of the international civil service or human rights.”<sup>112</sup> Furthermore, as the ICJ explained, international organizations, as subjects of international law, are “bound by any obligations incumbent upon them under general rules of international law.”<sup>113</sup> As organs of international organizations, international administrative tribunals also have an obligation to follow public international law.

The drafters of the ICJ Statute intended for the inclusion of general principles of law in Article 38 to avoid a finding of *non liquet* (a situation where there is no applicable law) by the court.<sup>114</sup> Although general principles of law may not always seem specific enough to create concrete rights and obligations, in an international context, such principles may sometimes serve as the only source of law. For example, Article 215 of the Treaty Establishing the European Economic Community prescribes that the liability of the European Community is subject to the “general principles

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109. General principles of law mentioned in Article 38 of the ICJ Statute are unwritten legal norms of wide-ranging character recognized in the municipal laws of States and are capable of being transposable at the international level. Alain Pellet, *Article 38, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 731, ¶ 254 (Andreas Zimmerman et al. eds., 2006).

110. *Mr. C v. European Bank for Recon. & Dev.*, Decision No. 01/03, ¶ 54 (Nov. 3–4, 2003).

111. Pellet, *supra* note 109, ¶ 305.

112. *In re Awoyemi*, Judgment, No. 1756, Considerations ¶ 3 (ILO Admin. Trib. July 9, 1998).

113. *Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt*, Advisory Opinion, 1980 I.C.J. 73, ¶ 37 (Dec. 20).

114. Pellet, *supra* note 109, at 765.

common to the laws of Member States.”<sup>115</sup> In this context, general principles of E.U. law, such as proportionality, legal certainty, legitimate expectations, and equality<sup>116</sup> fill in the gaps in E.U. law, strengthen its coherence, and help avoid the denial of justice.<sup>117</sup>

An additional example stems from investor-State disputes, which similar to international administrative law involve private parties (investors) and subjects of international law (States).<sup>118</sup> Tribunals in such disputes often rely on general principles of law, such as good faith, *restitutio in integrum* (an injured person’s duty to mitigate damages), and unjust enrichment.<sup>119</sup> As these and a number of other principles are now widely recognized as general principles of law, they should also serve as a source of law for international administrative tribunals.

Although each tribunal has its own written regulations and rules, a number of general principles of international administrative law have developed over time,<sup>120</sup> such as those relating to discrimination and equality of treatment, procedural and substantive irregularity, and other employment-related issues.<sup>121</sup> International administrative tribunals have also relied on general principles to develop the procedural law of international adjudication,<sup>122</sup> to

115. Treaty Establishing the European Economic Community art. 215, Mar. 25, 1957, 298 U.N.T.S 11.

116. PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 109 (5th ed. 2011).

117. ALINA KACZOROWSKA, *EUROPEAN UNION LAW* 231 (2009).

118. YARASLAU KRYVOI, *THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES* 17–19 (2012).

119. See Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT’L L. 216, 249–50 (2008).

120. It must be noted that administrative tribunals often share judicial personnel. For example, Jan Paulsson serves as Chairman of Administrative Tribunal of the Organisation for Economic Co-operation and Development, President of the Administrative Tribunals of the European Bank for Reconstruction and Development (EBRD), and a member of the World Bank Administrative Tribunal. *Jan Paulsson Biography*, ARBITRATION ACADEMY, [http://www.arbitrationacademy.org/?page\\_id=3038](http://www.arbitrationacademy.org/?page_id=3038) (last visited Dec. 16, 2014).

121. *Id.*

122. See, e.g., *Ms. M.H. v. Int’l Labour Org.*, Judgment No. 3182, at 6 (ILO Admin. Trib. Feb. 6, 2013) (“[T]he discretionary authority of the Director-General in appointment-related matters is not absolute and has to be exercised within the limits set by the Staff Regulations and general principles of law.”); *Mr. “A” v. Int’l Monetary Fund*, Judgment No. 1999-1, ¶ 92 (Admin. Trib. for the Int’l Monetary Fund Aug. 12, 1999) (finding that the tribunal has an obligation to apply generally recognized principles of international administrative law in support of the notion that the Administrative Tribunal must exercise jurisdiction over his claim so that it will not escape judicial review); see also *Jean-Claude Salle v. Int’l Bank for Recon. & Dev.*, Decision No. 10, ¶ 29 (World Bank Admin. Trib. Oct. 8, 1982) (concluding that conditions of employment may also derive from various other sources, including general principles of law, as the tribunal has determined in *de Merode*).

interpret written law as a source of substantive rights and obligations, and to fill lacunae in regulation.<sup>123</sup>

