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Fairness in International Administrative Law

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Abstract

This Article analyses the notion and role of fairness in the procedural rules and practice of international administrative tribunals. After reviewing decisions of international administrative tribunals dealing with the notion of fairness it shows that tribunals rely on the concept of fairness to limit discretion of decision-makers, to fill gaps in law and to override written law to ensure fairness. The Article makes suggestions as to how to reconcile the different visions and roles of fairness in international administrative law. It argues that with the further development of international administrative law tribunals should as much as possible rely on rules and principles formulated by external bodies rather than on their personal understanding of fairness.

Key words: international institutional law – international civil service – due process – international administrative tribunals – sources of law

A. Introduction

The notion of fairness plays a more important role in international administrative law, which governs employment relations between international civil servants and intergovernmental organisations, than it does in domestic legal systems. Unlike domestic employment law, in many respects international administrative law still remains at a rudimentary stage, as a result of which international administrative tribunals often applying general concepts such as fairness. Understanding the notion of fairness, the roles it plays and various manifestations is even more important because failure to guarantee fair dispute resolution procedure may result in the refusal

to honour immunity of international organisations by domestic courts[1] as discussed in more detail below.

The number of international organisations is growing as well as the number of people whom they employ which currently reaches hundreds of thousands throughout the world.[2] International administrative tribunals despite their name more resemble courts dealing with employment disputes rather than institutions conducting a traditional administrative review of administrative acts. Such tribunals constitute integral parts of intergovernmental organisations – the busiest include the ILO Administrative Tribunal, the World Bank Administrative Tribunal and the United Nations Disputes Tribunal, which decide hundreds of employment disputes every year on the basis of their own statutes and rules of procedure.

Fairness of dispute resolution procedure involving international organisations and civil servants requires special attention also because international administrative tribunals are detached from a domestic hierarchical system of authority and not subject to classical notions of separation of power; decisions of international administrative tribunals are usually both mandatory and final, without possibility of appeal.[3] The system of international administrative law is self-contained yet unlike many other international dispute resolution regimes or domestic legal systems it does not have comparable checks and balances and separation of powers.[4] There is also a lack of generally accepted hierarchy between various sources of law and lacunas in regulation, which makes the concept of fairness a powerful tool in the hands of international administrative tribunals.

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[1] The International Law Commission made the following observation: "The jurisdictional immunity of [organisations] before domestic courts and the burden of proof and evidence can be identified as the common procedural obstacles facing non-state claimants when they attempt to raise and implement the accountability of organizations" ILC, Report of the 55th Session 2003, UN doc. A/58/10, 50.

[2] MATTHEW PARISH, MIRAGES OF INTERNATIONAL JUSTICE: THE ELUSIVE PURSUIT OF A TRANSNATIONAL LEGAL ORDER 50 (2011).

[3] In most jurisdictions, administrative measures are subject to the review of courts. Article 6.1 of the European Convention on Human Rights implies that the exercise of administrative power should be subject to judicial control ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.") Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights](entered into force Sept. 3, 1953). The European Court of Human Rights addressed the issue of fairness of dispute resolution procedures in several cases as discussed in more detail in the next section.

[4] Yaraslau Kryvoi, *International Administrative Law: From Autonomy to Hierarchy*, 47 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 267, 276 (2015).

A report of the International Law Association suggests that fairness is a standard that derives from the fundamental principle of good faith.[5] Fairness can be classified into at least two general categories: procedural and substantive[6] although in many cases it is difficult to distinguish between these two. The notion of procedural fairness is associated with impartiality of the tribunal, equality of arms of the parties, including giving an equal opportunity to each party to make its case in regard to facts and evidence.[7] Even though the procedure itself could be fair, this does not necessarily result in a fair decision on the merits.[8] Substantive fairness, also known as distributed justice, looks into why a particular decision was reached and whether the decision reached is just.[9]

As discussed in more detail below, the concept of fairness comes into play at all stages of dispute resolution procedure – from the initial informal dispute resolution to possible challenges of immunity of international organisations in courts. The difficulty with defining fairness comes from its dependence on other relative concepts such as legitimate expectations, abuse of rights, equity and justice. This is why the concept can be better understood by analysing specific instances when tribunals have applied it. The case law analyzed in this Article shows various faces of fairness and provides an analytical framework to understand the role fairness plays in the

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[5] International Law Association, ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS, FINAL REPORT, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SEVENTY-FIRST CONFERENCE, p.12 (2004), available at http://www.ila-hq.org/download.cfm/docid/6B708C25-4D6D-42E2-8385DADA752815E8. ("The fundamental nature of the principle of good faith has given rise to other important principles with regard, for example, to the need for standards of honesty, fairness and reasonableness.")

