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Towards a universal law governing the international civil service: a coalescence of international administrative law amid a proliferation of tribunals

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CHAPTER 1

INTRODUCTION

I. SETTING THE SCENE

It was one of those bright and clear summer days in Geneva, where the Alps are visible from the city. And it was hot, over 25° C. With Covid restrictions recently relaxed, the *bains des Pâquis* on the banks of *Lac Léman* was overflowing with people. Some were there for bathing, but many were holding cocktails from the *buvette*, enjoying the artificial rainbow created when the waters of the *jet d'eau* dispersed into droplets and the summer sun shined through.

But all was not well in paradise. Up the hill in the *Palais des Nations* complex, staff members of the UN Secretariat were huddled around their desks, trying to make sense of a new reality. It was 30 June 2020 and the United Nations Dispute Tribunal (UNDT) had just handed down its Judgment in the *Abd Al-Shakour et al.* case, upholding a pay cut for Geneva-based professional staff members resulting from a change to the Post Adjustment Multiplier by the International Civil Service Commission (ICSC).[4] The decision would result in upwards of 800 USD less in take-home pay per month for a mid-level professional staff member.

'I can't believe I just bought that new flat in the city and thought I could make it work,' Marie lamented, 'I won't be able to pay the mortgage now!'

'Just think of Ahmed,' Pedro offered, 'He has two kids starting university in the USA in the fall.'

'Nothing changes for him,' Felix explained, 'He works over at the International Labour Organization (ILO) Secretariat.'

[4] UNDT/2020/106, *Abd Al-Shakour et al.*; UNDT/2020/107. See also similar cases rendered soon thereafter affecting staff members of UNEP, UNCTAD, UNJSPF, ECE and INTRCEN: *Cardenas Fischer et al.*; UNDT/2020/133, *Abd Al-Shakour et al.*; UNDT/2020/154, *Aksioutine et al.*

‘What do you mean?!’ asked Marie, confused, ‘That is just across the street! I can literally see his office out my window!’

‘That may be true,’ explained Felix, ‘But the ILO is subject to the jurisdiction of the Administrative Tribunal of the International Labour Organization (ILOAT), which struck down this bloody Post Adjustment Multiplier last July. So nothing changes for him and all the other lucky ones working for UN agencies and international organizations subject to ILOAT jurisdiction.’

‘Well that’s good news for Jeremy over at the United Nations Environment Programme (UNEP) then,’ Marie interjected, ‘The poor guy already commutes 80 minutes each way to save money buying his groceries across the border in France!’

‘Nope, UNEP is subject to UNDT jurisdiction,’ replied Felix, ‘Jeremy is in the same boat as us.’

Marie’s phone binged and she checked her messages. Her closest friends — one worked at the WHO, another at the ITU and a third at the International Telecommunication Union (ITU) — had sent a selfie enjoying a drink at the *bains des Pâquis* with the text ‘Life’s too short…*Viens tout de suite!*’ All working at organizations subject to the ILOAT, they were blissfully ignorant of the divided city Geneva had just become.

‘What kind of a “UN Common system” is this?’ questioned Pedro, ‘Half of us make 1000 dollars more a month than the other half for doing exactly the same work? I might just take early retirement and go work in a regular sector with regular rules.’

‘You might not want to talk to the pension fund people now though,’ joked Felix, ‘They are also subject to the UNDT ruling…’

II. INTRODUCTION TO INTERNATIONAL ADMINISTRATIVE LAW AND INTERNATIONAL ADMINISTRATIVE TRIBUNALS

The present work concerns International Administrative Tribunals (IATs), the dispute-resolution bodies between staff members and the administration of international organizations. Since international organizations are immune from the jurisdiction of the host State,[5] when a dispute develops between an international civil servant and the employing organization, the staff member cannot simply haul the employer before a national court to resolve it. Thus, the international civil service needs a separate adjudicatory system where the organization is not immune, and IATs have come to fill this role. Beginning with the creation of the League of Nations Administrative Tribunal (LoNAT) in 1927, which continued as the Administrative Tribunal of the International Labour Organization (ILOAT) upon the dissolution of the League,[6] the number of IATs has now grown to almost thirty.[7] This is discussed in detail in Chapter 2.