In 1929, the League of Nations Tribunal held that “it is only in the absence . . . of written rules that the Tribunal would be justified in referring to general principles of law.”<sup>124</sup> Subsequently, the ILO Administrative Tribunal held that general principles of law are subsidiary to internal rules of the ILO.<sup>125</sup> Nevertheless, the modern trend is to give more weight to general principles of law. Many statutes establishing international administrative tribunals explicitly mention general principles of law, while others remain rather conservative in their use of general principles and rely primarily on procedural rules.<sup>126</sup> But even when statutes of international administrative tribunals do not mention general principles of law, many tribunals nonetheless feel compelled to apply such principles.<sup>127</sup> The legitimacy of general principles as a source of law depends on whether they are “so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations.”<sup>128</sup>

International administrative tribunals often rely on the jurisprudence of other tribunals to demonstrate that the application of certain general principles is not revolutionary. Decisions of other

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123. See, e.g., *In re Gubin & Nemo*, Judgment No. 429, ¶ 9 (ILO Admin. Trib. Dec. 11, 1980) (“The Tribunal will consider the plea since there is a general principle of law protecting acquired rights, even in the absence of express provision.”); see also *Ms. A.B. v. Int’l Telecomm. Union*, Judgment No. 3156, at 2 (ILO Admin. Trib. Feb. 6, 2013) (addressing freedom of speech); *Mr. P.G.T. v. Int’l Telecomm. Union*, Judgment No. 3107, at 9 (ILO Admin. Trib. July 4, 2012) (recognizing a duty to refrain from conduct that may harm the dignity or reputation of staff and former staff members); *Ms. “B” v. Int’l Monetary Fund*, Judgment No. 1997-2, ¶ 59 (Admin. Trib. for the Int’l Monetary Fund Dec. 23, 1997) (deciding whether a reasonable notice of the particular change in policy would be required); *Mr. A.G.H. v. European Patent Org.*, Judgment No. 3195, at 6 (ILO Admin. Trib. July 4, 2013) (finding that an administrative error must be rectified).

124. AKEHURST, *supra* note 90, at 74 (quoting League of Nations Tribunal Cases *Di Palma Castigliona*, *Pheland*, and *Maurette*).

125. See *In re Sharma*, Judgment No. 30, at 2 (ILO Admin. Trib. July 13, 1957).

126. See Brian D. Petterson, *The Jurisdiction of Discrimination as Opposed to Simple Inequality in the International Civil Service*, 36 GA. J. INT’L & COMP. L. 1, 15 (2007).

127. See, e.g., *Mr. A.J.H.B. v. Int’l Telecomm. Union*, Judgment No. 3203, at 10 (ILO Admin. Trib. Judgment July 4, 2013) (“[G]eneral principles . . . form part of the law of the international civil service.”) (citing ILO Admin. Trib. Judgment No. 1118); see also *Mr. P.A. v. European Patent Org.*, Judgment No. 3058, at 5 (ILO Admin. Trib. Feb. 8, 2012) (concluding that the tribunal must apply the relevant rules and regulations and those general principles of law that govern the relationship between international organizations and their staff members).

128. See ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL MONETARY FUND, STATUTE OF THE ADMINISTRATIVE TRIBUNAL: COMMENTARY OF THE STATUTE 18 (2000), available at [https://www.imf.org/external/imfat/pdf/2009\\_Amended-Statute.pdf](https://www.imf.org/external/imfat/pdf/2009_Amended-Statute.pdf).

tribunals do not themselves constitute a source of law; however, they may serve as evidence of certain general principles. For example, the World Bank Administrative Tribunal in one case applied a decision from the Asian Development Bank Administrative Tribunal and specifically welcomed “the harmony of views of similar international jurisdictions,” noting that the tribunal would “be influenced by persuasive analysis whatever its source.”<sup>129</sup>

Additionally, the commentary to the statute of the International Monetary Fund (IMF) Administrative Tribunal explains that certain general principles of international administrative law are “so widely accepted and well-established in different legal systems that they are regarded as generally applicable to all decisions taken by international organizations.”<sup>130</sup> The commentary also stated that “reference to recognized principles of international administrative law is intended to limit the powers of the tribunal by making clear that the standards of review applied by the tribunal should not go beyond those applied by other tribunals.”<sup>131</sup> The Asian Development Bank Administrative Tribunal further explained that a general principle restrains an international organization as follows:

Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle, which can be regarded as part of the law, to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions.<sup>132</sup>

Furthermore, the 2004 report of the International Law Association encourages international organizations to consider establishing a common review mechanism of other international administrative tribunal judgments “to achieve the greatest possible consistency of jurisprudence in international administrative law.”<sup>133</sup> The report encourages international administrative tribunals to take account of each other’s decisions in efforts to reduce the risk of incompatible case law.<sup>134</sup>

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129. *Madhusudan v. Int'l Bank for Recon. & Dev.*, Decision No. 215, ¶ 25 (World Bank Admin. Trib. Oct. 1, 1999).