[6] Some authors consider to procedural fairness as synonym of legitimacy, meaning proper mechanisms to ensure creation, interpretation and application of the law as opposed to distributive fairness, which is allocating substantive burdens and benefits. See Tom Franck, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 22-24 (1995).

[7] C.F. AMERASINGHE, EVIDENCE IN INTERNATIONAL LITIGATION 14 (2005). The U.N. Human Rights Committee noted in *Perterer v. Austria* that the guarantee of equality before courts under Article 14(1) of International Covenant on Civil and Political Rights encompasses impartiality, fairness and equality of arms regardless of whether a particular judicial body is specifically tasked with imposing disciplinary measures on civil servants. United Nations, Human Rights Comm., 90th Sess., 9–27 July, 2007, Communication No. 1454/2006, U.N. Doc. CCPR/C/90/D/1454/2006, ¶7.2, at 17 (11 September, 2007).

[8] Other proposed categories of fairness include a relational/interactional fairness which reflects how a person is treated during the process from the emotional point of view and systemic fairness reflects the inherent bias of the dispute resolution system, potentially leading to an unfair process, outcome or treatment. See Idumati Sen, *Reflections On Fairness and Informal Dispute Resolution in International Organisations in Best Practices in* RESOLVING EMPLOYMENT DISPUTES IN INTERNATIONAL ORGANIZATIONS, Conference Proceedings, ILO Geneva, 15–16 September 2014, available at http://www.ilo.org/public/english/bureau/leg/download/best_practices_2015_en.pdf

[9] Ibid.

resolution of disputes between international organizations and international civil servants.

This Article will first demonstrate the importance of fair procedure in international administrative law by giving an overview of cases in which failure to guarantee such a procedure resulted in the refusal to honour the immunity of international organisations. It will then analyse the notion of fairness expressed in the statutes and procedural rules and practice of international administrative tribunals and will show that they apply the notion of fairness not only to procedural shortcomings, but also for substantive examination of the reasonableness of decisions and policies. The Article will examine the different roles fairness plays and how to reconcile the disparate visions and roles of fairness in international administrative law. It will conclude by suggesting that international administrative tribunals should rely whenever possible on general principles of law or other sources of international administrative law rather than on the notion of fairness.

B. Breach of Procedural Fairness as a Ground to Decline Immunity

Access to a court is considered a human right means the possibility for the individual to have a claim "heard and adjudicated in accordance with substantive standards of fairness and justice".[10] International civil servants usually cannot resort to domestic courts to resolve their employment disputes with international organisations because of immunity of international organisations. The main reason for immunity of international organisations from the jurisdiction of domestic courts and establishment of special administrative tribunals was, as the International Court of Justice put it, "to promote freedom and justice … and afford … judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."[11] Although the quote related to the United Nations system, its logic entirely applies to other international organisations. Immunity from jurisdiction of domestic courts has been considered a part of international customary law for a long time.[12]

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[10] See Francesco Francioni, The Rights of Access to Justice Under 1ary International Law, in ACCESS TO JUSTICE AS A HUMAN RIGHT 1 (FRANCESCO FRANCIONI ed., 2007).

[11] The International Court of Justice, *the Effect of Awards Case*, 1954 ICJ Reports at p. 57.

[12] Charles Brower, *United States* in THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS 330 (August Reinisch ed 2013) citing *Mendaro v World Bank*, 717 F.2d 610 (DC Cir 1983).

A number of cases decided by domestic courts suggest that failure to guarantee a fair dispute resolution process by international organisations may lead to a denial of immunity to such organisations. As discussed below, courts – both international and domestic – agree that international organisations may enjoy immunity only if they can establish due process for resolution of disputes with their employees.

In *Waite and Kennedy v Germany* the European Court of Human Rights ruled that Member States were responsible to ensure the implementation of the right to a fair trial in their territory and immunity of the international organisation was justified because the applicants had available to them "reasonable alternative means to protect their rights under the Convention".[13] Following a similar logic, the German Constitutional Court upheld immunity from jurisdiction because the administrative tribunal of the International Labour Organisation met both the minimum rule of law demands of the German Basic Law and the international minimum standard of fundamental procedural fairness.[14]

In other cases courts stripped international organisations of their immunity because of lack of fair process. In one case, a Belgian court denied recognition of immunity of an international organisation because the internal procedure of dispute resolution with its employees did not offer guarantees of a fair and equitable process which manifested itself in the lack of a public hearing, the impossibility to challenge members of the internal appeals committee and the absence of provisions regarding execution of adverse decisions.[15] Italian and French courts followed similar logic when they rejected immunity of international organisations for failure to provide an independent and impartial remedy constituted a necessary precondition to upholding

[13] *Waite and Kennedy v Germany* (Grand Chamber Judgment) App No 26083/94 (1999) §67. §68. In *Gasparini*, the European Court of Human Rights followed a similar logic that the protection afforded by NATO's internal dispute resolution mechanism was not "manifestly deficient" and upheld immunity of this international organisation. Eur. Court H.R., *Gasparini v. Italy and Belgium*, Judgment of 12 May 2009, 10750/03.

