Faculty of Law

University of Helsinki

Dissertationes Universitatis Helsingiensis 56/2024

Whistleblowers of the United Nations

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Doctoral thesis, to be presented for public examination with the permission of the Faculty of Law of the University of Helsinki, in Suomen Laki Sali, Porthania Building, on the 2nd of March, 2024 at 10 am.

Helsinki, Finland

2024

Publisher: Helsingin yliopisto

Series: Dissertationes Universitatis Helsingiensis 56/2024

ISBN 978-951-51-9678-1 (print)

ISBN 978-951-51-9677-4 (online)

ISSN 2954-2898 (print)

ISSN 2954-2952 (online)

PunaMusta, Joensuu 2024

Acknowledgements

Thank you to my supervisor, Jan Klabbers, to all my past and present colleagues and friends at the Erik Castrén Institute, to all the poets and artists in Helsinki and in Leeds, to my therapist, to my family, and to Fanny for all the chocolate. All errors are my own.

Addendum

This thesis was made possible with the kind assistance of the Academy of Finland projects “Trans-par-ency in the EU - From Re-ac-tion to Mani-festo?” and "Towards a Credible Ethics for Global Governance", the Otto Malm Foundation, and the Kordelin Foundation.

Abstract

In the past 20 years, UN civil servants have uncovered and reported on mass corruption, sexual abuse of children, abuse of power, concealed war crimes, and unchecked sexual harassment of employees at the United Nations headquarters and in field operations. These whistleblowers experienced retaliation for their actions and often eventually left the organisation. This thesis analyses the tribunal judgements in the cases of Wasserstrom, Hunt-Matthes, Nguyen-Kropp and Postica, Kompass, and Reilly, as well as the cultural linchpin cases of Bolkovac, Mullick, and Elbasri. Each of these incidents has legal significance on its own - in terms of the framework for responsibility for the original wrongdoing and (lack of) sanction for the reprisals, as well as for protecting the whistleblowers and remedying the harm done to them. But when taken together and analysed in the context of international organisations' law and ethos, these cases demonstrate how there are elements of the UN system's internal culture that contribute to the UN's apathy in protecting whistleblowers, and even the organisation's passivity in international affairs. On the other hand, the existence of whistleblowers, who embody the backbone ideals of the global institutions, gives hope that those principles are not simply a PR exercise on paper and provide a new perspective on the role of individuals in international law.

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Abbreviations

Abbreviation	Meaning
ACC	Administrative Committee on Coordination
ADBAT	Asian Development Bank Administrative Tribunal
ASG	Assistant-Secretary-General
AT	Administrative Tribunal
CAR	Central African Republic
DARIO	Draft articles on the responsibility of international organizations
ECOSOC	UN Economic and Social Council
ENMO	Ethics Network of Multilateral Organizations
GA	General Assembly
GAL	Global Administrative Law
IAAC	Independent Audit Advisory Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICS	International Civil Service
ICSAB	International Civil Service Advisory Board
ICSC	International Civil Service Commission
ILC	International Law Commission
ILO	International Labour Organisation
ILOAT	International Labour Organisation Administrative Tribunal
IO	International Organisation
IPTF	International Police Task Force
JIU	Joint Investigative Unit
OAJ	Office of Administration of Justice

OHCHR	Office of the United Nations High Commissioner for Human Rights
OHRM	Office of Human Resource Management
OIOS	Office of Internal Oversight Services
OIP	Oil-for-food Programme
OLA	Office of Legal Affairs
OSLA	Office of Staff Legal Assistance
PCIJ	Permanent Court of International Justice
PKO	Peace-keeping Operations
UN	United Nations
UNAdT	United Nations Administrative Tribunal
UNAMID	United Nations - African Union Mission in Darfur
UNAT	United Nations Appeals Tribunal
UNCEB	United Nations System Chief Executives Board for Coordination
UNDT	United Nations Dispute Tribunal
UNEO	United Nations Ethics Office
UNHCR	United Nations High Commissioner for Refugees
UNJSPB	United Nations Joint Staff Pension Board
UNMIK	United Nations Mission in Kosovo
USG	Under-Secretary-General
WBAT	World Bank Administrative Tribunal

Introduction

“Information is the currency of democracy.”[1]

Ralph Nader

In 2022 the BBC released a full-length documentary "The Whistleblowers: Inside the UN", which covered the stories of Emma Reilly, Anders Kompass, and James Wasserstrom, among others. In one of the interviews, Sima Kotecha, Newsnight’s UK editor, asks the Spokesperson for the UN Secretary-General Stephane Dujarric[2] if the UN has a “toxic culture … [where] people are punished for speaking out or complaining”[3]; Dujarrich’s answer is an unequivocal “no”. Kotecha details some of the feedback that she received from both named and anonymous sources, to which Dujarrich goes on to describing the measures that Secretary-GeneralG Guterres has taken to “improve the culture” - ie by protecting whistleblowers and investigating sexual harassment, etc. When asked to comment on the evidence from the documentary, Dujarrich says that systems were put in place by Guterres to “break what may have been for decades this kind of culture [sic]”; and also that “we are looking at the problem of male-dominated culture head-on”. Unfortunately Kotecha did not ask why there were measures put in place to improve the culture if there were no problems with the culture to begin with.

The interview with Dujarrich is one example of a particular UN approach to internal problems - “non-denial denials” - a phrase made famous by the 1976 movie “All the President’s Men” that depicted the watershed Watergate scandal. This approach lays counter to the core principles of the UN that are rooted in its Charter and encompass fundamental ideals that guide its mission and activities. The tenets include the promotion of international peace and security, the commitment to human rights, the pursuit of social progress; and those would not

[1] Nader R, *The Ralph Nader Reader* (Seven Stories Press 2001). p 403

[2] Dujarrich served as a spokesperson for SG Ban Ki-moon and SG Annan, as well as as Director for the Department of Public Information.

[3] BBC News, “Uncovering Allegations of Sexual Harassment and Corruption at the United Nations - BBC Newsnight” (July 15, 2022) <https://www.youtube.com/watch?v=_KdK4MHsMEw> accessed September 30, 2023

be possible without firm adherence to the rule of law. In turn, the rule of law necessitates implementing measures that guarantee the primacy of the law, equal treatment under the law, accountability to legal standards, equitable application of laws, the division of powers, involvement in decision-making, legal predictability, prevention of capriciousness, and transparency in both procedure and the legal system. According to General Assembly resolution 13 (I) from 13 February 1946,

> *"The United Nations cannot achieve its purposes unless the peoples of the world are fully informed of its aims and activities. "*

Rule of law, openness, and accountability have been aspirations for the UN for decades, but the internal work of the organisation has been guided by secrecy[4] and confidentiality. According to Burci, the UN regards confidentiality as "a necessary legal tool to achieve [their] purpose", given that "their mandate was essentially to co-operate with their Member States and other stakeholders".[5] Therefore, it is easy to conclude that secrecy is considered "functionally necessary" for the organisation to achieve its goals, while transparency is more often the aspirational veneer. This contradiction explains the policy of "non-denial denial" apparent in Dujarrich's interview - the attempt to preserve confidentiality and the image of the organisation, while telling the truth. And that would be the pessimistic conclusion if it weren't for whistleblowers, the individuals who speak up against the moral muteness inherent in the organisational culture.

The term whistleblower dates back to the 19th century when it was used to describe putting an abrupt stop to an activity. Until the mid-20th century there was a lot of stigma attached to being a "snitch", but its new meaning was created around 1965-1970.[6] It usually signifies an individual that reports wrongdoing either internally to his or her superiors, or externally to law enforcement.[7] There are significant differences between private and public sector whistleblowing, and

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[4] Duquet S and Wouters J, "Diplomacy, Secrecy and the Law" [2015] SSRN Electronic Journal

[5] Burci GL, "Inviolability of Archives" in August Reinsch and Peter Bachmeyer (eds), *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (OUP 2016)

[6] "Whistleblower Definition & Meaning." Dictionary.com, https://www.dictionary.com/browse/whistleblower. Accessed 30 Sep. 2023.

[7] Leaking confidential documents to the media is often, but not always, considered whistleblowing.

different legislations have been put in place to protect whistleblowers from retaliation. The most prominent and strongest international protection comes from the European Whistleblower protection directive from 2018. Whistleblower protection within the UN system was introduced in 2005 by Secretary-General Kofi Annan, following revelations that UN staff members had been documenting and reporting extensive corruption that had gone unaddressed for years.

Whistleblowing brings about both ethical and practical advantages. Firstly, it serves as a crucial method to hold individuals in positions of authority responsible, especially when other forms of supervision prove ineffective. Secondly, whistleblowers play a significant role in uncovering misconduct and fraudulent activities, resulting in substantial savings of public funds and preventing potential humanitarian, health, and environmental catastrophes. According to a 2016 study, at the UN "whistleblowers alone account for the uncovering of more fraud and corruption than all other measures of fraud detection combined".[8]

Because of the tension between secrecy and transparency, whistleblowers sometimes encounter reprisals such as isolation, demotion, missed promotion opportunities, professional interference, smearing campaigns, or even termination. It seems hard to imagine that someone like Kathryn Bolkovac reporting on UN involvement in sex-traficking, or Anders Kompass publicising a report on sexual abuse of children by UN peace-keepers, would face anything but commendation and praise, and the perpetrators given to justice, but it is not the case. It was the whistleblowers who were fired or asked to resign, among other violations of their rights as international civil servants. Due to the privileges and immunities of international organisations from prosecution, international civil servants' only recourse is the internal protections and legal system, which functions within the context of the law of international organisations and public international law. The legal background is complicated and full of contradictions that affect both the individual civil servants and the work of the organisation as a whole.

The bureaucracy[9] of intergovernmental organizations inhabits a legal grey area. The rules and practises affecting the civil service were invented as the practical

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[8] See JIU/REP/2016/4.

[9] For the purposes of this thesis, the bureaucracy of international organizations is defined as the individuals who perform administrative duties based on a contractual legal relationship with the

needs of the intergovernmental organizations arose - the need for clerical support, translation, research, security, conference organisation, record-keeping, etc. - by diplomats and by domestically-qualified legal practitioners from both civil and common law jurisdictions. The civil servants themselves provided feedback on the needs of the institution, based on their own experience. The theory caught up in fits and starts, by labelling and categorising already existing arrangements designed to facilitate the efficient day-to-day working of the institutions as they evolved and multiplied. The vocabulary used to describe those setups is borrowed from domestic law and domestic public administration, without adapting it to the international context, which is sometimes problematic because it influences the expectations, content and practice of the law.

The underlying assumption is that the global bureaucracy is a public administration like any other because a lot of the professional tasks overlap, because the staff were often hired or seconded from domestic bureaucracies, and because the content of the contracts, codes of conduct and misconduct rules share key elements. However, by accepting an offer and signing a contract, an individual international civil servant becomes a subject of a fundamentally different legal system, and is isolated from the protections of national law and citizenship. Even if the agreements between the individuals and the organisation are called contracts, and even if they contain standard phrases from domestic private law, the implementation and interpretation of the rights and responsibilities is very different. The specificities of the bureaucratic practice and law in international organizations raise essential questions about the dynamics between law and morality, the separation of powers in the organisation, the role and powers of the tribunals and related organs, and the punitive aspect of the internal law.