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[5] C. F. Amerasinghe, 'International Administrative Tribunals', in 2014 *Oxford Handbook of International Adjudication* 316, at 318–19.

[6] H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity Within Diversity* 487 (6th ed. 2018) (citing League of Nations, Official Journal, Special Suppl. No. 54, at 201, 478).

[7] At the time of this writing, the following international administrative tribunals are functioning: (1) Administrative Tribunal of the International Labour Organization; (2) Council of Europe Administrative Tribunal; (3) Organization of American States Administrative Tribunal; (4) European Space Agency Administrative Tribunal; (5) World Bank Administrative Tribunal; (6) Inter-American Development Bank Administrative Tribunal; (7) Administrative Tribunal of the Bank for International Settlements; (8) Organisation for Economic Co-operation and Development (OECD) Administrative Tribunal; (9) Asian Development Bank Administrative Tribunal; (10) International Monetary Fund (IMF) Administrative Tribunal; (11) Commonwealth Secretariat Arbitral Tribunal; (12) African Development Bank Administrative Tribunal; (13) African Union Administrative Tribunal; (14) Southern Common Market (MERCOSUR) Administrative Tribunal; (15) Administrative Tribunal of the European Bank for Reconstruction and Development (EBRD); (16) European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT) Appeals Board; (17) United Nations Dispute Tribunal; (18) United Nations Appeals Tribunal; (19) *Organisation internationale de la francophonie, tribunal de première instance*; (20) *Organisation internationale de la francophonie, tribunal d'appel*; (21) United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) Dispute Tribunal; (22) North Atlantic Treaty Organization (NATO) Administrative Tribunal; (23) European Stability Mechanism Administrative Tribunal; (24) Court of Justice of the European Union (CJEU), General Court, having jurisdiction over administrative law cases; (25) Appeals Board of the European Centre for Medium-Range Weather Forecasts; (26) CARICOM (Caribbean Community) Administrative Tribunal; and (27) European Schools Complaints Board (ESCB), which has jurisdiction over staff cases as well as, for example, complaints by parents and students. Although the GAVI (Vaccine Alliance) Administrative Tribunal has been mentioned in the literature (*See* C. de Cooker, 'Proliferation of International Administrative Tribunals', (2022) 12 *Asian Journal of International Law* 232, at 238), no information on it is publicly available. Similarly, the proposed creation in 2022 of the Square Kilometer Array Observatory (SKAO) Administrative Tribunal has been mentioned (*Ibid.*), but no information is publicly available. The jurisprudence of the European Centre for Medium-Range Weather Forecasts is also not publicly available, although it does appear to exist (*See* G. Wettberg, 'Appeals Board: European Centre for Medium-Range Weather Forecasts (ECMWF)', 2019 *Max Planck Encyclopedia of International Procedural Law*, para. 16).

This dissertation is also about the special legal regime applied by IATs, known as international administrative law. This regime exists because IATs operate within a unique legal space, settling disputes between an international organization and an individual who is employed by that organization. Neither of the litigants are States, the traditional subjects of international law, and the legal issues arising within this regime are specific and unique, relating to employment disputes. Although national law contains substantive rules relating to employment matters, its application would raise questions about which national law to apply, international organizations being composed of staff members of many nationalities. If the national law of the staff member were applied, different staff members would be subject to different law based only on their nationality. If the national law of the host State were applied, then international civil servants, even those working in the same organization, would be subject to different rules based on their different duty stations. An autonomous set of rules was thus necessary to ensure that 'all employees — whatever their nationality, their place of recruitment, or their duty station — [were] subject to comparable conditions of service and offered the same legal guarantees.'[8] This set of rules is international administrative law. Although the precise nature of this body of law is difficult to categorize and open for debate,[9] it has been described by Amerasinghe as 'a breed of international law [that] may even, therefore, be regarded as a special branch of public international law.'[10]

The present work is very much about both of these things — IATs and the law applied by them, international administrative law — and in particular how the former are shaping the latter. The fact that each individual IAT has developed a jurisprudence is not surprising. This is what courts and tribunals do. This dissertation, however, looks for something more in the collective work of the growing number of IATs. It searches for a whole that is greater than the sum of its parts, aiming to discern a nascent common jurisprudence of international administrative law from among the rapidly growing number of tribunals.