[14] *B. et al v. EPO*, Federal Constitutional Court, Second Chamber, 3 July 2006, 2 BvR 1458/03. (The court explained it had a legally defined jurisdiction, a proper legal procedure on the basis of its legal principles and rules and its judges were under duty to be independent and free from bias.)

[15] *Siedler v Western European Union*, ILDC 53 (BE 2003); [2004] Journal des tribunaux 617. The court explained its decision by the need to respect the right to a fair trial guaranteed by Article 6(1) of the European Convention on Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights.

its immunity from jurisdiction.[16] Domestic courts in Belgium on several occasions also did not allow immunity from execution of an order to pay compensation related to termination of an employment contract because the claimant had no access to other reasonably available means to protect his or her rights guaranteed by the European Convention on Human Rights.[17]

This review of case law suggests that international and domestic courts increasingly emphasize the right to fair process in international administrative law, violation of which may strip international organisations of their immunity.[18] Although in cases discussed above the courts relied on Article 6 of a regional convention, namely the European Convention on Human Rights, Article 14 of the International Covenant on Civil and Political Rights contains a very similar provision on fair hearing.[19] International organisations are not formally parties to the ICCPR, but over 160 States are parties to it and therefore the principles are regarded as customary international law.[20] International organisations as subjects of international law[21] should be bound by international public law, including by the general principles of law.[22]

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[16] *Drago v International Plant Genetic Resources Institute (IPGRI),* Final Appeal Judgment, Case No 3718, Giustizia Civile Massimario, 2007, 2, ILDC 827 paragraph 6.7 (IT 2007); Cass., 25 January, 2005, No. 04-41012, translated in ILDC 778 (2005); *Paola Pistelli v. European University Institute*, Italian Court of Cassation, all civil sections, 28 October 2005, no. 20995, Guida al diritto 40 (3/2006), ILDC 297 (IT 2005).

[17] See, e.g., *Lutchmaya v. ACP Secretariat*, Cour d'Appel [CA] Bruxelles, Mar. 4, 2003, J.T. 2003, 684, ILDC 1363 (BE 2003). *B.D. v. ACP Secretariat* (CA Bruxelles, 27 February 2007); see more detailed discussion in Jan Wouters et al., Belgian Court of Cassation, 105 AM. J. INT'L L. 560, 567 (2011).

[18] For a review of other similar cases see August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 CHINESE JOURNAL OF INTERNATIONAL LAW 258 (2008).

[19] According to Article 14 "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." International Covenant on Civil and Political Rights. 1966, United Nations. Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407.

[20] See *Drago v. IPGRI, supra* note 16; *Pistelli v. European University Institute, supra* note 16.

[21] See, e.g., International Court of Justice (ICJ) 1949 Advisory Opinion on the Reparation for Injuries Suffered in the Service of the UN, Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) ICJ Rep 1949, p.174.

[22] The applicability of international customary law to international organisations remains one of central problems of the law of international organisations. Although international organizations do not normally purport to consent to customary international law but arguing that international public law does not apply to organizations would mean "to deny that they are international persons, with rights and duties on the international plane". See analysis of applicability of international public law to international organizations Nigel White, THE LAW OF INTERNATIONAL ORGANISATIONS 23-25 (2005).

The following sections of the Article will show how international administrative tribunals understand and apply the concept of fairness.

C. Defining Fairness

In its usual understanding, fairness is as a synonym of equity, reflecting the general spirit of relations.[23] This generic definition does not contain any references to law. Fairness allows tribunals to depart from strict rights-based approach, focusing on legitimate expectations and underlying interests and needs of the parties.

Statutes and procedural rules of most international administrative tribunals do not mention the concept of fairness. The statutes usually provide that such tribunals should establish their own procedures.[24] However, some procedural rules and their official commentaries do refer to fairness as explained below.

According to the World Bank Group Principles of Staff Employment its subsidiary organs such as the World Bank Administrative Tribunal shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members.[25] The IMF Procedural Guidelines on Conducting Inquiries Related to Allegations of Misconduct refers to

> … fundamental fairness in procedural terms, including with respect to providing those against whom allegations are made notice of investigations and an opportunity to be heard, efforts to ensure balance and thoroughness, appropriate confidentiality, and freedom from reprisal.[26]

In one case the IMF Administrative Tribunal explained that it had authority to review the procedural fairness of any contested decision and this power derived from

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[23] BLACK'S LAW DICTIONARY, WHAT IS EQUITY? available at: http://thelawdictionary.org/equity/ (equity is defined as "the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men").