130. *Commentary to the Statute of the Administrative Tribunal*, INT'L MONETARY FUND, <http://www.imf.org/external/imfat/report.htm> (last visited Nov. 21, 2014).

131. *Id.*

132. *See Mesch v. Asian Dev. Bank*, Decision No. 2, ¶¶ 15, 20 (Asian Dev. Bank Admin. Trib. Jan. 8, 1994).

133. INT'L LAW ASS'N, *supra* note 42.

134. *Id.*

The ILO Staff Union insisted on the inclusion of generally recognized principles of international administrative law in the Statute of the ILO Administrative Tribunal.<sup>135</sup> While the tribunal explained that it invokes general principles where necessary, it also did not object to the inclusion of the following sentence into the Statute: “The Tribunal shall apply the generally recognized principles of international administrative law concerning judicial review of administrative acts.”<sup>136</sup> However, the statute does not currently reflect this sentence even though over a decade has passed since the ILO Staff Union and the ILO Administrative Tribunal reached this general agreement.

#### D. *Other Sources of Public International Law*

According to their very nature, international organizations are established by international treaties and governed by international law. As the ICJ once explained, international organizations are subjects of international law and, as such, are bound by any obligation incumbent upon them under general rules of international law, their constitutions, or international agreements to which they are parties.<sup>137</sup>

The Draft Articles on the Responsibility of International Organizations provide that international law governs the action of an international organization characterized as internationally wrongful.<sup>138</sup> One can draw a distinction between an international organization that breaches its human rights obligations internationally (for example, the North Atlantic Treaty Organization bombings) and an international organization that breaches its human rights obligations internally (for example, discrimination of certain employees). It remains difficult to conceive that international organizations, which are subjects of international law and created by means of international law, would be designed in such a manner to exclude the application of international law internally. Bound by general international human rights law, an international organization should be internationally responsible in both scenarios. Yet, for breaking international human rights internally, no instrument

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135. *Matters Relating to the Administrative Tribunal of the ILO*, International Labour Office Governing Body, 286th Sess., Doc. No. GB.286/PFA/17/2, at 2 (2003).

136. *Id.*

137. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 3.7 (Dec. 20).

138. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 5, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83, at 43 (Jan. 28, 2002).

similar to the Draft Articles on the Responsibility of International Organizations exists.

When it comes to application of treaties, international administrative tribunals primarily refer to the U.N. Charter,<sup>139</sup> international treaties dealing with immunity,<sup>140</sup> or the constituent documents establishing the international organization, and the tribunals apply international law to interpret the internal law of the organization.<sup>141</sup> However, sometimes tribunals explicitly state that other international conventions do not bind an international organization. For example, in the *Piboleau*, the ILO Administrative Tribunal explained that the ILO Maternity Protection Convention and Recommendation does not apply to the World Health Organization.<sup>142</sup> Following the same logic, in a separate case, the ILO Administrative Tribunal refused to apply the European Convention on Human Rights to an international organization on the grounds that the specific organization was not bound by that convention.<sup>143</sup>

Indeed, traditional international treaties create rights and obligations for parties to those treaties—usually States. States then implement the relevant international law outlined in a specific treaty into domestic law, which in turn binds individuals. Employees of international organizations, however, are not States or international organizations (traditional subjects of international law) and therefore cannot be parties to and be bound by international treaties. In this respect, international administrative law resembles the asymmetric nature of international investment law in which bilateral investment treaties create internationally enforceable rights for investors as private actors while also creating obligations for State parties.<sup>144</sup>

Surprisingly, tribunals, including the ILO Administrative Tribunal, do not refer to the ILO conventions—the most elaborated source of traditional international labor law.<sup>145</sup> Although these

139. See, e.g., *Ms. E.S.M.S. v. UNESCO*, Judgment No. 2740, at 9 (ILO Admin. Trib. July 9, 2008).

140. *In re Jurado*, Judgment No. 70, at 7 (ILO Admin. Trib. Sept. 11, 1964).

141. See, e.g., *Stepczynski v. Sec'y-General of the United Nations*, Judgment No. 64, U.N. Admin. Trib. 365, 370 (1956).

142. *In re Pibouleau*, Judgment No. 351, ¶ 8 (ILO Admin. Trib. Nov. 13, 1978).

143. *Miss E.E.H. v. European Patent Org.*, Judgment No. 2236, ¶ 11 (ILO Admin. Trib. July 16, 2003).

144. See Kryvoi, *supra* note 119, at 220.

145. At the same time, in the *Desgranges* judgment, the ILO Administrative Tribunal recognized the importance of the spirit of ILO instruments. *In re Desgranges*, Judgment No. 11, (ILO Admin. Trib. Aug. 12, 1953) (“[I]t is unthinkable that the International



conventions do not bind international organizations, they may serve as evidence of general principles of law recognized by most countries in the world.