An international organisation is not a state and the civil servants are not its citizens, and neither is the legislature - like the UN General Assembly - staffed by elected representatives. Diplomats are appointed by the executive branch of governments

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organisation, or based on a status bestowed on them by the organisational leadership. In many contexts, including the media and even academia, the bureaucracy is often mistaken with the diplomats, who are direct agents of governments. It is very important to draw a clear distinction between diplomats and the civil service.

and enjoy near-full immunity under international conventions,[10] and can therefore not be held accountable for the internal administrative regulations that they enact, or for the sometimes non-transparent process. A diplomat cannot be held accountable for abusing their powers over an international civil servant, for instance. Thus, even though the internal legal system of the UN functions and has the necessary moving parts,[11] it lacks some key elements of a binding, fair and balanced justice system with regard to the international civil service.[12] It is also closely linked to public international law because the sources of law are international treaties and the duties[13] and character of the bureaucracy are international, but the individual civil servants and the administration on its own does not possess international legal personality, capacity or responsibilities. The tribunals that interpret the law are legal bodies that are internal to the organisation and are dependent on the legislative organs like the Assembly; the tribunals do interpret international treaties, as well as internal legislation of other organizations. Therein arise other important issues with the role of whistleblowers, with the nature and purpose of the law of the international civil service, the nature and purpose of international organizations themselves, and the nature of international law and the role of nation states.

The UN Staff Rules and Regulations place an obligation on the civil servants to report misconduct and lays out disciplinary measures for the injuring party, but the internal conflict and unequal application of the law cancels out the spirit and content of the rules by encouraging staff members to remain silent. The treatment of whistleblowers in the UN system who fulfil that obligation to uphold the highest standards of integrity brings to light (1) the contradiction between the UN core principles and the application of the internal law; and (2) the problematic elements of the international civil service organisational culture - the unchecked power and limited accountability of Member States; the ad-hoc approach to resolving

[10] See Vienna Convention on Diplomatic Relations (1961). Under Art 29 diplomats are immune from detention, and under Art 31 are immune from criminal prosecution, unless the sending country waives that immunity under Art 32.
[11] According to Hart, "the full complement of *juge, gendarme et législateur* but fail to conform to certain fundamental requirements of justice and morality." Hart HLA, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012) p156
[12] See Amerasinghe, C. F. *The Law of the International Civil Service: Volume I.* 2nd ed., Clarendon Press, 1994 .p20.
[13] See UN Charter Art 100 (2) and UN Staff Regulation 1.1 (a)

problems; the leadership that is elected in a non-transparent manner and that sets the "tone at the top"; and the intraorganisational conflicts between organs.

The underlying claim of this thesis is that context matters - the public international legal context affects the treatment of individuals in the organisations; and the organisational context affects the application of the law - which is why the structure follows a concentric circle approach - from public international law to organisational law, and then from culture and structure to cases. Chapter 1 begins by outlining the legal background of the thesis - the theory of public international law and the role of Member States through the lenses of sovereignty and responsibility, and the history of the institutions and of the discipline of the law of international organizations. It then separates the distinct legal dynamics of international organizations and the role of Member States. The regime of privileges and immunities in particular creates a separation between the outside and inside of the UN in terms of rights and obligations, which also affects the responsibility of Member States, of the UN as an organisation, and the civil servants as individuals. Chapter 2 summarises the nature and principles of the law of the international civil service, as well as the scholarship in the field. It then looks at the administrative tribunals and their jurisprudence generally and on specific legal issues. In Chapter 3 this thesis develops the argument that the international civil service ethos and culture is found both in policies and the work of many inter- and intra-organisational mechanisms; the values and trust of the civil service in the organisation is demonstrated in studies, and in the organisational leadership. The whistleblower cases in Chapter 4 are analysed in that multifaceted context, wherein the fault-lines exposed are far-reaching and illustrate the character and courage of the whistleblowers. Each chapter is concluded by a human interest story that provides both texture and insight on the wider implications on the dynamic between individuals and global governance. The thesis does not recommend specific policy reforms because a deep transformation that addresses the public international legal context and the organisational culture is beyond the scope of a single thesis.

Chapter 1 - Public international law and International organizations law

"Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing."

John Stuart Mill, On Liberty (1859)

Introduction

International civil servants are not born such - they have a nationality or other status[14] at birth, and the rights and responsibilities that are tied to their country or place of origin. Upon becoming members of the global bureaucracy, they still live in a country - whether the country of their nationality or not - but their legal rights and obligations exist in a system that is cardinally different from the role of individuals, or individual public servants in a domestic administration.

In the abstract, domestic legal systems share certain fundamental elements - legislature, courts, rules (civil and criminal) - as well as the background of citizenship and principles of legality and justice - fairness, proportionality, etc. The creation of intergovernmental organizations represents a step on top, or away, from that model, but not above it in the sense of hierarchical supranationality, and it does not uniformly possess the above-mentioned fundamental elements. The rights and obligations of the staff of international organizations as subjects of the legal system are tied to their contractual duty to the organisation, and are determined and changed by government representatives that are not publicly accountable. Thus the conflict within the law of the international civil service is inherent in the global legal background, in the relationships between the organisation and its Member

[14] It is possible to apply as a "stateless" person for positions at the UN, and according to the latest human resource management report, there are 28 stateless persons employed by the UN, which represents 0,07% of total staff. Those persons had a status, most likely refugee or refugee-seeking in a domestic legal system, before entering employment at the UN. Palestinian citizens are not considered stateless in this context. See A/72/123.

States, and the organisational legal dynamics. This uncertain backdrop affects the work of the organisation and the individual civil servants, and the contradictory setting expresses itself practically in the cases where an individual is caught in the clashing frameworks - for example in the whistleblower cases.

Public international law is the system of rights and obligations - written and custom - that traditionally governed the relations between sovereign nation-states.[15] It lacks coherence[16] for many reasons - because of the conflict between sovereign will of states and international responsibility; because of the different overlapping regimes; the inequality of resources between countries, to name a few. It has been argued that the system lacks key elements of law[17] in terms of enforcement and morality[18] - a criticism that will also be raised with regard to the law of the international civil service because of the danger of using parallels with domestic law in a sphere that is fundamentally different. It is also important to note that the habitual conduct of states, and the tacit and spoken acceptance of that conduct, is a source of obligation that can be invoked as giving rise to state responsibility.[19] In fact, treaties and custom are the main sources of public international law, but custom does not apply to the actions of international organizations, or to the law of the international civil service. However, within international organizations the notion of state custom is an important way of legitimising actions of state representatives; it is also the source of the custom of secrecy.

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[15] Kelsen has theorised that the state is an "organ of the international community" See. Kelsen H, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie Litschewski Paulson and Stanley L Paulson trs, Clarendon Press 1997) p122.

[16] Although Kelsen would argue that it applies uniformly because of the "just war" in Kelsen, H, *Principles of International Law* (Lawbook Exchange 2012). Kelsen identifies law as a means in itself. See also Green L, "Law as a Means" in Peter Cane (ed), *HART-FULLER AT 50, Oxford Legal Studies Research Paper No. 8/2009* (Hart Publishing 2009)

[17] D'Amato argues it is, in Amato D, "Is International Law Really 'Law'?" in D Amato (ed), *International Law Sources* (Brill 2004) pp. 32–52.. On the other hand, some argue that law requires an enforcement authority that goes beyond sovereign consent. See Goldsmith JL and Posner EA, *The Limits of International Law* (Oxford University Press 2005).

[18] Besson S and Tasioulas J, *The Philosophy of International Law* (Oxford University Press 2010)

[19] See ICJ Statute, Art 38. 1(b) "The Court, …, shall apply … international custom, as evidence of a general practice accepted as law".

Public international law has come to affect and be affected by various non-state entities - first by intergovernmental organizations, and later on by NGOs, private companies, terrorist groups, individuals, etc. Not every party that is affected by public international law is considered a subject of the legal system. What distinguishes the subjects in international law from the actors / affected entities, is the capacity to create obligations and to raise claims against the consequences of internationally wrongful acts - a capacity limited to states and (in a very limited way) also to international organizations.[20] For example, a private company might be affected by trade restrictions, but only a state can raise a claim at the WTO Dispute Settlement Body or at the ICJ.

Global institutions like the UN are considered subjects of public international law, but not in the same way as states. The UN is neither a supranational structure that has hierarchical authority over nation states, nor a sovereign state, nor a state-like entity;[21] although it does have the capacity to enter into relations with other organizations and states.[22] International organizations were created as agents of states, and as such in theory possess certain independent capacities - personality, rights, and obligations - but they are limited in significant ways by both the letter and practice of the law. Moreover, nation-states hold the primary law-making powers in organizations like the UN through the plenary organs like the General Assembly and the Security Council. Therefore, the entire theoretical and practical discussion of personality, powers, privileges and responsibility of the UN is tied to the Member States.

Chapter 1 serves as a foundational exploration of the debate surrounding the role of whistleblowers within the context of international organizations. It begins by providing a comprehensive overview of the legal and scholarly underpinnings concerning the involvement of nation states in both the establishment and administration of international organizations. Albeit general, the chapter is

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[20] But not the bureaucracy of the organisation separately from the parliamentary organs.
[21] Article 1 of the Montevideo Convention on Rights and Duties of States lists the three key characteristics of statehood - permanent population, territory, government, ability to enter into agreements.
[22] See legal personality below in Section 1.6.1, and also in the discussion of the Reparation for Injuries Advisory Opinion of the ICJ.

necessary because it establishes the historical dynamics of control, responsibility, social context, and independence that have shaped these entities over time.

Given that international organizations are inherently designed to address global imperatives, the chapter emphasises the necessity of interpreting their functions within the broader framework of both external and internal social dynamics. However, it concludes that the foundational principles of public international law, which are rooted in the sovereignty of nation states, present inherent challenges that both define and undermine the autonomy of these institutions.

Further, the chapter delves into an analysis of the fundamental qualities comprising the legal ecosystem of international organizations. These include aspects such as legal personality, powers, privileges and immunities, responsibility, and internality. Through this examination, the chapter highlights how these foundational elements are impacted by the constraints imposed by the current understanding of functional necessity.

Central to the argument is the recognition that the internal and external contexts within which intergovernmental organizations operate have undergone significant transformations over the past century. These shifts fundamentally influence the interpretation of organisational objectives and subsequently redefine the rights and responsibilities of civil servants within these entities.

However, despite these evolving contexts, this thesis contends that the role of Member States has remained largely static, failing to adapt to the changing landscape of international affairs. Furthermore, traditional practices such as confidentiality and the preservation of organisational image have persisted without significant adjustment, further complicating the dynamics of accountability and transparency within international organizations.

1.1 Sovereign states and independence

There are two key elements to the enmeshment between states and IOs in terms of their personality, powers and interdependence that affects the international civil service - the sovereignty of states and the law of state responsibility. Any analysis

of intergovernmental organizations has to start with the system of nation-states and the importance of independence and autonomy. In 1648, the Peace of Westphalia established the two basic tenets of the new international order - the inviolability of the domestic affairs of a state, and the equality between states. In public international law, these two elements combined create a unique quality - sovereignty - which is acquired by unilateral declaration, although recognition by other states also plays a role.[23] This quality embodies the "horizontal"[24] nature of public international law as opposed to the vertical hierarchy of domestic law, a distinction that affects the internal hierarchy of international organizations and the differences between global and national bureaucracies.

The definitive judicial statement of sovereignty is by Justice Max Huber in the 1928 Palmas Arbitration -

> *"Sovereignty in the relations between States signifies* ***independence****. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."*[25] *[emphasis added]*

In other words, sovereignty refers to the exclusive authority of a nation-state to change its internal legal order, and to its international legal personality - i.e. the will, right, independence and ability to participate in the international legal order.[26] There is a circularity inasmuch as an entity has to be a state to be sovereign, and has to be sovereign to be a state per traditional definitions of statehood, but the

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[23] Otherwise known as the "declaratory" and "recognition" views on sovereignty. See (among others) Chen T-C, The International Law of Recognition, with Special Reference to Practice in Great Britain and the United States (Alpha Edition 2019); Crawford J, Brownlie's Principles of Public International Law (8th edn, Oxford University Press 2012); Sloane R, "The Changing Face of Recognition in International Law: A Case Study of Tibet" [2002] Emory International Law Review <https://scholarship.law.bu.edu/faculty_scholarship/542>;

[24] According to Falk, R, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order,* 32 Temple Law Quarterly 295-320 (1959)

[25] Island of Palmas Case (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA]. See Steinberger H, "Sovereignty," *Encyclopedia of Disputes Installment 10* (Elsevier 1987). See also Nincic D, *Problem of Sovereignty in the Charter and in the Practice of the United Nations* (Kluwer Academic 1970).