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[8] S. Villalpando, 'The Law of the International Civil Service', in J.K. Cogan, I. Hurd and I. Johnstone, eds., *The Oxford Handbook of International Organizations* (2016), at 1070.

[9] See C.F. Amerasinghe, 'Sources of International Administrative Law', in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (1987), vol. 1, at 68.

[10] *Ibid.* at 69.

III. THE PROLIFERATION OF TRIBUNALS AND THE QUESTION OF FRAGMENTATION

Almost sixty years ago when only a handful of IATs existed, Michael B. Akehurst, a commentator in the field, observed that '[i]nternational administrative tribunals behave *as if* the internal laws of different organizations formed part of a single system of law' and that it was 'clear that the internal laws of different organizations bear a remarkable resemblance to each other, and can therefore establish strong precedents for each other.'[11] The present work aims to take stock of whether Akehurst's statement remains true today, or if the proliferation of tribunals has instead led to divergences in jurisprudence.

Returning to our story of the Geneva-based *cadre* of international civil servants described above, while it may be difficult for some to feel too sorry for them, the legal divide they encountered is serious, and unacceptable. Staff members working in an organization which aims to uphold the rule of law should not be subject to two different legal regimes which lead to such different results. The handing down of these two differing judgments by the ILOAT and UNDT, therefore, was a critical moment in the growth and development of international administrative law. It was a moment which caused us to pause and reflect on the health of this rapidly growing area of law, to question whether the exponential proliferation of tribunals and consequent expansion of judgments was causing more growing pains than advantages. It was certainly a moment to question whether Akehurst's statement[12] had stood the test of time.

Public international law had this moment too. It is best captured by the concern in 1999 over the legal conclusion reached by the ICTY Appeals Chamber in the *Tadić* case relating to the level of control required for the attribution of acts of paramilitary forces, which specifically eschewed the test adopted by the ICJ in its 1986 Judgment in the *Nicaragua* case. While the ICJ had adopted an 'effective control' test in the *Nicaragua* case,[13] the ICTY Appeals Chamber found this unpersuasive and espoused a less stringent 'overall control' test.[14] Moreover, it did not simply do this in a vacuum but rather it overtly criticized the ICJ's test, claiming it '[w]ould

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[11] M. B. Akehurst, *The Law Governing Employment in International Organizations* (1967), 263 (emphasis added).

[12] See supra note 11 and accompanying text.

[13] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 at p. 65, para. 115.

[14] ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Judgment of 15 July 1999, IT-94-1-A, at paras. 115-145.

not seem to be consonant with the law of State Responsibility' and was 'at variance with judicial and State practice.'[15] The ICJ fired back in its 2007 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, calling the 'overall control' test 'unpersuasive' and 'unsuitable', lamenting that it 'stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.'[16] The President of the ICJ at the time, Gilbert Guillaume, even brought up the issue in his address to the UN General Assembly, stating that '[r]egardless of what one might think of [the ICTY's] solution, the contradiction thus created gives clear evidence of the risks to the cohesiveness of international law raised by the proliferation of courts.'[17]

Other examples from around this time of the negative consequences of proliferating tribunals abound. There were discussions about the risk of 'forum shopping' between the ICJ and ITLOS in law of the sea disputes following the creation of the latter tribunal, which became operational in 1996.[18] There were concerns about the different interpretations regarding the extraterritorial application of human rights treaties by the ECtHR in the *Banković* case, the ICJ in its *Wall* advisory opinion and the Human Rights Committee in its General Comment No. 31.[19] There was the position taken by the ECtHR in *Loizidou v. Turkey* concerning the permissibility of attaching certain reservations to declarations accepting compulsory jurisdiction, which differed from the longstanding practice of the ICJ permitting such reservations.[20] There was the divergence between the IACtHR and the ICJ concerning whether

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[15] *Ibid.* at 47, subtitle (a) and 51, subtitle (b).

[16] *I.C.J. Reports 2007*, p. 210, paras. 404-406.

[17] Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26 October 2000, available at www.icj-cij.org (accessed 5 November 2024), at 5.