### E. *The Practice of Organizations*

The practice of organizations constitutes an additional source of legal rights and obligations. The Commentary on the Statute of the IMF Administrative Tribunal, citing the *de Merode* decision, recognizes “the administrative practice of the organisation [which] may, in certain circumstances, give rise to legal rights and obligations” as one of two unwritten sources of the IMF’s internal law.<sup>146</sup> In another case, the IMF Administrative Tribunal held that it had to analyze the practice of the organization and certain general principles of law to determine the respective rights and duties of the international organization and its staff.<sup>147</sup> The ILO Administrative Tribunal also followed this approach.<sup>148</sup>

The practice of international organizations is similar to customary international law in that it can set standards for further organization practice. One arbitral tribunal noted, “[T]he practice of the organisation may also, in certain circumstances, become part of the conditions of employment.”<sup>149</sup> In this case, the tribunal drew a comparison to the ICJ’s decision in the *Asylum* case, which explained the need for uniform and consistent usage as a prerequisite for the development of international custom.<sup>150</sup> It must be

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Labour Organisation, which was established to ensure the security of all wage-earners, does not desire to assure that of all its officials, and that the spirit in which the existing legislation should be interpreted is thus quite clear.”).

146. ADMIN. TRIB. OF THE INT’L MONETARY FUND, COMMENTARY ON THE STATUTE 18 (2009); see also Ms. “B” v. Int’l Monetary Fund, Judgment No. 1997-2, ¶ 37 (Admin. Trib. for the Int’l Monetary Fund Dec. 23, 1997) (holding that “the administrative practice of an organization may give rise to certain legal rights and obligations”); Mr. M. D’Aoust v. Int’l Monetary Fund, Judgment No. 1996-1, ¶ 37 (Admin. Trib. for the Int’l Monetary Fund Apr. 2, 1996).

147. Ms. “B”, Judgment No. 1997-2, ¶ 59 (considering whether reasonable notice of the particular change in policy would nevertheless be required by general principles of law).

148. See In re Duberg, Judgment No. 17 (ILO Admin. Trib. Apr. 26, 1995); In re Leff, Judgment No. 18 (ILO Admin. Trib. Apr. 26, 1955); In re Wilcox, Judgment No. 19 (ILO Admin. Trib. 1955); In re Bernstein, Judgment No. 21 (ILO Admin. Trib. Oct. 29, 1955). The ICJ subsequently confirmed this approach. Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made Against UNESCO, Advisory Opinion, 1956 I.C.J. 77, 91 (Oct. 23) (ruling that the practice of considering employees hired under only fixed term contracts for renewal constituted a source of law despite an apparent contradiction to the Staff Regulations).

149. *de Merode v. World Bank*, World Bank Admin. Trib. Rep., Decision No. 1, ¶ 61 (1981).

150. *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 277 (Nov. 20).

noted that practice of international organizations is not identical to customary international law, which derives from interaction between subjects of international law, namely States and international organizations, based on the conviction that such practice reflects a legal obligation.<sup>151</sup> In the context of international administrative law, the practice derives from interaction between the organization and its employees and constitutes a separate source of international administrative law.

### F. *Municipal Law*

Municipal law usually does not constitute a source of law applied by international administrative tribunals. Nonetheless, in some instances, internal law of an organization may directly incorporate municipal law. For instance, the internal law of the international organization may refer to local laws on social security, taxes,<sup>152</sup> workers' compensation,<sup>153</sup> or visa issues.<sup>154</sup> Internal law of international organizations or employment contracts may also contain references to local law.<sup>155</sup>

The ILO Administrative Tribunal explained the application of municipal law as follows:

[T]he Tribunal has never ruled out municipal law a priori. Although it is ordinarily and essentially competent in a context of international law, it may well have to heed some provisions of municipal law where, as indeed in this case, there is renvoi to such law in a contract of service or in an organisation's rules. Precedent further has it that there may be reference to municipal law for the sake of comparison and so as to educe certain

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151. See, e.g., *Judgments of the Administrative Tribunal of the ILO*, 1956 I.C.J. 77, 91. In *de Merode*, the tribunal stated:

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

*de Merode*, Decision No. 1, ¶ 23 (also citing *Effects of Awards*, 1954 I.C.J. 53, 91).

152. See, e.g., *J.C. Peter Richardson v. Int'l Bank for Recon. & Dev.*, Decision No. 208, ¶ 2 (World Bank Admin. Trib. May 14, 1999).