[24] Examples of this approach include the ILO Administrative Tribunal, Article VI of the Statute of the Administrative Tribunal of the ILO; the Word Bank Administrative Tribunal and Article III of the Statute of the IMF Administrative Tribunal; Article 11, Statute of the United Nations Dispute Tribunal.

[25] Principle 2.1 of The World Bank Group Principles of Staff Employment (quoted in *AU v IBRD*, WBAT Decision No. 418, para. 30.) Interpreting this set of rules one tribunal clarified that "fairness compels the consideration of factors such as job performance, responsibilities, experience, grade level and the like when setting salaries." *L.T. Mpoy-Kamulayi (No. 5) v. International Bank for Reconstruction and Development*, WBAT Decision No 463.

[26] IMF Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct, 9 February 2000, available at https://www.imf.org/external/hrd/inquiries.htm.

the requirement of Article III of its statute, which deals with applicable law.[27] The tribunal also emphasized the significance of fair process as a general principle of international administrative law quoting the official commentary to its statute, which provides that:

> …certain general principles of international administrative law, such as the right to be heard (the doctrine of *audi alteram partem*) 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, including the Fund.[28]

Other tribunals refer to fairness in line with concepts such as transparency,[29] due process,[30] natural justice[31] and objectivity.[32] Tribunals touched upon the meaning of procedural fairness, which should encompass various procedural issues such as an opportunity to defend him/herself,[33] an opportunity to hear the evidence and to respond to it[34] or failure to disclosure certain important information "in the absence of any reason in law for non-disclosure".[35] One tribunal highlighted the need to ensure due process not tainted by prejudice, arbitrariness or other extraneous factors.[36]

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[27] *Ms. "K" v. International Monetary Fund*, Administrative Tribunal of the International Monetary Fund Judgment No. 2003-2, 30 September 2003. *Ms. "EE" v. International Monetary Fund*, Administrative Tribunal of the International Monetary Fund Judgment No. 2010-4, 3 December 2010. Article III provides that " … the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts…"

[28] *Ibid*. (citing Report of the Executive Board, p. 18.)

[29] *E v. IBRD*, WBAT Decision No. 325, (This lack of transparency of the applicable procedures constitutes a failure of due process. The Tribunal has referred in previous cases to "[t]he need for a guarantee of procedural fairness and transparency in the proceedings and decision-making arrangements" of the Bank). See also *A*, Decision No. 182 [1997], para. 14; *Shenouda*, Decision No. 177 [1997], para. 37; *E v. International Bank for Reconstruction and Development*, Decision No. 325, para. 61; see also Official Commentary to the Commentary on the Statute of the Administrative Tribunal of the International Monetary Fund (200), available at https://www.imf.org/external/imfat/pdf/2009_Amended-Statute.pdf#page=14.

[30] United Nations Administrative Tribunal Judgment No. 988 ("calls for an investigation to be conducted "… with strict regard for fairness and due process for all concerned" so as to "protect individual rights, … due process for all parties concerned and fairness during any investigation, …") (citing Secretary-General's Bulletin ST/SGB/273 of 7 September 1994, paragraph 18).

[31] *Judgment No. 2491*, ILO Administrative Tribunal, 1 February 2006.

[32] *Judgment No. 411*, United Nations Administrative Tribunal, 13 May 1988.

[33] *Judgment No. 1154*, United Nations Administrative Tribunal, 30 January 2004.

[34] *Judgment 3040*, ILO Administrative Tribunal, Judgment of 6 July 2011.

[35] Judgment 3264, ILO Administrative Tribunal, 2014, ILO Administrative Tribunal, Judgment 2873, 108th Session, 2010, Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization.

[36] *Calin*, Judgment No 815, United Nations Administrative Tribunals, (1997).

Instances of unfairness include conflict of interest situations,[37] retroactive application of regulations[38] and issues of jurisdiction and procedure such as failure to extend time limits to submit a claim.[39]

The World Bank Administrative Tribunal explained that the doctrine of fairness was originally applied "only to procedural shortcomings, [and subsequently] it has evolved into an examination of the reasonableness of decisions and policies".[40] It then quoted an eminent English jurist that

> a court's solicitude does not extend to regulations "if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men."[41]

Clearly that case makes a distinction between fairness applied to procedural shortcomings and substantive fairness as a standard to review the merits of decisions and policies.[42] It appears from the decision that whether procedural or substantive, the concept of fairness is linked to legitimate expectation:

> Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy. [Emphasis in original.][43]

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[37] *Judgment No. 1036*, United Nations Administrative Tribunal, 29 November 2001.