[18] T. Treves, 'Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice', (1999) 31(4) *New York University Journal of International Law and Politics* 809, at 811; S. Oda, 'Dispute Settlement Prospects in the Law of the Sea', (1995) 44 *International and Comparative Law Quarterly* 863, at 864 (arguing that '[t]he creation of a court of judicature in parallel with the Intrenational Court of Justice … will prove to have been a great mistake').

[19] B. Simma, 'Universality of International Law from the Perspective of a Practitioner', (2009) 20(2) *European Journal of International Law* 265, at 281-282; R. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench', (2006) 55(4) *International and Comparative Law Quarterly* 791, at 795.

[20] J. Charney, 'Is international law threatened by multiple international tribunals?', (1998) 271 *Recueil des cours* 101, at 160-162; G. Guillaume, 'The proliferation of international judicial bodies: The outlook for the international legal order', speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000, available at www.icj-cij.org (accessed 5 November 2024), at 5.

a detained foreigner's right to have his consular post notified formed part of international human rights law, the IACtHR holding that it did[21] and the ICJ stating in the *Avena* Judgment that it found no support for this conclusion in the text or *travaux préparatoires* of the Vienna Convention on Consular Relations.[22] In international investment law, there was the case of *Lauder and CME v. Czech Republic*, in which one UNCITRAL arbitral tribunal — in a case brought by Lauder, the controlling shareholder of the parent company of CME — concluded that the Czech Government had not breached the investment treaty, while another UNCITRAL tribunal concluded eight days later that the Czech Government had done so and awarded more than 300 million USD in damages.[23] Reference could also be made to the 'MOX Plant' dispute, concerning environmental effects of a nuclear facility in the United Kingdom, which was brought before three separate institutions: an Arbitral Tribunal set up under Annex VII of UNCLOS, the compulsory dispute settlement procedure under the 1992 Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and before the ECJ.[24] The Annex VII Arbitral Tribunal observed in that case that it was not unlikely in such a scenario that even the same rules could be applied differently by these different bodies.[25]

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[21] IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, para. 141(2).

[22] ICJ, *Avena and Other Mexican Nationals (Mexico* v. *United Slates of America), Judgment, ICJ Reports 2004*, at 60-61, para. 124. (discussed in Simma, *supra* note 19, at p. 282; Higgins, *supra* note 19, at 796.

[23] M. Waibel, 'Fragmentation in International Investment Law', in J. Bédard and P. W. Pearsall, eds., *Reflections on international arbitration: essays in honour of professor George Bermann* (2022) 835, at 841.

[24] See discussion in 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, UN document A/CN.4/L.682 (13 April 2006), at 12-13, paras. 10-13.

[25] See *ibid.* (citing ITLOS, *MOX Plant case, Order on Request for Provisional Measures (Ireland v. the United Kingdom*, 3 December 2001, para. 51).

A plethera of scholars began commenting on the risk of fragmentation in international law and the dangers looming due to a proliferation of international tribunals.[26] Three successive Presidents of the ICJ raised concerns about the issue in public speeches.[27] The International Law Commission began studying the question of the '[r]isks ensuing from fragmentation of international law', later recasting these 'risks' as 'difficulties' when it formally adopted the topic.[28]

With hindsight, we can now safely say that rumors of international law's demise due to fragmentation, or a proliferation of tribunals, were greatly exaggerated.[29] Thus, following the alarm bells raised by three successive Presidents of the ICJ, mentioned above, a much more

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[26] See, e.g., J. Charney, 'Is international law threatened by multiple international tribunals?', (1998) 271 *Recueil des cours* 101-382; J. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals', (1999) 31(4) *New York University Journal of International Law and Politics* 697-708; T. Treves, 'Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice', (1999) 31(4) *New York University Journal of International Law and Politics*, 809-822; C. P. R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', (1999) 31(4) *New York University Journal of International Law and Politics* 709-752; P.-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', (1999) 31(4) *New York University Journal of International Law and Politics* 791-808; H. Thirlway, 'The proliferation of international judicial organs: institutional and substantive questions: the International Court of Justice and other international courts', in N. Blokker and H. Schermers, eds., *Proliferation of international organizations: legal issues* (2001) 251-278; G. Hafner, 'Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?', in L. Caflisch, *The Peaceful Settlement of Disputes between States: Universal and European Perspectives* (1998) 25-41; Koskenniemi, M. and Leino, P., 'Fragmentation of international law? Postmodern Anxieties', (2002) 15 *Leiden Journal of International Law* 553, at 553-579; K. Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction - Problems and Possible Solutions', (2001) 5 *Max Planck Yearbook of United Nations Law*, 67-104; Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003); T. Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?', (2001) 14 *Leiden Journal of International Law* 267, at 272.