153. For example, World Bank Staff Rule 6.11, ¶ 2.01 provides for the application of the District of Columbia Workers' Compensation Act of 1998. WORLD BANK STAFF MANUAL (1983), available at [http://siteresources.worldbank.org/INTSTAFFMANUAL/Resources/StaffManual\\_WB\\_web.pdf](http://siteresources.worldbank.org/INTSTAFFMANUAL/Resources/StaffManual_WB_web.pdf).

154. See, e.g., *Safari O'Humay v. Int'l Bank for Recon. & Dev.*, Decision No. 140, ¶ 12 (World Bank Admin. Trib. Oct. 14, 1994).

155. See, e.g., WORLD BANK STAFF MANUAL, *supra* note 153, ¶ 3.01.

general principles of law that apply to the international civil service.<sup>156</sup>

Municipal law also helps to define concepts stemming from other legal systems, such as marriage, adoption, divorce, or residence,<sup>157</sup> and as discussed in the ILO Administrative Tribunal's statement above, it may also give rise to general principles of law.

## V. DEVELOPMENT OF A NORMATIVE HIERARCHY IN INTERNATIONAL ADMINISTRATIVE LAW

### A. *Hierarchy in Statutes of International Administrative Tribunals*

Under a hierarchical legal structure, a subordinate norm must yield to a superior norm in the case of a conflict. Domestic legal systems maintain a settled hierarchy of norms with constitutions at the top of the hierarchy.<sup>158</sup> It would be natural for lawyers coming from any jurisdiction to expect a similar hierarchy of norms in the internal order of international organizations. However, constituent documents of the oldest and largest international administrative tribunals contain no such provisions outlining either the sources of law or the hierarchy between international law and an international organization's internal law.<sup>159</sup> Even the Statute of the U.N. Dispute Tribunal adopted in 2009 merely provides that its judgments "state the reasons, facts and law on which they are based," without providing any guidance on the applicable sources of law.<sup>160</sup>

156. In re Kock, Judgment No. 1450, ¶ 19 (ILO Admin. Trib. July 6, 1995).

157. See Felice Morgenstern, *The Law Applicable to International Officials*, 18 INT'L & COMP. L.Q. 739, 746–50 (1969).

158. See, e.g., *The Legislative Hierarchy*, EGYPTIAN REG. REFORM & DEV. ACTIVITY (Jan. 8, 2012), [http://www.errada.gov.eg/index\\_en.php?op=show\\_feature\\_details\\_en&id=13](http://www.errada.gov.eg/index_en.php?op=show_feature_details_en&id=13).

159. See, e.g., Statute of the Administrative Tribunal of the International Labour Organization art. X, adopted Oct. 9, 1946, available at <http://www.ilo.org/public/english/tribunal/about/statute.htm>; Statute of the Administrative Tribunal of the International Monetary Fund (2009), available at [https://www.imf.org/external/imfat/pdf/2009\\_Amended-Statute.pdf](https://www.imf.org/external/imfat/pdf/2009_Amended-Statute.pdf); Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association, and International Finance Corporation (Apr. 30, 1980); Statute of the United Nations Appeals Tribunal, G.A. Res. 63/253, *supra* note 94.

160. Statute of the United Nations Appeals Tribunal, G.A. Res. 63/253, *supra* note 94, art. 11. The duty to give reasons ensures that the judge knows how to weigh various interests at stake and that the judge uses his powers to achieve a just end. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 39 (2005); see also Giacinto della Cananea, *Maximum Standards of Procedural Justice in Administrative Adjudication*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 67, 67 (Stephan Schill ed., 2010).

However, some international organizations do stipulate the applicable sources of law. For example, the Rules of Procedure of the Administrative Tribunal of the European Bank for Reconstruction and Development (EBRD) provide that the tribunal shall base its decisions on “the provisions of the Staff Member’s contract of employment, the internal law of the Bank and generally recognised principles of international administrative law.”<sup>161</sup> Moreover, the Statute of the EBRD Administrative Tribunal provides for the supremacy of international law over the internal law of the EBRD by establishing that decisions of the Board of Directors or the Board of Governors should not breach international administrative law.<sup>162</sup>

Unlike the Statute of the EBRD Administrative Tribunal, however, the Statute of the IMF Administrative Tribunal requires that the latter tribunal “apply the internal law of the [IMF], including generally recognized principles of international administrative law concerning judicial review of administrative acts.”<sup>163</sup> It is interesting to note that while the EBRD considers general principles of international administrative law as something separate from its internal law, the IMF considers such general principles as part of its internal law. The official commentary to Article III of the Statute of the IMF Administrative Tribunal sets out a hierarchy of the internal law of the organization<sup>164</sup> and its relation to general principles of international administrative law as follows:

To the extent that a tribunal’s decision is dependent on the particular law of the organization in question (such as the precise language of a staff regulation), the decision would be regarded as specific to the organization in question and not part of the general principles of international administrative law.<sup>165</sup>

Furthermore, the official commentary notes that an administrative tribunal applying general principles of international administrative law “cannot derogate from the powers conferred on the

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161. European Bank for Reconstruction and Development, Administrative Tribunal Statute and Rules of Procedure, Rule 3.02, *available at* <http://www.ebrd.com/downloads/integrity/appeals.pdf>.