[38] *Judgment No. 590*, United Nations Administrative Tribunal, 25 June 1993.

[39] *In re Leff*, Judgment No. 18, p.5, 26 April 1955 (a reasonable mistake of law preventing the claimant from submitting the claim on time); see also *In re Desgranges*, Judgment No. 11, 12 August 1953 (interpreting the scope of jurisdiction of the ILO Administrative Tribunal); *Aouad*, UNAT Judgment No 224 [1977], *Hiplern*, UNAT Judgment No 63 [1956], *von Stauffenberg et. al*., Order of 22 April 1986, WBAT Reports [1986].

[40] *Lavelle v. IBRD*, World Bank Administrative Tribunal, Judgment of 19 July 2003, para. 24. (quoting *Kruse v. Johnson*, [1898] 2 QB 91, [1895-99] All ER Rep 105 and *R v. IRC, ex parte MFK Underwriting Agencies Ltd*, [1990] 1 WLR 1545, at 1569-70.)

[41] Ibid. The tribunal then explained that it was not bound to follow the national law but the ratio from those English cases summarized expanding upon the meaning of the concept of fairness. Ibid. para. 25. A similar approach was taken in *Barbara Nunberg v International Bank for Reconstruction and Development,* WBAT Decision No. 245.

[42] This distinction has been also articulated in *Buendia*, UNDT, Judgment No. YNDT/2010/176 (2010)("Disciplinary findings and penalties imposed as a result or as a consequence of a breach of the [procedural propriety and the protection of fundamental rights] cannot be regarded as fair. A breach of the right to due process is both procedurally and substantively unfair").

[43] *Lavelle v. IBRD, supra* note 40, para. 24 (*quoting R v. North and East Devon Health Authority, ex parte Coughlan [2000] 3 All ER 850, 871-2, para. 57.)*

The EU Civil Service Tribunal explained that to assess the fairness it is necessary to examine and compare the procedures followed in similar situations,[44] which supposedly helps to understand the existing legitimate expectations.

To sum up, tribunals commonly view the notion of fairness as a synonym of just and equitable treatment of parties, which includes both procedural and substantive treatment based on the concept of legitimate expectations. The next section will analyse various roles the notion of fairness can play in the practice of international administrative tribunals.

D. The Role of Fairness

As the following review will demonstrate, in most cases, fairness serves one of three roles. First, international administrative tribunals rely on fairness to limit a potential abuse of discretion in rendering decisions on various procedural and substantive matters. Secondly, it fills the gaps in the regulation – when there is no written law on a particular procedural or substantive issue tribunals decide on the basis of fairness. Finally, some tribunals deviate from applying the written rules of the internal law of international organisation to achieve a more fair and equitable resolution.

1. Fairness to Limit Discretion

International administrative tribunals often refer to fairness to limit decision-making discretion and ensure the equality between the parties.[45] One tribunal quoted C.F. Amerasinghe who highlighted that

> what all discretionary decisions have in common is that a 'fair' procedure or 'due process' be followed when they are taken, fairness or the

[44] See, e.g., *Michael Cwik v European Commission,* Judgement of the European Union Civil Service Tribunal (Second Chamber), 8 December 2014, Case F-4/13.

[45] As the UN Human Rights Committee noted in *Lederbauer v Austria*, the guarantee of equality before courts under Article 14(1) encompasses impartiality, fairness and equality of arms whether the case is considered by a judicial body, which is asked to impose disciplinary measures on civil servants. Communication 1454/2006, 11 September 2007, at para 7.2; United Nations Administrative Tribunal Judgment No. 639, 13 July 1994. ("The Tribunal notes in this regard that the Officer-in Charge's discretion was not absolute. He had to abide by certain rules of fairness and administrative procedures before he was able to make his decisions.")

> appropriateness of process being relative to the nature of the decision taken.[46]

The official commentary to the Statute of the IMF Administrative Tribunal also mentions fairness as a way to limit the exercise of managerial discretion:

> with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.[47]

A report of an external panel, which reviewed the International Monetary Fund's dispute resolution system, concluded that the standard of review used by IMF Administrative Tribunal encompasses setting limits to the improper exercise of discretionary power by organs of an international organisation and the protection of legitimate expectations.[48] Since international administrative tribunals are organs of international organisations this also applies to them. That report cited a case requiring this international organisation "to set high standards of conduct for itself and to ensure appropriate remedies for breach of what the Grievance Committee referred to as 'fundamental fairness'."[49]

The United Nations Administrative Tribunal repeatedly ruled on issues of incorrect application of internal regulations, which violate the principles of equity and fairness.[50] The IMF Administrative Tribunal has underscored "the importance of procedural fairness in the exercise of discretionary authority"[51] by international

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[46] *Leung-Ki v. The Secretary-General of the United Nations*, United Nations Administrative Tribunal Case No. 693, 13 July 1994, para. IX (quoting Amerasinghe, supra note **Error! Bookmark not defined.** at 357-358).