[26] Kelsen, (n. 16) [pp 440-441]

determinations are more political than strictly legal.[27] Public international law is based on the same will and capacity of states to participate in the international legal order - to sign treaties, to act and legitimise actions, and to create new entities. Therefore, the sovereignty of nation-states is the basis for their interactions in the public international law sphere, and yet does not describe the entirety of the system because of the presence of other actors.

At the end of the 19th century nation-states conceived the modern global institutions through collective principal-agent acts,[28] and endowed them with the necessary qualities to fulfil certain purposes through legal and political action.[29] By accepting obligations under international law, states accept limitations on their actions, which describes and moulds the role of states in international organizations - as creators, lawmakers, subjects of and (arguably) organs of the institution. The rise of international organizations and the proliferation of treaties is understood to impose limits on the freedom of states without affecting their sovereignty or their functions.[30] Subsequently, in the 20th and 21st century, scholars refer to "relative" sovereignty as opposed to the "absolute" sovereignty of the 19th century.

This entanglement affects the ability of both states and intergovernmental organizations to invoke and take responsibility under public international law. States are independent of and equal to each other in theory, but there are many differences in capacity and influence, which are reflected in the power dynamics and representation in different organizations and organs. For instance, even if they are granted membership, not every country can afford to have delegations big enough to be represented at every meeting taking place at the UN Headquarters in

[27] The widely accepted criteria for statehood are listed in the Montevideo Convention - a population, territory, a government and the capacity to enter into relations with other states. See Crawford JR, *The Creation of States in International Law* (Oxford University Press 2007).
[28] See Klabbers J, "The EJIL Foreword: The Transformation of International Organizations Law" (2015) 26 European journal of international law 9
[29] See below for a more comprehensive history through the writings of functionalists Paul Reinsch and Francis Sayre, and for details on the personality, powers, responsibility, privileges and immunities of international organisations.
[30] See Steinberger (n. 25), and Anand RP, "Sovereign Equality of States in International Law," *Collected Courses of the Hague Academy of International Law.*, vol 197 (1986)

New York, or at every meeting of every organisation in Geneva - the WTO, the WHO, ITU, OHCHR, etc.

International organizations thus have a unique position in public international law, as creations, forums, and creators of international law.[31] The global institutions are not states, or super-states, but they still exist in the same horizontal legal space where only nation-states used to inhabit, and the mandates of international organizations increasingly encroach and overlap. This cohabitation creates terminological and epistemological issues with the scholarship of international civil service that will be addressed in Chapter 2. As will be pointed out below, the scholarship of international organizations law focuses on describing the institutions in line with Western legal tradition, and on mechanisms of control. Those trends reflect a reluctance of states to cede powers and independence to the global institutions, and a Eurocentric view of the global system of states and institutions.[32]

Despite the widespread recognition of the existence, importance, and legitimacy of non-state actors in international law in the 21st century, state sovereignty and domestic legal vocabulary is still the focus of scholarship and the metre against which all the stakeholders are compared. As will be shown in section 1.6, the concept of sovereignty is not only the source of the capacity of states to create international organizations and control them; it is also the yardstick to measure the limits on the international legal personality, powers and responsibility of the organizations.

Following the conclusions of the Palmas arbitration quoted above, nation-states are independent sovereign subjects of international law; while international organizations are only quasi-independent owing to the lack of will of their Member States acting as their creators and internally as law-makers. Autonomous will is one of the defining stated characteristics of international organizations; and as will be discussed later on, the independence of the UN Ethics Office and the international administrative tribunals is a root issue in the whistleblower cases. A legal entity that is ambiguously autonomous cannot legitimately engage with other entities because it would not be clear who is responsible for the outcome of its

[31] See Klabbers, (n. 28) [9–82]

[32] Koskenniemi M, "Global Governance and Public International Law" (2004) 37 Kritische Justiz 241

actions. The issues of responsibility of international organizations for actions of their civil servants to third parties, or for the actions of the organisation vis-a-vis the civil servants, arise from the core problems of state responsibility.

1.2 Law of responsibility of states

States are independent subjects of international law, and as such possess international legal personality - i.e. the capacity to form legal agreements, and to take on rights and obligations. When a state breaches an obligation under public international law, it incurs international responsibility. This is such an obvious statement that it is surprising to note how long it took to codify it, how many caveats there are, and how ultimately the leading source of law did not become a binding treaty.

The academic authority on state responsibility is James Crawford,[33] who has traced the evolution of the topic from the writings of pre-Grotius scholars Belli in the 16th century, all the way through[34] the Hague Codification Conference of 1930, the Harvard Draft Research 1929 and 1961, and the work of the International Law Commission from 1949 onwards. The International Law Commission (ILC) was established in 1947 by the UN General Assembly[35] as an independent body of experts working on the formalisation and harmonisation of public and private international law. In 1949 at its first session the ILC approved the Draft Declaration on the Rights and Duties of States, but work on state responsibility did not begin until 1956 with the Special Rapporteur García-Amador, and it took nearly 50 years of reports before the final version was approved. The ILC adopted the Articles on the Responsibility of States for Internationally Wrongful Acts on 31 May 2001, which were noted by the General Assembly on several occasions. However, they were never adopted as a separate convention due to opposition by

[33] Crawford, J. (2013). *State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press.
[34] For example, Gentili, Grotius, Zouche, Puffendorf in the 17th century; Wolff and Vattel in the 18th, Wheaton and Heffer in the 19th, Triepel and Anzilotti in the early 20th, Borchard, Eagleton and Ago around WWI.
[35] See General Assembly Resolution A/RES/174(II).

the UK[36] and others, under claims that the articles would have *less* legal weight as a convention because now they stand as codified customary international law.[37] This is a very unconvincing argument, but the history of the Articles and international law in general does illustrate how unwilling states are to have clear rules that place strict limitations on their sovereignty. As a corollary several steps removed, international organisations' representatives are unwilling to admit an internal issue like male-dominated culture exists, because that would place more rigorous obligation to examine its root causes and to fix it.

Since international organizations are created by states, and their internal law is created and amended by state representatives, the question comes up on whether the legislative action or inaction can constitute an internationally wrongful act under the ILC draft articles. Crawford claims that Art 1 intended to leave the question whether responsibility can be incurred for an act, wrongful act or omission open, but that subsequent practice has solidified the idea that responsibility of states is limited to wrongful acts. In theory the Articles refer to the breach of the obligations of a State, that is attributable (Art 2 (a)) and refers to an international obligation (2(b)). Art 3 characterises an international obligation as governed by international law, and as we will point out in Chapter 3, international administrative law is not considered public international law because the subjects are individuals. According to Crawford, there is no limitation that the responsibility is limited to that of States to States; there is also no requirement that the breach is willful, or that there is a "damage". Crucially however, according to Art 42 and 48, the invocation of responsibility can only be done by "an injured State" or "by a State other than an injured State".

Therefore, according to the customary international law codified in the ILC Articles, a non-state actor, like an intergovernmental organisation, cannot invoke responsibility of a State for their actions in the respective organisation.[38] It is also

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[36] See General Assembly Resolution A/62/63, p6.

[37] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Rep 2007 p. 43, 209.

[38] Conflicts arising from treaties or agreements between an IO and a state have found ways around this barrier in practice by political negotiations and in theory by using non-binding judicial mechanisms. See for instance, the Convention on the Privileges and Immunities of the United Nations - "SECTION 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it

significant that according to the statute of the International Court of Justice,[39] an international organisation would have no standing at the court, regardless of its legal personality, its founding treaty, or even the purpose given by its founders. The current law of responsibility is thus self-contradictory, especially in a multi-actor multi-layered reality of overlapping regimes of international law.[40] Creutz has argued that those deficiencies have given rise to branches of public international law such as international criminal law, which deal with individuals rather than states. This argument can be extended to international administrative law in yet another circularity - wherein the agreement and obligations are between an individual and the organisation, but in the context of the public international legal obligations of the organisation; wherein the tribunal interprets an international agreement, but not as binding on the General Assembly or nations states as subjects of public international law that can incur international responsibility. The unwillingness to clarify the ambiguity is as telling as the conflict itself.

The inherent contradiction between sovereignty and responsibility lies at the heart of the law of international organizations, and also at the heart of the fault lines exposed by whistleblowers; the fault lines which can be traced to the creation of the independent international civil service of the League of Nations, and throughout the scholarship of the intergovernmental organizations. The issue of responsibility of international organisations will be analysed below in subsection 1.7.

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is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

[39] See ICJ Statute Art 34 (1) "Only states may be parties in cases before the Court."

[40] See Creutz K, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge University Press 2020)

1.3 International Organizations in multitudes

The end of the 19th century marked a move from the ad hoc international conferences to institutionalised cooperation with permanent structures, which dramatically changed the landscape of public international law. The first true intergovernmental organizations were the Commissions of the Danube River, which were created by the Treaty of Paris (1856), followed by the technical cooperation unions like the International Telegraph Union (1865, later renamed to the International Telecommunications Union), and the Universal Postal Union (1874). The ITU and the UPU are the oldest surviving intergovernmental institutions today, but have undergone some important changes, including acquiring an international bureaucracy. The predecessor to the UN, the League of Nations, was established in 1919 and was the first one to begin its existence with a dedicated international civil service.

This thesis focuses chiefly on the UN as a representative of intergovernmental organizations because it is a near-universal organizations and its rules on whistleblower protection are used as a template by other bodies. International organizations law is hereafter used as a blanket term, but it can be difficult to draw a coherent legal system out of the fragmented international institutions. All global public institutions are created by international law, create international law, and are subjects[41] of international law, but the similarity stops there. There is now a great variety in membership size of institutions, ranging from 2 to 193; membership type, from near-universal to regional; location; function, from general to technical; and admission, from closed to open. It is hard to imagine a uniform set of laws that would apply to the whole spectrum and number of organizations[42] - from the

[41] In the 20th century it was often claimed that states and international organizations are the only subjects of public international law, but that claim has been disputed in recent years. In the 21st century, there are initiatives such as the GAVI Alliance that bring private businesses and intergovernmental organizations together, there is the UN Global Compact and non-governmental organizations have been granted observership status and various global institutions.

[42] According to the Union of International Organizations, it has data on approximately 69, 000 institutions, which includes both public and private organizations. Of the public organizations, the "conventional" intergovernmental bodies are 275, "others" and "special types" are over 7, 000. See Union of International Associations, "Historical Overview of Number of International Organizations by Type" (*Uia.org*, 2013)

United Nations and the World Bank, through the EU and ASEAN, to the Community of Portuguese Language Countries and the Shanghai Cooperation Organisation.

On the other hand, there are parallels in both the core theoretical principles and the practical operations of most global institutions. A stable intergovernmental organisation that works continuously towards a goal or on a problem requires at the minimum a founding legal document or decision; representation of the Member States that votes on decisions; and a dedicated, independent civil service. There is a general agreement among academics that most international organizations share other features[43] - they were created between states, established by a treaty,[44] and possess an independent will[45] - but those are not absolute rules. For instance, the United Nations Industrial Development Organisation (UNIDO) was created by Resolution 2152 (XXI) of the UN General Assembly - an act of an already existing global institution which does not have treaty-status.