162. *See id.* Rule 8.03.

163. Statute of the Administrative Tribunal of the International Monetary Fund, art. III (2009), *available at* [https://www.imf.org/external/imfat/pdf/2009\\_Amended-Statute.pdf](https://www.imf.org/external/imfat/pdf/2009_Amended-Statute.pdf).

164. *See* Commentary to the Statute of the Administrative Tribunal of the International Monetary Fund, *available at* <http://www.imf.org/external/imfat/report.htm>. With respect to formal sources of law, insofar as the Executive Board derives its authority from the Articles of Agreement, the Executive Board’s decisions must be consistent with the Articles as a higher authority of law. Likewise, the Executive Board is also bound by resolutions of the Board of Governors as the highest organ of the Fund. *Id.*

165. *Id.*

organs of the [IMF], including the Executive Board, under the Articles of Agreement.”<sup>166</sup> In other words, the internal law of the IMF is superior to general principles of international administrative law. Clearly, the statutes of the EBRD and the IMF administrative tribunals follow different approaches toward the hierarchy between international law and the internal law of international organizations.

Several other international administrative tribunals uphold the importance of general principles of international administrative law. On more than one occasion, the World Bank Administrative Tribunal has reviewed the legality of actions taken by the legislative body of the World Bank. For example, in *de Merode*, the World Bank Administrative Tribunal recognized that the World Bank could not violate the principle of nonretroactivity due to its fundamental nature. Similarly, the Appeals Board of the European Launcher Development Organisation also explained that employment contract provisions cannot contradict the general principle of nondiscrimination.<sup>167</sup> Therefore, certain general principles, such as nondiscrimination and the notion that an organization cannot reduce one’s salary, are fundamental.<sup>168</sup>

One ILO Administrative Tribunal decision explained that a right derived “from a general principle . . . must be respected even where contrary provisions exist or in the absence of any explicit text.”<sup>169</sup> Nevertheless, some tribunals remain reluctant to nullify internal law enactments on the basis of conflict with fundamental norms of international administrative law.<sup>170</sup> One reason for the reluctance could be that the tribunals want to show respect for an international organization’s legislative procedures. However, other tribunals boldly recognize fundamental norms that international organizations cannot violate, such as nonretroactivity and

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166. *Id.*

167. See AMERASINGHE, *supra* note 40, at 296; see also *Ms. N. Sachdev v. Int’l Monetary Fund*, Judgment No. 2012-1, ¶ 150 (Admin. Trib. for the Int’l Monetary Fund Mar. 6, 2012) (noting that it was “permissible that the selection process, which was taken together with the World Bank for a position in a joint Bank/Fund office, not follow the precise requirements of the Fund’s written law as long as the process met standards of fairness consistent with generally recognized principles of international administrative law.”).

168. AMERASINGHE, *supra* note 40, at 789.

169. *In re Ferrechia*, Judgment No. 203 (ILO Admin. Trib. May 14, 1973) (discussing the right to participate in the examination of evidence).

170. *Mullan v. Sec’y-General of the United Nations*, Judgment No. 162, U.N. Admin. Trib. 387, 389 (1972).

nondiscrimination.<sup>171</sup> The main challenge moving forward will be to define the aims of such principles, which could prove to be difficult as not all legal systems share the same legal culture and tradition.<sup>172</sup>

### B. *Toward Supremacy of International Law*

Under a legal hierarchy, every action and enactment of the international organization must respect higher-ranking norms. Article 38 of the ICJ Statute, the most respected list of the sources of international law,<sup>173</sup> provides that international conventions, general principles of law, and international customary law serve as primary sources of international law, while judicial decisions and scholarly writings serve as subsidiary means to determine international law.<sup>174</sup> Despite this articulation, international administrative tribunals never refer to Article 38(1) of the ICJ Statute.<sup>175</sup>

Although Article 103 of the U.N. Charter explicitly provides that obligations under the Charter shall prevail over any obligations of U.N. member States,<sup>176</sup> under other international agreements, the ICJ Statute does not establish a hierarchy of sources of international law. The ICJ Statute merely suggests the order in which a tribunal should consider each source: if the solution is found in a treaty, a tribunal should not refer to custom, but if no such custom or treaty exists, then the adjudicator must resort to general principles of law.<sup>177</sup> This order goes from the most special rules to the most general ones, reflects the decreasing ease of proof, and reflects preference to sources in which consent of States is better articulated.<sup>178</sup> The same logic can apply to international administrative law—in the absence of relevant treaties of customary inter-

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171. See, e.g., *de Merode v. World Bank*, World Bank Admin. Trib. Rep., Decision No. 1, ¶ 61 (1981).