[47] Commentary on the Statute of the Administrative Tribunal of the International Monetary Fund 19 (2008) (Citing *Durrant-Bell*, WBAT Reports, Dec. No. 24 (1985), at paras. 24, 25).

[48] See Report of External Panel "Review of the International Monetary Fund's Dispute Resolution System" p ii (2011), available at https://www.imf.org/external/hrd/dr/112701.pdf.

[49] Ibid. quoting Case 1996-5 of the IMF Grievance Committee.

[50] See, e.g., See for example United Nations Administrative Tribunal Judgments *Taylor,* No. 360, (1985); *Khamis* No. 108 (1967); *Islam,* No 953 (1997) (ruling that it was within the Tribunal's power to review whether the application of the rrules has been effected in an arbitrary, unfair or prejudicial manner); Judgment No. 483, United Nations Administrative Tribunal, 25 May 1990.

[51] *Mr. S. Negrete v. International Monetary Fund*, Administrative Tribunal of the International Monetary Fund Judgement No. 2012-2, 12 October 2012, para. 140.

organisations and the need to avoid incorrect interpretation of regulations.[52] In another case, the World Bank Administrative Tribunal clearly treated fairness as an interpretation tool: "The power of the Tribunal … is very broad and allows for the examination of all elements of fact and law as well as of procedural fairness and transparency."[53]

Elements of bias, prejudice or manifest unreasonableness may lead to a conclusion that a certain decision was unfair and arbitrary.[54] The World Bank Administrative Tribunal cited a decision of the Inter-American Development Bank Administrative Tribunal, which explained the criteria used to challenge discretionary decisions:

> it is a well-established principle of law, which this Tribunal has already had occasion to invoke, that all administrative decisions, including discretionary ones, must respect basic principles of due process of law, including the requirement that they be adopted by impartial officials, after fair proceedings, on sufficient factual grounds and providing reasonable and adequate justification.[55]

2. Fairness to Fill Gaps in Law

International administrative law (both procedural and substantive) has gradually evolved from a stage of customary law similar to *lex mercatoria* to a more codified version with clearly stipulated procedural and substantive rules and principles. As in any other emerging branch of law, at earlier stages of development judges have exercised significant discretion on procedural and substantive matters in the absence of written rules.[56]

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[52] ILOAT Judgment 3143, 4 July 2012, p. 4 („[the respondent] failed to ensure the consistent and equitable application of the rental subsidy scheme and, by so doing, violated the principles of fairness and equity"); ILOAT Judgment No. 2915, 8 July 2010, p. 15 („whether or not [retirement] is required by the principle of equality, which embraces the notions of fairness and equity also invoked ..."); (*Bertrand*, Decision No. 81 [1989], para. 20.)

[53] *A v. International Bank for Reconstruction and Development*, World Bank Administrative Tribunal Decision No. 182, November 18, 1997

[54] *De Raet*, World Bank Administrative Tribunal, Decision No. 85. (At most the Tribunal can find that this conclusion was reached in an arbitrary manner, involving, for example, unfairness, failure to allow the Applicant to state his case, or other departures from established procedure, bias, prejudice, the taking into consideration of irrelevant factors or manifest unreasonableness.")

[55] *Buria-Hellbeck* 1989 IDBAT, No 23, para. 144. See also *Pagurek vs. IDB*, Judgment No 44 1997, which is too much the same effect.

[56] See, e.g., Roscoe Pound, *Making Law and Finding Law*, 82 CENTRAL LAW JOURNAL 351 (1916).

Statutes of international administrative tribunals usually do not specify the sources of applicable law (substantive or procedural),[57] which gives tribunals freedom to use the concept of fairness to rule on issues not specifically regulated in written law to fill the gaps in regulation. It is generally accepted that the rules of fair procedure may be derived "from general principles of law where the written law is silent"[58] and while some international administrative tribunals have applied fairness to fill gaps in the law, other tribunals have denied that they have power to do so.[59]

The League of Nations Tribunal explained in one of its early decisions that "it [was] only in the absence ... of written rules that the Tribunal would be justified in referring to general principles of law or equity".[60] The ILO Administrative Tribunal supported a similar line of reasoning ruling "the judge [was] bound to observe strictly the rules of law and can have recourse to equity only in the event of lack of clarity of the text or silence in the regulations".[61]

The most common example of application of fairness is when, in the absence of detailed rules, tribunals award compensation for damages arising out of certain procedural irregularities.[62] Fairness plays a significant role here because determination of damages usually involves translation of a breach of law into a mathematical calculation, which inevitably involves exercise of discretion.[63]

3. Overriding Written Law to Ensure Fairness

[57] Kryvoi, supra note 4, at 268.