1.4 Legal Dynamics and Context

The creation of public intergovernmental organizations was driven by the issues generated by an unprecedented wave of cultural and technical globalisation.[46]

<https://uia.org/sites/uia.org/files/misc_pdfs/stats/Historical_overview_of_number_of_international_organizations_by_type_1909-2013.pdf> accessed October 6, 2023

[43] See Klabbers J, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022) pp6-14

[44] According to Klabbers, with one exception - the OSCE. Although the fact that the Helsinki accords don't have treaty status is a bit formalistic, since the act of creation of a formal organisation expresses a will to be bound by its decisions and its purpose in the same as the formal treaty would. In any case, an organisation does not come into being without a decision to create it, whether it is done by a treaty or not.

[45] The notion of independent will is quite academic. Firstly, considering that Member States make decisions in parliamentary organs, it is questionable that the organisation is independent. Moreover, if it were proven that an organisation does not have independent will, it would not invalidate its legal acts or capacities. And as will be elaborated in section 1.7, the limited independence of an organisation affects its international and domestic responsibility; and the lack of independence of the international administrative tribunal judiciary affects the internal law, but does not invalidate it.

[46] Klabbers J, "The Emergence of Functionalism in International Institutional Law: Colonial Inspirations" (2014) 25 European journal of international law 645

Despite the fact that the world was ruled by powerful Western colonial empires, no single government had either the will or the capacity to address those developments. Thus, nation-states created the modern global institutions and endowed them with the international legal personality, the powers, and the privileges and immunities necessary to fulfil certain purposes. It is argued that since governments did not want to create a super-state with the authority to control them, they instead invented a structure that would perpetuate their sovereignty in pursuit of their international goals. Nation states became Member States, with voting powers in parliamentary organs that negotiate, pass resolutions and create law, and with a bureaucracy that supported their activities. The descendants of the old empires retained some of their past authority in the form of a veto power in the UN Security Council; in their ability to participate in most of the meetings taking place in New York and Geneva; and in their overrepresentation and influence of key institutions and organs like the ICJ and the judges of the international administrative tribunals.

International organizations were first created when there were virtually no third parties outside of non-Member States, and when the internal labour law was very limited because of the very small number of international civil servants. The current situation is very different - there are many more states at different levels of development, new institutional organs, hundreds of international organizations, NGOs, networks of grassroot movements, and even private companies that engage in international law-making activities and are affected by the actions of global institutions. The role of individuals has also changed, and very pertinently so - there are over a hundred thousand international bureaucrats across different organizations on many continents, and their obligations to the purpose of the organisation are sometimes in conflict with the prevalent culture. These are different affected parties with different rights and responsibilities according to the applicable law, and according to their relationship with the other parties - whether it is public or private international law, or domestic law, or yet another specific situation like the internal labour law of the UN,[47] or the immunity of international

[47] See Chapter 2 for the sources of law and for the jurisdiction of the administrative tribunals.

organizations, or the cases for responsibility for the behaviour of peacekeepers in a conflict zone.[48]

The inherent fault lines of international organisation law are not due to their functions and goals, but to the history and building blocks of the organisation, and how the context has changed. The principles of the UN and other organizations have a different standing now in the context of global social ethics, wherein new common goals were articulated in documents like the Millennium Development Goals and Social Development Goals - ideals that reflect the needs and agency derived from the constituents, rather than the states. This context also affects the background of whistleblowing and the culture of secrecy; the role of bureaucrats in the ethical and legal meaning of the position and importance of the organisation among the global society; and the consequences of their choice to speak up or stay silent.

1.5 Functionalism

Functionalism is difficult to imagine as a legal concept because domestic law works very differently - criminal law proscribes certain acts, civil law describes rights and duties of persons among themselves, etc.; the rules are made by the legislative, interpreted by the judicial and enforced by the executive branches. Public international law, as it applies to an international organisation, is that the will of the founding states - both articulated and intended - is the source of law. There is no court that has jurisdiction over the institutions, even though there are tribunals that bind the organisation in its decisions on labour disputes. The executive branch is both the Secretary-General as an agent of the founders and a

[48] From domestic courts decisions see for example House of Lords, Attorney General v. Nissan, 11 February 1969, All England Law Reports, 1969-I, p. 646. Also Oberlandesgericht Wien, N.K. v. Austria, 26 February 1979, International Law Reports, Vol. 77, p. 470. Generally, the immunity applies - See, for instance, Court of Appeal of The Hague, Mothers of Srebrenica v. Netherlands and the United Nations, 30 March 2010, 49 International Legal Materials (2010), p. 1021 et seq.; Supreme Court of the Netherlands, Mothers of Srebrenica Association et Al v.The Netherlands, 13 April 2013, 51 International Legal Materials (2013), p. 1327 et seq. See below a more detailed discussion on immunity and waivers.

chief administrative officer, and the states as agents of the organisation when implementing treaties and other judicial decisions.

The core of the concept of functionalism can be illustrated quite simply - the UN was created by nation states to fulfil a goal that is codified in the UN Charter, through cooperation between sovereign states,[49] and was given rights and responsibilities to further that function. Because sovereign states create organizations through the founding document and all the other internal legislation, those states define the purpose, the capacities of their creation, and the limitations for their exercise that would affect the sovereignty of nations. The assumption behind functionalism is that the will of Member States is the only fair source of justice because traditional public international law is based on the will and sovereignty of states. Therefore, the actions taken in pursuit of the goal they agreed on would, by definition, not infringe on their sovereignty; the only other limitation would be *jus cogens* - the peremptory norms of public international law.

Such a system is best described with an analogy outside of states and international organizations; such a parallel has limitations, but provides a more concrete idea of the difference between domestic law and public international law. Let’s imagine that a group of governments create a restaurant, and the rules are such that anything they decide to do to run the restaurant is considered legal - buying food, hiring cooks, deciding opening hours, setting the prices on a menu, etc. There is no court that has jurisdiction over the restaurant and the governments make all the rules, but they hire an arbiter that rules on disputes between the employees and the employers - anything from promotions, benefits, misconduct, etc. Of course, murder or stealing in the pursuit of running the restaurant would not be justified because the owners have agreed those are not justifiable (as wouldn’t genocide or torture in the name of achieving the goal of the UN). Buying nuclear weapons would not be legal because it is (hopefully) not necessary for the running of the restaurant; buying chairs, cars, ovens, gas canisters, or salt would be legal; signing cellphone contracts or buying ad space would be legal; buying books might be legal if they relate to cooking and restaurants; investing in the stock market is probably not legal; buying chainsaws is very likely not legal. However, if the owners decide that it is necessary for the restaurant to invest in the stock market,

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[49] See UN Charter Preamble, Art 1 and 2.

they could modify the goal and the rules. If the owners decide the function of the restaurant, they would have the final word even on what is considered food, or edible food, or food that does not endanger the customers, without any oversight.

Within the metaphor, many questions arise, including which law of the restaurant/international organisation would apply to contracts, labour practises, food standards etc.; and who decides what is legal. Any court would have a hard time deciding on a breach of contract if one of the parties is governed by legality tied to its function that is governed only by its creators and not by objective standards. The restaurant business and its practices are a straightforward model with millennia of tradition across cultures, but international organizations are newer, with varied purposes. It is difficult to imagine that any action supposedly taken in pursuit of a goal agreed on by a group of states / restaurant owners can be considered legal without judicial review by an independent, impartial body. The International Court of Justice would be the logical candidate for an adjudicating body, but it does not have jurisdiction over the restaurant / international organisation until the states / owners decide it does, and so its mandate is limited by the sovereignty of states, and the rules of responsibility discussed in the previous section. A decision by the ICJ and peremptory norms are mostly theoretical limitations and discussions, since a sovereign state cannot be forced to participate in judicial proceedings or make reparations. With regard to matters between the employees and the owners, the arbiter is not strictly independent because they would be paid by the states, and if the owners decide not to abide by the arbiter's ruling or to not comply with his orders to provide information, there is no other recourse. An Advisory Opinion can have some legal weight in clarifying points of law, including internal labour law, but there are limitations and issues therein as well, including the fact that individual staff members cannot request an ICJ advisory opinion, and do not have standing at the international court.

Much like a restaurant, an organisation that oversees an airport - like EuroAirport in Basel - has a clear function and necessary capacities, but the same cannot be said for the United Nations headquarters in New York. The purpose of an organisation like the UN is so general - stopping war, promoting human rights, justice and social progress - that arguably almost any step can be justified as a way to achieve it. If the extreme means are approved and accepted by sovereign states, they could in theory become a source of customary international law, unless they

were violating a peremptory norm.[50] On the other hand, even if states voice a political agreement, but do not sign a treaty to that end, there is no way to challenge their inaction. And so despite the fact that the UN has a goal that requires legal actions, there is no universally recognized way to investigate the legality of the inaction of the UN with regard to its purpose like in the case of the genocide in Rwanda; or of the lack of protection for whistleblowers; or of the selection process of judges for the internal administrative tribunals.

Thus, the interpretation of the purpose of the institution - which are also referred to as aims or goals depending on the organisation - and the application of that purpose into law is tied to the sovereign will of nation states.[51] Within this entanglement the personality, powers, privileges, and immunities of the organisation are justified as long as they are directly conferred by the nation states, or contribute to the fulfilment of the function that is also interpreted and endowed by the states - a notion often referred to as “functional necessity”. Therefore, there is never a clear line separating the creators from their creation and the organisational goal - from the inception, through their relationship in terms of law-making and control, and finally in the consequences of their actions. Conversely, the lack of autonomy[52] means that the organisation cannot or would not directly force states to act, and the states could or would not[53] authorise the organisation to take responsibility because of their own potential liability.

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[50] The question of conflict of laws between treaty and custom is a complex one. It is generally accepted that treaties codify existing custom, and subsequent custom can modify the interpretation of the existing treaties. Public international law is overwhelmingly positivist - ie, states are only bound by obligations that they agree to - and therefore it is difficult to formulate a dogmatic legal scenario where a nation signed a treaty, thus agreeing to an obligation, and subsequently adopted a custom that goes against the treaty. However, this exact situation occurs very often in the international sphere, and even moreso with states arguing different positions at different international organizations.

[51] Many international organizations exercise very little autonomous political power. See Schermers HG and Blokker NM, *International Institutional Law: Unity within Diversity, Fifth Revised Edition* (Martinus Nijhoff 2011) p10, 12.

[52] Klabbers J, “Interminable Disagreement: Reflections on the Autonomy of International Organisations” (2019) 88 Nordic journal of international law 111 <http://dx.doi.org/10.1163/15718107-08810006> 111-133

[53] The line between capacity and willingness in this context is often based on political, rather than legal considerations

The case-law of the PCIJ in the Danube Commission case in the late 1920s, and the ICJ Advisory Opinions in the Reparation for Injuries case, the Effect of Awards case[54] and the Certain Expenses case was characterised by functionalist logic. However, international organizations have changed quite a lot in the last century, and so have their purposes - from very few entities dealing with technical issues, to hundreds of organizations including a near-universal United Nations in the 21st century - but that has not given a significant modification of the judicial thought. The goal alone can hardly describe and ground the entire spectrum of organizations and their legal systems, as well as the overlaps. On one hand, an organisation like the Universal Postal Union, which was established in 1874, can legitimately influence national postal policies and administer the world postal system, but it cannot enact a legal nuclear weapons ban. However, the World Trade Organisation, which was created in 1995, has ruled on environmental policies and labour rights because those can affect trade access. The decision of what is necessary for the function is left to the national governments and their representatives in each individual organisation; and those have been known to vote differently on similar issues in different organizations - like the issue of labour standards at the ILO and the WTO.