172. However, the same argument would apply to the force of international law generally, such as the U.N. Charter, which is primarily based on the Western legal tradition.

173. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 36 (7th ed. 1997) (stating that Article 38(1) of the ICJ Statute "is usually accepted as constituting a list of the sources of international law").

174. ICJ Statute, *supra* note 2, art. 38.

175. AMERASINGHE, *supra* note 40, at 283.

176. U.N. Charter art. 103.

177. Pellet, *supra* note 109, ¶ 271.

178. Pierre-Marie Dupuy, *La pratique de l'article 38 du Statut de la Cour internationale de Justice dans le cadre des plaidoiries écrites et orales*, in *COLLECTION OF ESSAYS BY LEGAL ADVISERS OF STATES, LEGAL ADVISORS OF INTERNATIONAL ORGANIZATIONS, AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL LAW* 377, 381, 388 (1999), available at <http://www.un.org/law/books/CollectionOfEssaysByLegalAdvisers.pdf>.

national law, adjudicators should resort to general principles of law.

According to Hersch Lauterpacht, a specific treaty overrides international customary law and even general principles of law, and it may also depart from a general treaty binding on the parties, subject to certain limitations.<sup>179</sup> Lauterpacht argues that because treaties and custom hold the first place in the hierarchy of international legal sources, a tribunal should interpret them against general principles of law.<sup>180</sup> However, because treaties and custom result from interaction of States rather than interaction between international organizations and their employees, treaty application in international administrative law is questionable. Moreover, international organizations themselves are rarely parties to treaties.

While the supremacy of constituent documents of international organizations over other internal law is widely recognized, this is not the case with the supremacy of general international law over the internal law of international organizations. One author suggests, “[T]he general principles of law yield to the written sources.”<sup>181</sup> On the other hand, others believe that general principles of law usually prevail over a conflicting written internal law of the organization.<sup>182</sup> Some argue that every internal regulation of an international organization must conform to general principles of international administrative law and any other applicable norms of general public international law.<sup>183</sup> In other words, the practice of an international organization cannot override a fundamental general principle of law, such as the prohibition against discrimination.

A number of international legal instruments support the supremacy of international law over the internal law of international organizations. The Vienna Convention on the Law of Treaties provides that “an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.”<sup>184</sup> Further, Article 32(d) of the Draft Articles of Responsibility of International Organizations provides, “[T]he responsible international organization may not rely

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179. 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 87 (Elihu Lauterpacht ed. 1970).

180. *Id.* at 244.

181. HENRY SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 390 (2011); AKEHURST *supra* note 90, at 80.

182. AMERASINGH, *supra* note 40, at 296.

183. DUPUY, *supra* note 88, at 245 (1988).

184. Vienna Convention on the Law of Treaties, *supra* note 85, art. 27.

on its rules as justification for failure to comply with its obligations under this Part.”<sup>185</sup> Although these Articles do not address an international organization’s obligations vis-à-vis its employees but rather deal with traditional subjects of international public law,<sup>186</sup> no reason exists as to why the same principle cannot apply to employment relations.<sup>187</sup> The main issue in establishing such a hierarchy with respect to international administrative law is deciding which norms occupy the highest hierarchical position.

The ICJ in the *Barcelona Traction* case suggested in a well-known dictum that “basic rights of the human person” create obligations *erga omnes*, which are more important to the international legal order.<sup>188</sup> The case provided several examples of such *erga omnes* rules, including the “protection from slavery and racial discrimination.”<sup>189</sup>

Certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community.<sup>190</sup> These include obligations concerning the protection of basic human rights.<sup>191</sup> As treaties attract nearly uni-

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185. Draft Articles on Responsibility of International Organizations, *supra* note 4, art. 32(d). This provision mirrors Article 27 of Draft Articles on Responsibility of States for Internationally Wrongful Acts. See also Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 138.

186. According to Article 33 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the international organization may owe obligations to one or more States, to one or more organizations, or to the international community as a whole. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 138, art. 33.

187. Drawing an analogy to the hierarchy of rules within E.U. law proves useful. The principle of constitutional legality under E.U. law establishes that each act attributable to the European Union should not contradict higher-ranking law. Armin von Bogdandy, *Neither an International Organisation nor a Nation State: The EU as a Supranational Federation*, in THE OXFORD HANDBOOK OF THE EUROPEAN UNION 761, 763 (Erik Jones et al. eds., 2012). For example, the practice of individual E.U. institutions cannot change the primary law of the European Union. Case 68/86, United Kingdom v. Council, 1988 E.C.R. 855, ¶ 24.