[27] President Jennings and President Guillaume discussed the dangers of proliferation of tribunals at the fiftieth anniversary of the ICJ. President Schwebel addressed the issue in his 1999 speech to the General Assembly. President Guillaume raised it in his 2000 speech to the General Assembly and devoted his 2000 speech to the Sixth Committee to the issue. See Koskenniemi and Leino, *supra* note 26, at 553-555.

[28] This rebranding was an attempt to present the matter in a more positive light. See Report of the International Law Commission, fifty-fourth session (29 April-7 June and 22 July-16 August 2002), UN document A/57/10 (2002), at 239, para. 500. The ILC formally adopted the topic as 'The fragmentation of international law: difficulties arising from the diversification and expansion of international law'. *Ibid.* at 241, para. 511. See also B. Simma, 'Fragmentation in a Positive Light', (2003-2004) 25 *Michigan Journal of International Law* 845, at 846-47; P. S. Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation', (2004) 25(4) *Michigan Journal of International Law* 929, at 936.

[29] For a contrary view, see E. Benvenisti and G. W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', (2007) 60(2) *Stanford Law Review* 595 (arguing that 'the problem of fragmentation is more serious than is commonly assumed because it operates to sabotage the evolution of a more democratic and egalitarian international regulatory system' and that '[p]owerful states labor to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created').

positive prognosis was offered by a fourth, President Higgins, in her speech to the General Assembly in 2006:

> 'Th[e] growth in the number of new courts and tribunals has generated a certain concern about the potential for a lack of consistency in the enunciation of legal norms and the attendant risk of fragmentation. Y et these concerns have not proved significant. The general picture has been one of these courts seeing the necessity of locating themselves within the embrace of general international law. The authoritative nature of ICJ judgments is widely acknowledged. It has been gratifying for the International Court to see that these newer courts and tribunals have regularly referred, often in a manner essential to their legal reasoning, to judgments of the ICJ with respect to questions of international law and procedure. Just in the past five years, the judgments and advisory opinions of the ICJ have been expressly cited with approval by the International Tribunal for the Law of the Sea, the European Court of Human Rights, the European Court of Justice, the United Nations Commission on Human Rights, the Inter-American Commission on Human Rights, the International Centre for Settlement of Investment Disputes, the International Criminal Tribunal for the former Yugoslavia, and arbitral bodies including the Eritrea-Ethiopia Claims Commission. The International Court, for its part, has been following the work of these other international bodies closely.'[30]

Indeed, the creation and subsequent functioning of the ITLOS, even as the ICJ continues to handle maritime delimitations, has not led to mass confusion in the area of the law of the sea. To the contrary, the ITLOS has rendered useful decisions in numerous areas, such as prompt release, fisheries management, flags of convenience, detained vessels and crews, maritime delimitations, as well as responding to several requests for advisory opinions and requests for the indication of provisional measures.[31] The regional human rights courts and the human rights treaty bodies have continued developing their respective jurisprudences not to the detriment but rather to the advantage of the overall cohesiveness of international law as a

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[30] Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations, 26 October 2006, available at https://www.icj-cij.org/files/press-releases/9/13149.pdf (accessed 18 March 2025), at 7. See also R. Higgins, 'The ICJ, the ECJ, and the Integrity of International Law', 52 (2003) *International and Comparative Law Quarterly* 1-20.