A subject of a fair legal system should have a responsibility to act in good faith and be answerable for the legality and consequences of its actions. While the purpose of the organisation delineates the legality of power and responsibility between the nation states and intergovernmental organizations, there is no accountability link with non-state actors, stateless persons, multinational corporations, and also its own civil service. Therefore, the main limits of the functionalist theory lie in issues of immunity and accountability,[55] especially in the context of the concept of *ultra vires* (see below).[56] The actions of an organisation like the UN affect not only nation states, but there are no external international mechanisms for establishing liability in such cases, which was exemplified in the case of the cholera epidemic

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[54] Which is very important in the context of the law of the international civil service and will be analysed in Chapter 2.

[55] Klabbers J, "Unity, Diversity, Accountability: The Ambivalent Concept Of International Organisation" (2013) 14 Melbourne Journal of International Law 149

[56] See Klabbers J, "Contending Approaches to International Organizations: Between Functionalism and Constitutionalism," *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing 2011)

in Haiti.[57] The purpose of the organisation and the interests of its creators / Member States cannot (or should not) be legitimately put above principles of justice and the rule of law that the institution advocates. An organisation that avoids liability for its actions because it is not directly necessary for achieving its function is acting against the inner morality[58] of the rule of law and is affecting the expectations of the legal system as a whole.

The rest of the analysis in this chapter will follow Jan Klabbers'[59] three-dynamics model,[60] which conceptualises the legal system into (1) legal dynamics between the organisation and its Member States; (2) external dynamics and the international responsibility of the organisation; and (3) the intra-organizational dynamics, respectively.[61] Because of the role of sovereign states in public international law and as creators of international organizations, the legal relationship between international organizations and its Member States is the most explored one in academia. The dynamics between the organisation and third parties and the internal legal sphere have been largely neglected in scholarship.[62]

The three-dynamics model demonstrates how well functionalism fits the jurisprudence of the ICJ relating to the legal pillars of international organizations - the international legal personality, the powers, and the privileges and immunities - and how lacking it is in issues of accountability and intra-organisational law. And, as Klabbers points out, the legality of the "external" and "internal" dynamics are less straightforward[63] in both the theory and practice of functionalism, because the connection between action, recipient, rules, and enforcement are less clear. This is especially significant when discussing the UN Staff Rules and Regulations in Chapter 2, and the interpretations by the tribunals, because of the conflicting

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[57] There could be a mechanism to determine damages and liabilities, but it was never established. See Article VIII (Section 29) of the Convention on the Privileges and Immunities of the United Nations, and issues of responsibility in the next subsection.
[58] Fleming discusses combining formal with procedural characteristics to enhance the ethical concept of rule of law. Fleming JE, *Getting to the Rule of Law* (NYU PRESS 2011)
[59] See below in 1.9.3
[60] See Klabbers (n. 43)
[61] Klabbers puts intra-organizational relations second and external relations third in the textbook. Because the focus in this thesis is on the intra/organisational relations, the order has been reversed.
[62] See inter-international organisation chapters in Schermers, Amerasinghe, discussed below.
[63] See Klabbers (n. 28)

connection between the purpose of the organisation, the law and ethos of the civil service, and the conduct of the civil servants in the context of misconduct and whistleblower cases.

Different (but interconnected) normative elements of functional necessity dominate each of the three legal dynamics, and the dynamics themselves are not isolated from each other. The law of intergovernmental organizations is defined by issues of autonomy, lack of enforcement and judicial review, as well as by a conflict between stated and implied rules - three issues that directly affect the international bureaucrats in general and whistleblowers in particular.

1.6 Legal pillars and function

Unlike states, international organizations do not declare themselves as subjects of the public international legal system, but are instead attributed certain legal characteristics in their founding treaties. However, nation states did not bestow the global institutions with a clear set of juridical qualities, but rather relied on vague political definitions in treaties. There are three such important parts of the legal dynamics between member states and the global institutions with regard to functionalism that arose from what nation states required of their creations - the international legal personality, the powers of the organisation, and the privileges and immunities regime. Each of those is discussed in seminal Advisory Opinions of the ICJ, which is interesting because of the lack of legal standing of the institutions in the world court - a case of a subject of public international law whose qualities are clarified by the world court without an actual trial. The legal subjectivity of international organizations affects their decision- and law-making capacities, which in turn defines the international civil servant rights and obligations - the background of whistleblower cases.

1.6.1 Legal Personality

A subject of a legal system possesses a legal personality - a set of qualities that enable it to form relationships with other legal subjects - which is determined by

the system itself.[64] An international organisation would have both domestic legal personality, which is bestowed by each individual state in an expression of the sovereignty discussed earlier,[65] as well as an international legal personality. There is no supranational body that confers international legal personality, and there is no universal description of the set of obligations and rights of the subjects of public international law. Some founding treaties of intergovernmental organizations mention personality specifically, and some do not; in the case of the UN, there is no formulation of personality in the Charter. Although there is a provision in Art I, section 1 of the Convention on Privileges and Immunities (discussed below) which could potentially cover both domestic and international personhood.[66]

When there is no direct mention in the treaty, there is a divergence of opinion among academics[67] on whether the personality of an organisation can be inferred as a logical consequence of the will of the founders, or whether it is possible to make an objective determination. The jurisprudence has largely been focused on determining the intent of the creators because of the centrality of state sovereignty in international law. The proponents of the objective personality argue that an organisation that has a distinct will should have the capacity to engage with other actors in legal relations.[68] Such a rationalisation goes radically against the sovereignty of states and is not accepted in the practice of international organisations. According to others, international organizations operate based on the so-called presumptive personality[69] elaborated in the Reparation for Injuries

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[64] See below for summary on domestic legal personality in the context of the privileges and immunities of international organizations. Klabbers discusses domestic and international legal personality together, but the privileges and immunities form the legal status of an international organisation in the domestic legal context

[65] Through treaties and domestic laws, etc; again, see below.

[66] "*The United Nations shall possess juridical personality. It shall have the capacity: (a) To contract; (b) To acquire and dispose of immovable and movable property; (c) To institute legal proceedings."* It is somewhat unclear whether (c) covers both domestic and international proceedings, though.

[67] Schermers and Blokker (n. 51) identify three theories - attributed, objective, and "will". See Brolmann C, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007)

[68] See Seyersted F, *Objective International Personality of Intergovernmental Organisations. Do Their Capacities Really Depend upon Their Constitutions ?* (1963); See also Seyersted F, *Common Law of International Organizations* (Martinus Nijhoff 2008), which was written in the 1970s, but was first published in 2008;

[69] Klabbers, (n. 43)

Advisory Opinion by the ICJ. In this idea, if an international organisation performs an act that can only be explained as a consequence of international legal personality, then the institution has that international legal personality. There is an obvious circularity and post-factum determination in this definition, but the difference between objective and presumptive personality is not simply a semantic one. In practice, the sovereign Member States are more likely to join and endorse an organisation that deals with practicalities as they arise without an affirmation that would strictly limit their actions, rather than an independent organisation that autonomously assumes personality and powers by declaration. This tacit endorsement is also reflected in the internal organisational culture of a global institution, as will be pointed out in Chapter 3; and in the amendment of the statute of the tribunals by the Secretary-General limiting the judicial review of whistleblower cases in Chapter 4.

This first basic legal quality is closely tied to the global social context because it describes the limits of legal participation in that context, while at the same time avoiding the definition of the context. In the Reparation for Injuries Advisory Opinion request in 1949,[70] the International Court of Justice was asked to establish whether the United Nations had the capacity to bring a legal claim against a non-Member state. According to the *travaux preparatoire* of the UN Charter,[71] the drafters considered the question superfluous and that an answer could be determined by other provisions. It is worth reiterating the homogeneity of the international legal system, its limited number of subjects and their relative power at that time.

The Court's finding in the Reparation for Injuries began with the determination that,

[70] A UN official, Folke Bernadotte, was assassinated in Jerusalem in 1948. Israel was not a member of the UN at the time, and the General Assembly wanted to explore the possibility of bringing a legal suit against a non-member state.

[71] It is interesting that the Preparatory Commission saw fit to include provisions for international legal personality in the Draft Convention on the Privileges and Immunities and in the Draft agreement with the host state. See Reinisch A, "Convention on the Privileges and Immunities of the United Nations" (*Legal.un.org*) <https://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html> accessed October 3, 2023

"The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community."

At the time of the Opinion, the UN had 59 Member States, and there was only one non-state observer entity - the Organisation of American States.[72] The variation within the subjects of the legal system that the Opinion envisioned was probably influenced by these characteristics. Furthermore, the Opinion most likely referred to the community of states because non-state actors were not very prominent, but the decision still refers to the collective as a whole that has common goals, rather than the goals of the whole being defined by the member states. Thus, it should be the "needs of the community" and their evolution that determine the legal nature of the subjects of international law, as well as the source of the power to confer the respective personality -

"On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims."

If the Member States were found not to represent the vast majority members of the international community, it would naturally follow that they did not have the exclusive right to limit the organisational personality. The Opinion does not establish that States did confer the personality, since the UN Charter does not have such provisions, but claims instead that through their representation of the global community, the fifty states had the capacity to bestow the personality. The representation of the community is the source of legality, and the source of the purpose. However, the question remains as to why didn't the fifty states actually give their creation a clear legal personality in the founding treaty or any other document; conversely, if they did not confer a legal personality, did they really have that power. These are mostly semantic musings because the international legal personality of the UN has not been in question since. It is possible to argue

[72] See United Nations General Assembly Resolution 253 (III)

that the nation states decided not to confer the personality in an unambiguous manner that would enable the organisation to be unambiguously independent.

The determination by the ICJ was based on the "intent" of the creators in terms of the UN as a whole, ie

> *"what characteristics the Charter was intended to give to the Organization. ... the Charter conferred upon the Organization rights and obligations which are different from those of its Members. ... the Organization ... has a large measure of international personality and the capacity to operate upon an international plane, although it is certainly not a super-state."*

The Court concluded that the UN had the right to bring the claim in order to exercise functional protection of its staff as agents. Therefore, the ICJ through its Opinion also builds the link between the international civil service, the function of the organisation, the global society, and the legal personality of the institution. The work of the staff towards the goals of the organisation is a part of the legal identity of the organisation, the identity that is derived from the need that goes beyond the capacity of the sovereign states; and the protection in pursuit of that work should also be considered part of that legality.

It is important to reiterate that the capacity to bring a claim is bound by several factors. As mentioned in Chapter 1, an international organisation cannot invoke international responsibility of a state, and further, an international organisation does not have standing at the ICJ. It will be demonstrated further that the human and social rights of UN civil servants have been infringed many times, and yet the organisation has never brought an actual case in an international or a domestic forum.

1.6.2 Powers

Another important issue that was addressed by the ICJ in the Reparation for Injuries Opinion was the question of powers, which is different but not entirely separate from the legal personality. In order to achieve its goals, an organisation needs to be able to contract, acquire, own, dispose of property; institute proceedings, be sued; create its own internal regulations and adjudicating bodies - which are all elements of a domestic legal personality of a sovereign state. The

rights and obligations of the organisation can be contained in the founding treaty, but can also arise from treaties with third parties, and even custom. In the case of the UN, the domestic capacities are mentioned in the founding treaty and are tied to the function -

> *"The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." (UN charter Article 194)*

In addition, an intergovernmental organisation can have supranational regulatory powers (EU), treaty-making powers, dispute settling (WTO) powers, or even territorial jurisdiction as was the case of the League of Nations and the UN now-defunct trusteeship system.

In the scholarship of international organizations law, there are three main theories[73] on the legal powers of international organizations - the so-called attributed, implied and inherent doctrines. All three approaches deal with the question of the source of the powers - whether they are expressly attributed by states, or implied in the founding treaty, or are they inherent to the institution, respectively. The doctrines reflect on the lack of stability and predictability of the obligations and competencies of the international civil service as well. In some cases the bureaucracy mandates are limited to what the parliamentary bodies and their decisions expressly permit, some part of the duties of staff is implied, and there are also inherent civil service obligations. The ambiguity of organisational autonomy shapes the contradiction between efficiency and justice - ie what is necessary for the functioning according to the Member States v. what would be fair and just.