[58] C.F. AMERASINGHE, PRINCIPLES OF INTERNATIONAL INSTITUTIONAL LAW 306 (2005).

[59] See an overview in MICHAEL AKEHURST, THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANISATIONS 90-92 (1967).

[60] *Di Palma Castiglione*, League of Nations Judgement No 1, 1929, at p.3. (translation from AKEHURST Ibid at 74).

[61] In *re Tranter*, ILO Administrative Tribunal, Judgment No. 14, 3 September 1954.

[62] Judgment No. 1365, United Nations Administrative Tribunal, 6 February 2008 ("As the Joint Appeals Board declared this irregularity to be a violation of the principles of equity and fairness, the Tribunal considers that the $500 recommended by the Board and accepted by the Secretary-General to be clearly inappropriate in light of the gravity of the flaw, which was neither more nor less than age discrimination. "); *Advisory Opinion, Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against UNESCO* (I.C.J. Reports 1956, at p. 100) (citing *Corfu Channel case*, Judgment of December 15th, 1949, I.C.J. Reports 1949, p. 249).

[63] See, e.g., *Duberg*, Judgments Nos 17-19 and 21, 26 April 1955, p.5. *In re Godchot*, Judgment No. 33, n 23 September 1958, p. 4; *Garcin*, ILO Administrative Tribunal Judgment No. 32 (19958).

In some cases, tribunals knowingly departed from the requirements of written law applying the concept of fairness. For example, the IMF Administrative Tribunal explained the departure from written law by the need to ensure "fairness consistent with generally recognized principles of international administrative law".[64] In several cases, this tribunal has awarded relief for failure to observe procedural fairness while confirming the contested decision.[65] For instance, in the *Cauro* case the OEEC/OECD Appeals Board was ordered to pay a supplementary indemnity, beyond that which was established by the Staff Regulations, to deal with an "abnormal injury, for which the statutory provision do not, in the present case, provide an equitable compensation".[66]

On the other hand, some tribunals are conscious about the border between application of law and creation of law. For example, an IMF administrative tribunal explained that it could not consider questions of fairness or unfairness in its application of written law and that the regulations did not contemplate discretionary decision-making and that the tribunal could only decide on whether the application was appropriate.[67]

4. Conclusion: Reconciling Conflicting Visions and Roles of Fairness

As the analysis above demonstrates, fairness plays an important role in international administrative law. Failure to respect procedural fairness may lead to denial of recognition of immunity of international organisations by domestic courts. Fairness also plays an important role when applicable procedural and substantive law contains gaps or requires interpretation. The concept of fairness allows international

[64] *Ms. N. Sachdev v. International Monetary Fund*, Administrative Tribunal of the International Monetary Fund Judgment No. 2012-1, IMFAT Judgment No. 2012-1 (6 March 2012) ("it was permissible that the selection process, which was taken together with the World Bank for a position in a joint Bank/Fund office, 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.")

[65] Ibid. See also Ms. "C" v. International Monetary Fund, IMFAT Judgment No. 1997-1 (22 August 1997), para. 44; Judgment No. 2012-1, *Ms. N. Sachdev v. International Monetary Fund*, para. 150; *Ms. "EE" v. International Monetary Fund*; Judgment No. 2010-4 Administrative Tribunal of the International Monetary Fund, 3 December 03, 2010, para. 266.

[66] Decision No 34, 1961 (translation from AKEHURST, *supra* note 59 at 87.

[67] See *Loguinov*, Judgment No. 685 (1994), and *Demers Dear,* No. 749 (1996).

administrative tribunals not only to ensure just procedure but also to fill such gaps, taking into account legitimate expectations of the parties.

One problem with replacing written rules with the concept of fairness is that the parties may not necessarily know the perception of fairness of a particular tribunal, which leads not only to increasing number of cases but also creates uncertainty as to the correct course of procedure for international civil servants. A recent Council of Europe report on the accountability of international organisations for human rights violations emphasised that uncertainty as to the precise scope of obligations incumbent on the international organisation undermines legal certainty - both for the organisations themselves and for third parties.[68]

As demonstrated above even if procedural or substantive written rules are rather specific on a particular issue, tribunals may decide not to apply them to achieve a result, which is fairer in their view. That creates even more uncertainty for the parties. Although it is desirable for the rules to be fair, it is submitted that it is even more desirable to have predictability and certainty even if some rules might seem unfair. Furthermore, the main task of international tribunals is to apply law rather than to create it.[69] As the International Court of Justice explained in the *Fisheries Jurisdiction* case a court of law "cannot anticipate the law before the legislator has laid it down."[70] Norms of law are supposed to restrict powers of international organisations and international administrative tribunals, which function as adjudicators rather than lawmakers.[71]