[31] See, e.g., Rao, *supra* note 28, at 946-949. See also the varied list of 33 concluded cases on the website of the ITLOS, www.itlos.org (accessed 11 November 2024).

whole, as evidenced by the multiple times the ICJ has relied on them in past years. Indeed, the ICJ has stated explicitly that it will take 'into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this [is] relevant for the purposes of interpretation' of the instrument in question.[32] For example, it cited to a decision of the Committee Against Torture when considering the temporal scope of the Convention Against Torture.[33] It cited to the work of the Human Rights Committee when analyzing the territorial scope of the ICCPR as well as the principle of proportionality as applied to the provisions of the ICCPR.[34] It corroborated its interpretation of Article 13 of the ICCPR by reference to a decision of the Human Rights Committee and a General Comment of the Committee, emphasizing that:

> 'Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.'[35]

In the same Judgment, the ICJ further supported its reasoning by reference to decisions of the African Commission on Human and Peoples' Rights, the ECtHR and the IACtHR.[36] In compensation cases, a new frontier for the Court, it has drawn on the practice of numerous other courts, tribunals and commissions, including the ITLOS, ECtHR, IACtHR, Iran-United States Claims Tribunal, Eritrea-Ethiopia Claims Commission, the UNCC, the ICTY, the

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[32] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, ICJ Reports 2021*, at 96, para. 77.

[33] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012*, at 457-458, para. 101.

[34] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 (I)*, at 179, para. 109, and at 192-193, para. 136).

[35] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010 (II)*, at 663-664, para. 66.

[36] *Ibid.*, at 664, paras. 67-68.

Committee Against Torture and the African Commission on Human and Peoples' Rights.[37] With the ICJ citing to this broad variety of other international adjudicatory bodies, which in turn have often regularly cited to it, and to each other, the international community of courts and tribunals is meeting the challenge, post proliferation, of coalescing and combining its shared understanding of international legal norms.

Perhaps even more interesting than the above examples, in which the ICJ followed the conclusions of these other courts, commissions and tribunals that it has referenced, there is the case where it does not. In particular, in its determination of whether 'national origin' in Article 1(1) of CERD included 'nationality', the ICJ reviewed the practice of the CERD Committee and regional human rights courts.[38] While these other bodies concluded that 'national origin' did encompass 'nationality' in the provisions of the respective instruments over which they had interpretive authority, the Court reached the contrary conclusion with respect to the CERD. Thus, with respect to the CERD in particular, the ICJ directly contradicted the CERD Committee. It would seem another *Tadić/Nicaragua* moment, but this time it passed almost without comment. There was no panic among commentators about fragmentation, no renewed concerns about a proliferation of tribunals. Perhaps the international community, a quarter century after *Tadić*, had finally come to accept that two adjudicatory bodies reaching different conclusions was not such cause for alarm, but could actually amount to a beneficial fleshing out of legal norms, an inter-judicial dialogue which could ultimately result in a better understanding of the law.

The argument to be made in the present work is that the same is proving true with respect to IATs: their proliferation has not led to the problems some foresaw; to the contrary, the advantages have greatly outweighed any disadvantages. Engaging in a thorough review of all current IAT jurisprudence, I will argue that indeed Akehurst's statement has proven correct,

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[37] ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, ICJ Reports 2012 (I)*, at 331, para. 13; at 334-335, para. 24; at 337, para. 33; and at 339-340, para. 40 (citing the ITLOS, ECtHR, IACtHR, Iran-United States Claims Tribunal, Eritrea-Ethiopia Claims Commission and the UNCC) at 52, para. 107; at 56, para. 123; at 68, para. 158; at 69-71, paras. 163-164; at 77-79, paras. 188-191; at 81-83, paras. 202-205; at 85, para. 214; at 95, para. 249; at 130-131, paras. 382-384; and at 133, para. 392 (citing the Eritrea-Ethiopia Claims Commission, the ICC, the UNCC, the ICTY, the Committee Against Torture and the African Commission on Human and Peoples' Rights).

[38] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, ICJ Reports 2021*, at 100-105, paras. 100-104.

perhaps beyond what he could have ever imagined. Far from the divergence and fractures that some have warned against as the number of IATs has grown,[39] there has been a convergence, as IATs have increasingly cited to a common set of international norms, general principles, and to each other, in an exercise of reciprocal growth, sharing the task of creating and developing an ever more universal international administrative law. Thus, I argue that the some thirty different IATs currently in existence are no longer functioning individually but rather are developing a common jurisprudence of international administrative law.

[39] See J. S. Powers, 'The Evolving Jurisprudence of the International Administrative Tribunals: Convergence or Divergence?', 2018 *Asian Infrastructure Investment Bank Yearbook of International Law* 68, at 70.