The attributed powers doctrine is most closely related to state sovereignty, and relies on express references to powers in founding treaties.[74] In its early jurisprudence from the 1920s the PCIJ[75] used the attributed powers doctrine to

[73] See Klabbers (n. 43). Also Schermers and Blokker (n. 51).
[74] See Art I-V of the FAO Constitution, and Art 1 of the Charter of OAS
[75] See Jurisdiction Of The European Commission Of The Danube Between Galatz And Braila, Advisory Opinion. Publications Of The Permanent Court Of International Justice. Series B. - No 14. 8 Dec 1927

define the limits of the ILO activity.[76] The court decided that it was only a question of reading and interpreting the founding treaty, since the capacities of the organisation were limited to what was expressly bestowed by the founding states. The issue with this theory is that it is static and later jurisprudence from the ICJ moved away from the attributed power doctrine because the organizations were faced with challenges they were not directly mandated to handle.

The notion of implied powers is not in and of itself a big leap forward, because it still refers to interpreting treaties in a way to fulfil the function that was granted by the Member States and their ability to fulfil it.[77] This doctrine was born out of the practice, since the founding treaties did not provide for every case scenario, and amending the treaties is cumbersome and legally questionable in terms of retroactivity. If a treaty was amended in order to resolve an already existing issue, then the amendment would have to be applied retroactively in order to apply to the problem at hand, which goes against accepted general legal principles. In the Reparations for Injuries Advisory Opinion, the court used the implied powers doctrine to establish the capacity of the UN to bring a case against a non-member state.

The ICJ has also relied on the implied powers doctrine in one very significant case in the context of the law of the international civil service. In the Effects of Awards Advisory Opinion the Court judged on whether the UN General Assembly had the capacity to refuse to give effect to awards of compensation for unfair dismissal issued by the now-defunct UN Administrative Tribunal (UNAdT). In 1953 several US staff of the UN, serving on both permanent and temporary contracts, were dismissed without notice for refusing to testify at a US Senate Committee that was charged with unearthing communist agents in the US government. The staff members exercised their constitutional right to not incriminate themselves - the so-called Fifth Amendment right - and were accused of disloyalty towards the host state. The pertinent Staff Regulations provided that permanent contract holders

[76] See Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture Advisory Opinion of 12 August 1922, and Competence of the ILO to Examine Proposal for the Organisation and Development of the Methods of Agricultural Production, Advisory Opinion of 12 August 1922.

[77] See Judge Hackworth's dissenting opinion in the ICJ Reparations for Injuries Advisory Opinion.

were entitled to notice, and based on that the UNAdT granted large monetary compensations to those staff members. The judgements also noted that the tribunal did not have jurisdiction to examine the legality of the actions of Member States with regard to the UN civil servants. The General Assembly asked the ICJ for an Advisory Opinion on whether a "subsidiary body" like the Tribunal could bind the parliamentary organ; the ICJ decided that the Secretary-General has the power to settle disputes between UN and staff and that the UN General Assembly has the power to establish an administrative tribunal, even though there are no provisions to that end in the UN Charter -

> *"the power ... was essential to ensure the efficient working of the Secretariat and ... of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter."*

By "necessary intendment" the ICJ concluded that the Assembly intended to establish a real independent judiciary body, with the power to bind the whole organizations, which is significant in the context of the international civil service and whistleblowers. The conclusion was that the Member States-driven Assembly did not have the power to conduct judicial review and reject the Tribunal's decisions because that would go against the core purpose of the UN. The Opinion put the UN Administrative Tribunal in a shared public international legal space by virtue of the binding power of its judgement. It is noteworthy that several significant changes have taken place since that Advisory Opinion, namely that the ICJ no longer has judicial review powers over the judgements of the UN tribunals, and the General Assembly has modified the Staff Rules and Regulations in such a way as to avoid that specific cause for legal action.

The other influential case relating to organisational powers is the 1962 Certain Expenses Advisory Opinion, wherein the ICJ was consulted on whether the expenses for UN peace-keeping operations fall within the definition of "expenses of the organisation" according to Charter Art 17. The PKO was created by a resolution of the General Assembly; in that historical period there was a struggle for power between the Security Council and the Assembly, which is one of the political considerations referenced above. In that context, several UN Members refused to pay their contributions, based on the argument that those would be used

to finance the PKO; they further argued that peace-keeping was not a capacity spelled out in Charter, and since it was also not ordained by Security Council (the mandate of which is security issues) it should be deemed illegal. The ICJ decision referred to Art 11, which gives the GA mandate to take action on questions of "maintaining peace and security". The Opinion concluded that the powers of the UN may be implied if they are necessary for the fulfilment of the purpose of the international organisation -

> *"When the Organization took action which warranted the assertion that it was appropriate for the fulfilment of one of the purposes of the United Nations set forth in Article 1 of the Charter, the presumption was that such action was not ultra vires the Organization"*

The core assumption of international organizations law is that the moral superiority of the function of the UN - peace - gives a justification for the actions of the organisation, even if the capacities are not spelled out in the treaties or examined by an independent judiciary. Therefore, both the attributed and implied powers doctrines sidestep the question of organisational autonomy.

The proponents[78] of objective international legal personality have also formulated the inherent powers doctrine - the idea that the organisation should exercise autonomous capacities that reflect the independent will of the institution. This theory is supported by the practice of the law of global institutions only insofar as daily clerical activities are concerned - translation, conference management, etc. In terms of law-making, the inherent powers doctrine is mainly an academic intellectual exercise, but it does raise interesting questions in practical terms as to the level of control and say-so that the nation states have over the activities of the organisation and its staff. An organisation like the UN has its headquarters - where the Member States representatives gather, negotiate, and make treaties - in New York, but the UN has political and legal activities in many cities around the world. It is not feasible to say that national governments could or should endorse every such action; but it is also not realistic to claim that the institution determines its own mandate independently of the Member States.

[78] See Seyersted (n. 68)

Nation-states have the responsibility to provide international organizations with the powers to achieve their assigned task. If an organisation were to act *ultra vires* - outside of the capacities explicitly or implicitly given by the nation-states - the act would give rise to international responsibility. Also, when governments fail to provide the tools to address the task, both creators and creation could face consequences in both domestic and international law. If the Member states of the organisation tacitly or explicitly endorse an action, it is assumed that it is not *ultra vires*. The next section will outline the regime protecting organizations from those consequences - privileges and immunities, the aspect that is based on autonomy, and both separates and brings together the internal and external legal space of international organizations - before dealing with accountability and third-party relations.

1.6.3 Privileges and Immunities

Intergovernmental organizations enjoy certain special treatment - immunity from prosecution in domestic courts, inviolability of premises and archives,[79] preferential communication access, among others - in the countries where they conduct their affairs. These privileges and immunities are granted directly by the sovereign states and govern the relationship between a state and an organisation; they are justified under functional necessity in jurisprudence; and they are the reason why whistleblower protection is the exclusive dominion of international organisations.

The history of the legal protection of global institutions can be traced to the 19th century, when diplomatic immunities were granted for the first time to non-diplomatic functionaries.[80] The core idea of privileges and immunities is to shelter the institutions from external influence, a protection that is justified by the purpose of the institution. The modern concept of the privileges and immunities of international organizations can be found in the Covenant of the League of Nations, where Art 7(4) and (5) provided for a functional "diplomatic" protection of the officials of the League.[81] The current regime on privileges and immunities is

[79] See Burci (n. 5)
[80] Kunz JL, "Privileges and Immunities of International Organizations" (1947) 41 The American journal of international law 828
[81] See Covenant of the League of Nations.

rooted in the founding treaties of international organizations, like UN Charter Article 105; in international treaties, like the Convention on the Privileges and Immunities of the United Nations from 1946 (hereafter Privileges and Immunities Convention);[82] in agreements between the host state and the organisation, like the UN Headquarters Agreement; and finally sometimes in domestic law[83] or even in customary international law. There is no universal blueprint of privileges immunities that would provide legal stability, but many organizations have so far established individual systems modelled after the Privileges and Immunities Convention, which is considered a codification of customary law.

According to Singer,[84] the concept of functional necessity as a source of jurisdictional immunity arose because state immunity (or reciprocal immunity) was not applicable to international organizations.[85] Granting sovereignty to the hundreds of international organizations in existence would create chaos in international affairs, mostly because of the absence of a supranational authority; and it would also complicate matters of enforcement of obligations due to the responsibility issues discussed above. Another explanation would be that sovereign states were and are not willing to grant state immunity to non-state entities.

Aside from Singer, the leading authorities on the modern interpretations and jurisprudence on privileges and immunities are Miller[86] on the framework of functional necessity, and the Commentary on the Conventions on the Privileges

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[82] The Convention applies to the UN Secretariat and to the Programmes and Funds of the UN: UNDP, UNHCR, UNICEF, WFP, UNRWA, UNEP, UNCTAD, UNFPA. A separate regime established by the 1947 Convention on the Privileges and Immunities of the Specialised Agencies (Specialised Agencies Convention) applies to: ILO, FAO, ICAO, UNESCO, IMF, IBRD, WHO, UPU, ITU, WMO, IMO, IFC, IDA, WIPO, IFAD, UNIDO, WTO (tourism), IRO.
[83] See the US International Organizations Immunities Act of 1945 as cited in Jam v. International Finance Corp.
[84] See Singer M, "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns" (1995) 36 Virginia Journal of International Law 53
[85] Perhaps it is possible to argue that agreements with host states are types of unilaterally granted immunity that upholds the state sovereignty and allows an international organizations to form domestic legal relations. No such argument can be made about treaty-making or peace-making.
[86] See Miller A, "United Nations Experts on Mission and Their Privileges and Immunities" (2007) 4 International organizations law review 11; Miller A, "Privileges and Immunities of United Nations Officials," *Globalization and International Organizations* (Routledge 2017); Miller A, "The Privileges and Immunities of the United Nations" (2009) 6 International organizations law review 7

and Immunities of the UN and the Specialised Agencies by Reinish and Bachmayer.[87] Miller discusses different types of activities - from undisputed ones like contracting and property-related; to others that would possibly fall outside of the UN mandate unless authorised by the GA - like commercial activities and joint ventures. The Commentary is a detailed analysis of both the history of the drafting of the two Conventions, and specific issues in each provision.

The rest of this subsection will focus on the privileges and immunities granted to international civil servants acting in their official capacity; on the immunity of the organisation staff from suit by third parties and from suit by staff members; and on the waiver of the latter by the head of the organisation such as the UN Secretary-General. These are the most relevant elements for the whistleblower discussion, but also most clearly distinguish the status of international organizations from diplomatic and sovereign immunity.

1.6.3.1 Civil servants' immunity

The privileges and immunities regime of international civil servants is modelled after the law of immunity of diplomats in public international law, but is not based on nationality. According to Art. V (Section 18 (a)) of the Privileges and Immunities Convention, "[officials] of the United Nations shall: (a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;" - that is, functional immunity. This means that, unlike state representatives,[88] most UN staff are only protected from domestic litigation for acts carried out in pursuit of their official duties, or in other words - in pursuit of the realisation of the function of the organisation. Officials protected by functional immunity are still liable for private legal obligations - like rental agreements, driving tickets, etc.[89]

Furthermore, under the Privileges and Immunities Convention Section 19, some higher-ranking officials of the UN - in particular the Secretary-General, Under-

[87] See Reinisch A (ed), *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (Oxford University Press 2016)
[88] The status of representatives of nation states or state-like entities to international organizations is also the subject of the Privileges and Immunities Convention, but will not be discussed here because it does not relate to the international civil service.
[89] See Staff Rule 1.2 (b) private legal obligations of staff members.