188. See *Barcelona Traction Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 33–34 (Feb. 5). For a discussion of what constitutes fundamental rights under various instruments, see Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 5–11 (1986).

189. *Barcelona Traction Light and Power Co., Ltd.*, 1970 I.C.J. at 32. However, there is no agreement as to which human rights norms constitute such superior norms, with the exception of a few norms, including genocide, torture, and slavery. For a discussion on this topic, see Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413 (1983).

190. M. Giorgio Gaja, *Obligations Erga Omnes in International Law*, 71 INST. INT’L L. Y.B., no. 2, 2005, at 286, 287.

191. *Id.*



versal ratification, it is often assumed that the principles they contain have achieved the status of customary international law.<sup>192</sup>

One set of principles, which nearly all jurisdictions recognized as fundamental,<sup>193</sup> is contained in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.<sup>194</sup> These principles include freedom of association, the effective recognition of the right to collective bargaining, elimination of all forms of forced and compulsory labor, effective abolition of child labor, and the elimination of employment discrimination.<sup>195</sup> It is argued that these principles should prevail over conflicting internal law of international organizations.

A hierarchy of norms of international administrative law, with international law holding the highest hierarchical position, will help to prevent proliferation of poor quality international administrative case law. Furthermore, it will send a message to international organizations that the international community will not tolerate a breach of such rights guaranteed under general international law. An establishment of a hierarchy will thereby help develop the international administrative legal system.

## VI. CONCLUSION

The current system of international administrative law does not constitute a hierarchically-ordered model. Ascertaining the necessary degree of conflict between international law and internal law may prove exceedingly difficult, particularly when the superior law, namely general international law, is so amorphous. To remain normative, international administrative law must have a formalized standardization based on the supremacy of international law.<sup>196</sup> The current pluralist model of international administrative law fails to offer a degree of legal certainty. Clarifying the relevant sources and setting up a hierarchy between internal law and inter-

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192. ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 100 (2006).

193. *NORMLEX, Ratification by Convention*, INT'L LABOUR ORG., <http://www.ilo.org/dyn/normlex/en/?p=1000:12001:0::NO::> (last visited Mar. 8, 2015). The number of ratification ranges from the Worst Forms of Child Labour Convention 1999 (No. 182) with 178 ratifications to 152 ratifications for Freedom of Association and Protection of the Right Convention, 1999 (No. 182). *Id.*

194. ILO Declaration on Fundamental Principles and Rights at Work, *adopted* June 18, 1988, *available at* [http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm](http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm).

195. *Id.*

196. D'ASPREMONT, *supra* note 44, at 30.

national law could diminish the space available for politics and unlimited discretion.

As a system of law completely detached from domestic legal systems, international administrative law is a purely international creature. However, not all sources of law applied by international administrative tribunals qualify as international public law in a strict sense of this term. Internal regulations of organizations, decisions of an organization's highest governing body, and an individual's employment contract clearly give rise to rights and obligations of employees and intergovernmental organizations. However, these do not constitute sources of public international law, and their role should be subordinate to international public law *sensu stricto*, backed by the legitimacy of the international law-making process.

International conventions and customary international law provide the most appropriate means to determine the rights and obligations of international organizations. Yet, it is difficult to locate directly applicable rights and obligations of employees in these instruments. Although international organizations are rarely parties to international treaties related to human rights and labor standards, they may be bound by the general principles of law articulated in them. General principles of law play an important role as a source of law both for employees and for international organizations. Similarly, decisions of other tribunals and the teachings of the most highly qualified scholars of the various nations should serve as subsidiary means to determine rules of law.

Rules of international public law, including procedural and substantive general principles of international law, should prevail over any conflicting internal law of international organizations. While some international organizations explicitly recognize this hierarchy in their statutes, others remain reluctant to do so. Administrative tribunals have started to recognize this principle in their jurisprudence, albeit without any reference to the theory of public international law. An established hierarchy of sources will make international administrative law more coherent and predictable and will ensure greater procedural equality between international organizations and international civil servants.

To achieve this hierarchy, administrative tribunals can clarify the sources of law applicable to disputes and outline the normative hierarchy. International organizations should also consider following the example of the EBRD Administrative Tribunal, which defined the sources of applicable law and established supremacy of

international administrative law over conflicting internal law of the organization.<sup>197</sup> Finally, the International Law Commission could codify general principles of international administrative law, similar to the Draft Articles on the Responsibility of International Organizations, as this will explicitly establish the supremacy of such principles over the internal law of international organizations.

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197. See EBRD, Administrative Tribunal Statute and Rules of Procedure, *available at* <http://www.ebrd.com/downloads/integrity/appeals.pdf>.