IV. RESEARCH QUESTION

Taking into account the context described in Section II above, I aim in the present work to answer the following research question:

> *What has been the result of the rapid proliferation of IATs? Has the law governing the international civil service become fragmented or have IATs developed a common jurisprudence of international administrative law?*

This research question is best answered by considering the following sub-questions in detail:

1. *To what extent are IATs referring to common principles or a common body of law in reaching their conclusions?*
2. *Can a common jurisprudence be deduced from the extent to which IATs refer to each other (cross-fertilization)?*
3. *Can a common jurisprudence be illustrated through an examination of references to a shared set of international human rights instruments?*

V. RESEARCH METHODOLOGY

I began by reviewing the doctrine on international administrative tribunals and international administrative law, in order to develop an appreciation of existing scholarship and analysis. In this regard, I collected all of the titles listed in the included bibliography and I have thoroughly reviewed them over the past years. From this review of the literature, it became apparent that no exhaustive attempts have been made to tie together the various jurisprudential strands developed by different administrative tribunals to determine whether the proliferation of tribunals is creating divergences or rather if the many tribunals are in fact coalescing around a common jurisprudence. For example, one of the only articles on this theme is a 2018 piece by Joan S. Powers, entitled 'The Evolving Jurisprudence of the International Administrative Tribunals: Convergence or Divergence', which offers a *tour d'horizon* of the question and concludes that '[t]his is a huge question that deserves a more comprehensive treatment.'[40] Another notable effort was made by Peter C. Hansen in articles published in 2007 and 2012.[41] While Hansen's study is exhaustive in its substantive scope, it is limited to to the practice of one tribunal: the WBAT. There has thus been no comprehensive study of the question of convergence or divergence of IATs following their proliferation which thoroughly treats all existing IATs. The present dissertation aims to fill that gap. In this regard, I have examined the question of cross-fertilization between IATs and the use of human rights instruments by IATs through an examination of the jurisprudence of each IAT. I believe that it is through such an analysis of primary source material that this dissertation can make a lasting contribution to the field.

[40] Powers, *supra* note 39, at 72.

[41] P. C., Hansen, 'The World Bank Administrative Tribunal's External Sources of Law: A Retrospective of the Tribunal's First Quarter-Century' (1981-2005), *The Law and Practice of International Courts and Tribunals*, vol. 6 (Martinus Nijhoff, Leiden/Boston, 2007), pp. 1-87; P. C., Hansen, 'The World Bank Administrative Tribunal's External Sources of Law: The Next Chapter (2006-2010)', *The Law and Practice of International Courts and Tribunals*, vol. 11 (Martinus Nijhoff, Leiden/Boston, 2012), pp. 199-251 (Part I) and pp. 449-497 (Part II).

VI. SOCIETAL AND SCIENTIFIC RELEVANCE

Beginning with just a handful of tribunals handling few cases, international administrative law has expanded exponentially, both in the number of tribunals now in existence and in the number of cases heard. As it has developed into its own sub-discipline of international law, much has been written about various aspects of international administrative law. The societal and scientific relevance of this dissertation is in its effort to uncover jurisprudential commonalities and divergences, especially though a detailed examination of primary sources (the decisions of the tribunals themselves).

VII. GENERAL STRUCTURE OF THE DISSERTATION

In order to answer the research question posed in Section IV above, a thorough understanding of IATs must first be established. Chapters 2 and 3 are dedicated to this task.

Chapter 2 traces the institutional evolution of international administrative tribunals. It explains that while IATs have become standard features of many international organizations, this was not always the case. For a long period, there existed only a handful of IATs, and in the time before this, the need for IATs was not even apparent, or at least widely accepted or acknowledged. The chapter elaborates on these issues and traces the institutional evolution of IATs in the international community. It begins with a discussion of the need for IATs and the legal basis for their establishment. It then looks at their proliferation as well as the long-running debates concerning their possible merger or the harmonization of their work. The chapter then discusses the review of tribunal judgments and the growth of appeals tribunals. After offering a brief description of the functioning of a typical IAT, the chapter then provides an overview of each of the various IATs in existence.