Secretaries-General and Assistant Secretaries-General - are covered by full diplomatic immunity.[90] Those staff members are immune for both official and private acts in both civil and criminal matters. This distinction exemplifies the layers within the UN bureaucracy - the division between the political appointees and lower-level staff with regard to treatment by domestic courts (and also internal law, as will be pointed out below). The dichotomy also shows up in the power differential and the impunity from consequence discussion. Another special category of staff in terms of privileges is experts on missions. Under Article VI of the Privileges and Immunities Convention grants those officials prerogatives "necessary for the independent exercise of their functions", namely immunity from arrest, detention, or legal process, including for any statement[91] made in the course of their duties; as well as inviolability of documents, correspondence, and personal baggage.

The privileges and immunities of the international civil service were conceived, in contrast to the doctrines on attribution of personality and powers described above, on the understanding that such an institution needs to function independently, and that being the subject of domestic law could interfere with that autonomy. The extra layer of protection is also tied to protecting the independence and international character of the international bureaucracy in the pursuit of their duties -

> *"In the international sphere, the problem of the control of organisational power in its impact upon the individual becomes most acute. The international civil servant is perhaps the most **vulnerable** of all individuals to the uncontrolled exercise of organisational power. ... Cut off from participation in the familiar primary groups of his own national society, except in his family relationships, denied legal protection of the important expectations implicit in his contract of employment because of the immunity*

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[90] In some duty stations, other staff members also enjoy diplomatic immunity - in Austria and Switzerland, under the agreements with the host states, UN officials at P-5 grade and higher are given such privileges.

[91] It is interesting that the immunity from legal process for written and verbal comments is not procedural - i.e. it still applies even if the expert is no longer employed by the UN.

from national jurisdiction of his employer, the international civil servant becomes a peculiarly isolated and exposed individual. [emphasis added]"[92]

Says Singer,

> *"In this context, as in others, it is important to remember that no international tribunal has compulsory jurisdiction over international organizations.*
>
> ...
>
> *Under current doctrines of jurisdictional immunity, for example, states are effectively free to brutalize whom they please within their own territory, with little fear of adverse consequences. It would be undesirable to send international organizations the message that they now enjoy the same freedom within the confines of their various establishments."*

The statements highlight a significant concern regarding the application of jurisdictional immunity, both at the state and international organisation levels. Current doctrines of jurisdictional immunity can provide states with a degree of impunity, enabling them to engage in human rights abuses within their own territories without facing significant consequences. The argument is that extending similar immunity to international organizations within their premises would be undesirable, as it would effectively grant them a similar level of freedom from accountability for any potential wrongdoings or human rights violations. This perspective underscores the importance of maintaining mechanisms for oversight and accountability, as well as a culture of respectful dissent in order to prevent abuses of power.

As per General Assembly Resolution 64/110 from 16 December 2009, the raison d'etre of immunity is

> *"to ensure that the original intent of the Charter of the United Nations can be achieved, namely that United Nations staff and experts on mission would*

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[92] Carlston KS, "International Administrative Law: A Venture in Legal Theory" (1959) 8 Journal of Public Law 329

never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalised without due process".

This idealistic definition is not supported by practice and scholarship. There have been cases through the years, where, for instance, staff members have attempted to avoid paying alimony or being served warrants by hiding in UN buildings, where national police officers were not allowed to enter.[93] In other cases staff of international organizations have been accused of activity that is illegal in their host state, although it could be argued that it was necessary for the fulfilment of the goals of the organisation - like espionage.[94] In *Toukolon* (2014-UNAT-047), the UNAT stressed that the privileges and immunities of the UN civil service should not be "used as a shield permitting the criminal behaviour of staff members and experts on mission from being properly prosecuted."[95]

Regardless of the justification behind immunities, they have certainly been abused and also violated by states. Since 1986[96] a yearly report by the UN Secretary-General has documented issues with privileges and immunities of the officials of the UN and the Specialized Agencies and related organizations. The reports documented murders, abductions, sexual and aggravated assaults, illegal arrests, unlawful detainments without indictment or convictions, deaths in prison, travel limitations, illegal taxes and fees, etc. The actions are not limited to UN staff in field operations. In 2020 the President of the USA[97] authorised sanctions against officials of the International Criminal Court,[98] in direct retaliation against investigations into possible war crimes committed by US military forces in Afghanistan. These instances have mostly been resolved through behind-the-scenes political negotiations. Despite the claims in the Reparation for Injuries Advisory Opinion, an intergovernmental organisation cannot bring a claim against a state at

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[93] See *Bernard* UNAdT Judgement 244.
[94] See US v. Melekh (32 ILR 308 esp at p.333); and also US v. Coplon and Gubitchev ((1949) 16 ILR 293, Case no. 102).
[95] See *Kamnuyi,* 2012-UNAT-194; *Bekele,* 2012-UNAT-190
[96] See for example 1986 report A/C.5/41/12, 1998 report A/53/501, 2015 report A/70/383. There have been no consolidated, publicly-available statistics.
[97] Hansler J, "Trump Authorizes Sanctions against International Criminal Court Officials" [2020] *CNN* <https://www.cnn.com/2020/06/11/politics/icc-executive-order/index.html> accessed October 6, 2023
[98] The ICC was established by the UN General Assembly, and the US is a signatory to the Statute, but has not ratified it.

the ICJ, and no domestic judicial action has been taken to remedy these violations to date.

1.6.3.2 Immunity from suit

Because of the immunity from suit of the organisation, the staff cannot bring labour claims against the organisation in domestic courts; this is the main reason why whistleblower retaliation cases can only be adjudicated in international administrative tribunals. There have been two recent cases where domestic courts have appeared to place limitations on the immunity from judicial process.[99] The first case of Waite & Kennedy the ECHR (European Court of Human Rights) has claimed that international organizations' immunities need to be proportionate, and there needs to be "reasonable alternative means" for resolving the disputes. The Court overturned the claimants' complaints. The second case is from 2019, where the US Supreme Court overturned a lower court ruling in the case of Jam et al v. International Finance Corporation.[100] The IFC had argued that it had absolute immunity from prosecution, but the Court decided that the wording of the legislation aimed to "ensure ongoing parity between" state immunity and international organisation immunity, and since states no longer have absolute immunity in the US, the same would apply to the IFC. Again, it remains to be seen whether the IFC would be found to be subject to the US domestic jurisdiction. Other relevant jurisprudence can be found in the Dutch courts[101] although the immunity of international organisations has to date not been overturned.

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[99] See *Waite & Kennedy v. Germany*, Application no. 26083/94, ECHR Judgement, Strasbourg, 18 February 1999

[100] See *Jam v. International Finance Corporation*, 139 S. Ct. 759 (2019) . Analysis by Gulati R, "The Immunities of International Organisations: The End of Impunity?" (*Opinio Juris*, March 1, 2019) <http://opiniojuris.org/2019/03/01/the-immunities-of-international-organisations-the-end-of-impunity/> accessed October 6, 2023. Also see Kim E, "The Supreme Court Rules in Jam v. International Finance Corporation" (*Lawfare*, March 1, 2019) <https://www.lawfareblog.com/supreme-court-rules-jam-v-international-finance-corporation> accessed October 6, 2023

[101] See Di Filippo M, "Immunity from Suit of International Organisations versus Individual Right of Access to Justice: An Overview of Recent Domestic and International Case Law" (2013) 1 DUCC - Editorial de la Universidad Católica de Córdoba 382. Also Ryngaert C, "Immunities of International Organizations before Domestic Courts: Reflections on the Collective Labour Case against the European Patent Organization," *Netherlands Yearbook of International Law* (TMC Asser Press 2016)

1.6.3.3 Waiver

The final question concerning international civil servants and domestic jurisdiction is that of how the duties and their limitations are determined - ie what is functionally necessary - and in what cases the Secretary-General would exercise a waiver of immunity from prosecution. The Secretary-General determines whether an act is considered within the official capacity of a staff member in this context.[102] There are two key ICJ Advisory Opinions - Mazilu[103] and Cumuraswamy[104] - which both concern experts on mission who required protection from their own states. In Mazilu it was established that the Privileges and Immunities Convention applies to special rapporteurs because it is necessary *"for the independent exercise of their functions."*[105] The ICJ upheld that it is the Secretary-General who has the authority to "entrust" experts with their mission on behalf of the UN, to determine the extent of their duties, and thus grant the functional necessity protection. In this context, an important issue is the concept of ultra vires, where "any activity of an international organisation is either official or *ultra vires"*[106] which according to Reinish means that since an IO can only act within the capacities granted to achieve its function, so the immunity should be absolute.[107] If this were true, however, there would be no need for a waiver of immunity discussed below.

By mandate, the Secretary-General has the ultimate authority[108] on decisions relating to immunity and lifting of immunity, except when it is the Secretary-General's immunity, in which case it is within the Security Council's mandate.[109] Individual staff members do not have the right to unilaterally waive their own

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[102] See ST/AI/299.
[103] Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Mazilu) [1989] ICJ Reports 177
[104] Difference Relating to Immunity of Legal Process of a Special Rapporteur of the Commission of Human Rights (Cumaraswamy), [1999] ICJ Reports 62
[105] See Mazilu (n. 103) [p. 194, para. 47]
[106] According to Ignaz Seidl-Hohenveldern, quoted in International Law Commission, Final Report on State Immunity, Buenos Aires Conference 1994, 475
[107] Reinish A, "Immunity of Property, Funds, and Assets (Article II Section 2 General Convention)" in A Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (Oxford University Press 2016)
[108] The OLA has competency over the relationships with domestic courts. The 1947 Specialized Agencies Convention gives the Executive Heads of these Agencies purview over immunity and waiver decisions, but they do consult with the UN OLA on these matters.
[109] See section 20 of the Privileges and Immunities Convention of the UN.

immunity, in order to acquire residence in the US for example.[110] A domestic court that requests waiver of immunity of a staff member does not have to meet any particular standard of proof, other than the fact that the course of justice would be impeded otherwise. The capacity to issue waiver has been delegated to the UN Legal Counsel, who applies a functional test to determine whether the waiver can be issued without prejudice to the interests of the UN. Both the Secretary-General's authority in the matter and the test were upheld by the ICJ Advisory Opinion in Cumaraswamy.

In October 2013,[111] a class action suit was lodged at the US District Court for the Southern District of New York, on behalf of family members of victims of the cholera outbreak in Haiti, which was allegedly connected to UN peacekeepers who were infected with cholera prior to arriving in the country. The District Court upheld the UN's immunity from suit due to the lack of an express waiver, and in August 2016 the US Court of Appeals held that the immunity was not contingent on fulfilling the obligations under Article VIII, section 29 of the Convention on Privileges and Immunities. Section 29 of the Convention reads as follows: *"The United Nations shall make provisions for appropriate modes of settlement of: a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party … "*

The Haiti cholera case demonstrates how, even though the privileges and immunities regime is supposed to protect the pursuit of the institutional function and the staff of the organisation, the immunity from prosecution of the UN has been utilised in a way that is inconsistent with the spirit of the international rule of law. The Member States act as creators of the organisation; as the source of its personality, power, privileges and immunities; as the source of the mandates for the civil service and the peacekeepers; as the sole source of financial contributions; as the seconding party of the peacekeepers involved because the UN does not have its dedicated military force; and as the domestic legal system that is supposed to hold the organisation accountable. Since the turn of the century the role of third parties in international law, and the obligations to those third parties have had to be addressed, but the rules on the responsibility of intergovernmental institutions to

[110] See UNAdT judgements *Khavkine* (Judgement 66) and *Fischman* (Judgement 326)

[111] Delama Georges et al v United Nations et al (United States District Court, Southern District of New York, 13-CV-7146-JPO, 9 January 2015).

those entities remain vague and tangled with the role and interests of sovereign states.