It is argued that departing from written regulations of international organisations to reach a more fair result should only be allowed when it is possible to prove that such regulations contradict generally recognised principles of international administrative law. This would help distinguish legal procedure based on legitimate sources of law from non-legal procedure. It would also allow international administrative tribunals to constrain international organisations with the rule of law

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[68] Council of Europe Parliamentary Assembly, Accountability of International Organisations for Human Rights Violations, 17 December 2013, paragraph 17, available at: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=20310&Lang=EN.

[69] HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 373-374 (1933).

[70] *Fisheries Jurisdiction*, *UK v Iceland, Merits*, ICJ Reports, 1974, 23-24.

[71] Jan Wouters and Philip De Man, *International Organisations as Law-Makers*, in RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS (JAN KLABBERS AND ÅSA WALLENDAH EDS, 2011).

rather than subjective discretion of judges deciding the case. Fairness in the eyes of one judge will not necessarily mean fairness for another judge or for the parties. Fairness is a judgment call, which depends on moral, cultural, religious, political and other preconceptions. While it is very difficult to prove general principles of law, it is almost impossible to "prove" fairness, which is in essence an exercise of discretion.

If the tribunal cites other cases or sources of law to demonstrate fairness – that would suggest that they have actually applied general principles of law other than fairness as such. Reliance on general principles may enhance accountability of international administrative tribunals by recognising principles commonly found in jurisprudence of other tribunals and national administrative law.[72] Whenever possible, the tribunals should rely upon general principles of law rather than fairness. A rule or principle, which is fair, is probably considered as such because it has been adopted by most legal systems as fair and can be regarded as a general principle of law as understood by Article 38 of the Statute of the International Court of Justice. While some statutes and procedural rules of international administrative tribunals stipulate applicable substantive law,[73] others simply require a reasoned decision.[74] It is argued that instead of relying on their subjective perceptions the tribunals should opt for demonstrating whenever possible that a certain principle is widely recognised and applied by other tribunals in the analogous situations.

It is useful to draw a parallel with national legal systems. For example, in the United States, "unconstitutionally vague" statutes are unenforceable. Fair notice and control of arbitrary enforcement underpin the doctrine of vagueness.[75] Under US law the problem of arbitrary enforcement violates the principle of equal protection.[76] The

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[72] See discussion of attractiveness of the use of general principles of law in EU administrative law. PAUL CRAIG, UK, EU AND GLOBAL ADMINISTRATIVE LAW. FOUNDATIONS AND CHALLENGES 361 (2015).

[73] See, e.g. Rules of Procedure of the Administrative Tribunal of the European Bank for Reconstruction and Development, Rule 3.02, available at http://www.ebrd.com/downloads/integrity/appeals.pdf; Statute of the Administrative Tribunal of the International Monetary Fund, art. III available at http://www.imf.org/external/imfat/pdf/2009_Amended-Statute.pdf.

[74] Statute of the United Nations Dispute Tribunal, art. 11, G.A. Res. 63/253 (Dec. 24, 2008) available at http://www.un.org/en/oaj/files/undt/basic/2008-12-24-undt-statute.pdf; Statute of the Administrative Tribunal of the International Labour Organization, Article IV, available at http://www.ilo.org/tribunal/about-us/WCMS_249194/lang--en/index.htm.

[75] If a statute is too vague for the average citizen to understand, a statute is void for vagueness and unenforceable under the US constitutional law. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES (2011).

[76] According to the Fourteenth Amendment to the US Constitution, known as the Equal Protection Clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of

fair notice or fair warning principle means that individuals should formulate legitimate expectations and adjust their behaviour accordingly – both on substantive and procedural matters. As in domestic legal systems,[77] multiple precedents can create from a fluid principle a particularly defined, binding set of legal standards in international administrative law. However, this is not an automatic process as even in a positivist tradition the relevant precedents are analysed against the backdrop of values, which shape their decisions.[78]

As the practice of tribunals develops, international organisations and legal scholars will analyse and systematise the development of customs and general principles, where written law has not yet developed or remains unclear. The need to use fairness and equity should diminish as detailed written rules evolve. Instead of being based on the judges' inherent understanding of justice or fairness, the tribunals should rely on general principles or other sources of international administrative law, which would lead to more predictable and fair international administrative law.

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citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*" 71 VIRGINIA LAW REVIEW 753 (1985).

[77] HARRY EDWARDS & LINDA ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW. APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 12 (2007).

[78] CRAIG, supra note 72 at 117.