Chapter 3 examines the sources of law applied by IATs. These sources are grouped into two substantially different categories: ‘self-contained’ and ‘universalizing’ sources. The self-contained sources of international administrative law are those which are specific to a given organization, including the contract of employment; the staff regulations and staff rules; the bulletins, circulars, manuals and issuances of the organization; the constituent instrument of the organization; decisions and resolutions of the plenary organ of the organization or other decision-making body; and the practice of the organization. The chapter then examines the

'universalizing' sources of international administrative law, which are those sources, referred to with increasing frequency, which are 'outward-looking' and thus may be adopted in common by multiple IATs. These include general principles of law, international law and (I will argue) decisions of other international administrative tribunals. As a result of these 'universalizing' sources, the chapter concludes that a universal law governing the international civil service has begun to crystalize.

Having offered a thorough picture of IATs in Chapters 2 and 3, including their institutional development and the sources of law they apply, the second part of the dissertation is dedicated to answering the research question posed, namely: *What has been the result of the rapid proliferation of IATs? Has the law governing the international civil service become fragmented or have IATs developed a common jurisprudence of international administrative law?* It is recalled that this question contains three sub-questions: (1) To what extent are IATs referring to common principles or a common body of law in reaching their conclusions? (2) Can a common jurisprudence be deduced from the extent to which IATs refer to each other (cross-fertilization)? (3) Can a common jurisprudence be illustrated through an examination of references to a shared set of international human rights instruments? The dissertation begins to answer the first sub-question already in Chapter 3 with its discussion of 'universalizing' sources of law. In particular, it shows that IATs are referring to a common set of general principles and a common body of law (international law) in reaching their conclusions.

In light of their substantive breadth, the dissertation then dedicates full chapters to answering the second and third sub-questions of the research question. Chapter 4 addresses the phenomenon of 'cross-fertilization', i.e. the citation by one IAT in its reasoning to a decision of another IAT. Engaging in a systematic review of the jurisprudence of all IATs, its findings are presented beginning with those tribunals having most actively participated in cross-fertilization and progressing to those less willing to engage in it. It first reviews the jurisprudence of those tribunals most actively involved in cross-fertilization, including the World Bank Administrative Tribunal (WBAT), the International Monetary Fund Administrative Tribunal (IMFAT), the United Nations Dispute Tribunal (UNDT), the United Nations Appeals Tribunal (UNAT), the Asian Development Bank Administrative Tribunal (ADBAT), the Council of Europe Administrative Tribunal (ATCE), and the African Development Bank Administrative Tribunal (AfDBAT). It then reviews the jurisprudence of those tribunals which regularly practice cross-fertilization, including the NATO Administrative

Tribunal (NATOAT), the OECD Administrative Tribunal (OECDAT), the European Bank for Reconstruction and Development Administrative Tribunal (EBRDAT), the Commonwealth Secretariat Arbitral Tribunal (CSAT), the European Space Agency Administrative Tribunal (ESAAT), and the Bank for International Settlements Administrative Tribunal (ATBIS). Finally, it considers those that have been most hesitant to engage in this practice, including the International Labour Organization Administrative Tribunal (ILOAT), the Organization of American States Administrative Tribunal (OASAT), and the Inter-American Development Bank Administrative Tribunal (IDBAT). The second half of the chapter examines the question of cross-fertilization by reference to the most influential cases. The chapter concludes that as a result of this practice of cross-fertilization, a universal law governing the international civil service has begun to crystalize.

Chapter 5 considers the practice of IATs referring to international human rights instruments. It canvasses more than 400 decisions across some twenty IATs where references to international human rights instruments have appeared. Interestingly, it emerges that the vast majority of cases in which international human rights instruments are cited concern three substantive areas: non-discrimination, due process rights and economic rights. The chapter therefore devotes separate sections to these three areas. The chapter then goes on to address several other international human rights which have been referenced by IATs, including privacy rights, expression-related rights, the right not to be arbitrarily deprived of nationality and the right to just and favourable conditions of work. The chapter concludes that while IATs now regularly refer to international human rights instruments, their treatment of this body of law is inconsistent, ranging from some judgments refusing to acknowledge its direct applicability at all to other judgments considering it hierarchically superior to other sources of law.

Chapter 6 offers an answer to the main research question on the basis of the findings in Chapters 2 through 5. It then considers possible ways forward for international administrative law, drawing on the experience of public international law once it lived through the growing pains of fragmentation and proliferation. It ends by providing some recommendations for future research and concluding thoughts.