The privileges and immunities regime creates a space wherein the protections are agreed to and given by the sovereign states in the form of domestic laws, treaties and custom; and even though the institutions are parties to the agreements, they cannot enforce them at the ICJ. The deep faults in the privileges and immunities regime are also reflected in the external legal dynamic of responsibility and transparency.

1.7 Responsibility and transparency

Unlike a domestic setting - where a government is accountable to the constituents in some form and has a court system, and the national law generally distinguishes between civil and criminal law - public international law and the law of international organizations has no genuine enforcement and is quite vague on the accountability and responsibility issues.[112] As already mentioned, the responsibility of states can only be invoked by other states, and only states have standing at the ICJ; this is without prejudice to the rights and obligations a global institution might have and what wrong might befall from their actions.

One important factor is that, up until the late 20th century, intergovernmental institutions were mostly considered as negotiation forums for states, reminiscent of the international conferences of the 19th century. However, there has been a historical shift towards an active dynamic between the international organizations and the global society because of the diversification of the field. Until the 1960s there were under 150 organizations worldwide, and in the early 1980s the number of organizations skyrocketed from under 300 to over 1000, to over 4000 in the

[112] In this section we will use accountability and responsibility interchangeably, although the former has a connotation of information-sharing and a more ethical notion of "being held accountable" , while the latter is closer to legal liability. In the context of international organizations, accountability is often used in the context of transparency, but the terms are not clearly separated. See UNDP, "Accountability" (*UNDP*) <https://www.undp.org/content/undp/en/home/accountability.html> accessed October 6, 2023

1980s and over 7700 in 2013.[113] The accountability of a few technical institutions in the beginning of the 20th century - which mostly dealt with domestic agencies and harmonisation - was dealt with in practical fashion to resolve situations. There was little interest in a theoretical framework, much like the law of the international civil service until the 1990s.

In the past decade the rise of various third party non-state actors - international NGOs, multinational companies, even private military contractors and terrorist groups - has changed the landscape of public international law considerably. The UN has developed various instruments - like the Global Compact - that create the basis for a relationship with some of those actors, but those are soft-law mechanisms that are not enforceable. Some intergovernmental organizations have also been granted membership and observership status in other intergovernmental organizations, and have allowed NGOs to observe and even intervene in official settings. In a complex humanitarian situation, the focus thus far has been accountability to donor countries, but there are many other parties on the ground; and accountability to NGOs is certainly not the same as the accountability to diplomats or to tribal leaders. In terms of actual information-sharing, the transparency policies of the UN and the programmes and funds have only recently formulated a public interest exception to confidentiality, but there is no real mechanism to review decisions on those matters yet.[114]

The external legal relations of intergovernmental organizations were first addressed in the 1970s. The starting notion was that the institutions, as a part of their legal personality, conclude contracts and treaties not only with their Member States, but also with third parties - like private companies and other international organizations. As was pointed out above, the capacity to form contracts and treaties, as well as to bring claims, has been granted to international organizations by attribution or intendment. The domestic and international responsibility arising from those compacts have been analysed as arising from the international legal

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[113] See Union of International organizations (n. 42)

[114] See Leppävirta L and Stoyanova D, "Access to Information in International Organizations: The EU and UN" (2017) 2 Jean Monnet Working Papers, City University London

personality[115] of an institution, or from either custom[116] or general rules[117] of international law. The legal framework and the sources of law can be found in the Draft Articles (DARIO) by the ILC and in the commentary thereof, and although those are relatively new they have already been referred to in court cases.[118]

The International Law Commission began work on the topic of the responsibility of international organizations in 2001, and the final Draft Articles were adopted in 2011. The DARIO were modelled after the Articles on State Responsibility mentioned in section 1.2, but are not based on the existing practice unlike was the case with sovereign states.[119] According to Justice Giorgio Gaja of the ICJ, the purpose of the Draft Articles is to define international organisation's *"responsibility when an organization is responsible towards another organization or a State or the international community as a whole".*[120] Article 49, paragraph 3, requires that "safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organisation invoking responsibility". The notion of "international community" echoes the Reparation for Injuries Advisory Opinion, while at the same time not defining the legal system, the rights and responsibilities, or their enforcement. Also, the Articles do not contain a definition of responsibility towards a non-state actor, or the possibility of an invocation of responsibility by a party that is neither a state nor a global institution, and does not have standing at the ICJ - like an international civil servant.

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[115] Ginther K, "International Organisations, Responsibility" in R Bernhardt (ed), *Encyclopedia of Public International Law II* (1995) p 1336

[116] Hirsch M, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (Brill 2023) p8

[117] Arsanjani MH, "Claims Against International Organizations" (1981) 7 Yale Journal of World Public Order 131

[118] The Association of Mothers Citizens of Srebrenica v. The State of the Netherlands, Judgement, (16 July 2014), District Court of the Hague, Case No. C/09/295247/ HA ZA 07-2973.

[119] Alvarez JE, "Memo to the State Department Advisory Committee: ILC's Draft Articles on the Responsibility of International Organizations, Meeting of June 21, 2010" in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (2012)

[120] Gaja G, "Articles on the Responsibility of International Organizations" (*Legal.un.org*, December 9, 2011) <http://legal.un.org/avl/ha/ario/ario.html> accessed October 8, 2023

The DARIO follow the structure *and* the definitions of the Articles on State Responsibility - the "internationally wrongful act" or omission[121] needs to be "attributable" and to constitute a "breach of an international obligation of that organisation" (Art 4). An act is attributable if it is performed by a "organ" or "agent" of the organisation, or even organs of a state if the organisation has control over them. The DARIO supposedly apply to all types of institutions, regardless of the variety mentioned in Chapter 1, but under Art 64 some "special rules" would affect the responsibilities of some international organizations but not others; the most important example being the European Union as specified in the commentary.

As for the content of the obligations, the DARIO contain only secondary rules,[122] and the Commentary on the Articles states that

> *"Like the articles on State responsibility, the present draft articles express secondary rules. Nothing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on international organizations."*[123]

Even though this section conceptualises external relations as a separate dynamic, the central questions are still legal pillar issues of autonomy of international organizations from the Member States. DARIO Articles 14-19 discuss the responsibility of an institution for the conduct of a Member State or another international organisation, especially by circumventing an obligation by authorising or binding Member States to commit an act that would constitute a breach of an obligation (Art 18). In addition, Article 40 puts an obligation on Member States to take "all appropriate measures" according to the rules of the organisation to enable said organisation to fulfil its obligation for reparation. It is unclear whether the DARIO are thus putting an obligation on Member States as sovereign states, or as organs of the institution. Article 62 holds that, because an

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[121] The responsibility for omission has an ethical core rather than a legal one in practice. See Klabbers J, "Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act" (2017) 28 European journal of international law 1133 <http://dx.doi.org/10.1093/ejil/chx068>

[122] Nollkaemper A and Jacobs D, "Shared Responsibility in International Law: A Conceptual Framework" [2011] SSRN Electronic Journal

[123] General Commentary to the DARIO, note 1, paragraph 3

intergovernmental organisation has a separate legal personality, its Member States do not accrue responsibility based on its actions. This is odd given that treaty-, and decision-making is the exclusive dominion of Member-driven organs like the General Assembly and the Security Council, and conditions of procurement contracts are also determined by the parliamentary organs. Those binding agreements give rise to obligations and rights, as well as adjudication, jurisdiction, and most importantly - domestic and international legal responsibility.

When an international organisation breaches the rights or causes harm to a third party, the sovereign states have been called to correct or compensate. In the 1980s, an intergovernmental body with the mandate to control the market of tin - the Tin Council - went bankrupt and ceased to exist. Private companies tried to bring cases to UK courts to recover their losses from the Member States of the defunct organisation. The courts found that the states were not liable for the debts of the entity accrued in pursuit of the function bestowed by the same Member States - in effect, governments hid behind the supposed institutional independence and functional necessity. A similar line of thought has been applied to the actions of UN peacekeepers - since the troops are seconded by Member States, the organization has chosen to not waive immunity from suit or offer compensation for the sexual abuse of children in the CAR. Domestic courts have so far not brought charges against peacekeepers for their actions either.[124]

In the WHO and Egypt Advisory Opinion, the ICJ elaborated on the obligations of international organizations under general international law towards third parties, except the third party was also a Member state of the organisation. The ICJ held that the WHO was bound by its own constitution, by agreements to which the organisation is a party, and by the “general rules of international law”. One way to look at this would be to accept that international organizations are bound by general international law in much the same way as states, and therefore are bound by the same principles. This point of view would align with the UN abiding by international rule of law tenets mentioned in the introduction. These are, however,

[124] Morenne B, “No Charges in Sexual Abuse Case Involving French Peacekeepers” *The New York times* (January 6, 2017) <https://www.nytimes.com/2017/01/06/world/africa/french-peacekeepers-un-sexual-abuse-case-central-african-republic.html> accessed October 4, 2023

theoretical reflections that would not provide clarity unless the Member States decide to adopt DARIO as binding.

1.8 Municipal dynamics - dimensions of internality

This thesis deals with the law of the international civil service, wherein the binding law is considered to be the "internal" law of the organisation. The law of the international civil service will be discussed separately in the next chapter, and the relationships between organs that directly relate to the treatment of whistleblowers will be addressed in Chapters 3 and 4. This section will touch briefly on the overarching legal questions and the core internal faults of the law of international organizations relating to the internal legal functionalist dynamics. The main question is how do the different layers of the organisation interact with each other, as well as their power to legally bind the organisation, or be bound by the acts of the entire institution.

Because of the enmeshment with sovereign states, the privileges and immunities regime, and the nature of public international law responsibility and enforcement, it is difficult to draw the line between the internal and external legal space of an intergovernmental organisation. If the UN becomes a truly universal organisation, that could arguably make the entire world politics "internal" to the UN. However, the relationships between the UN and the agencies could not be considered "internal" because these are separate entities with their own founding treaties, even though there are common rules promulgated by the same states and applied by the same tribunals. The relationship between an organisation such as the World Bank and a Member State could be called "internal" in certain terms, which is why the reports and information are confidential. The rules governing the deployment of peacekeepers concern both the seconding state, the organisation, the receiving state, the individuals affected, etc. so the applicable law is neither public international, nor international civil service rules, nor domestic law. The law of diplomatic immunity is not internal to intergovernmental organizations, but it does affect the work of the organisation. The relationships between the tribunals are also not straightforward, as will be examined in Chapter 2.

The UN Appeals Tribunal has purview not only over UNDT cases, but also other tribunals' decisions - UNRWA, decisions taken by the Standing Committee acting on behalf of the UNJSPF, decisions by ICAO, IMO, ICJ, ISA and ITLOS. Conversely, the ILOAT has jurisdiction over disputes arising in the International Federation of Red Cross and Red Crescent Societies, the Inter-Parliamentary Union, the Global Community Engagement and Resilience Fund, the Consortium of International Agricultural Research Centres, the Global Crop Diversity Trust, among others, which are not intergovernmental organizations. There have been other signs of cross-fertilization and exchange between the different courts, which further complicate the "municipal" dimension and the issues of binding power of decisions of one tribunal over staff of another organisation, or even the power of a tribunal to bind organs that are governed by representatives of sovereign states that are not members of the organisation that decides the mandate of that tribunal.[125]

As was stated earlier, states and international organizations are the only subjects of international law, state practice is a source of law, and only states can invoke international responsibility. This affects not only the external accountability of the institutions, but also the work of the administrative tribunals and international administrative law. The UN bureaucracy was created to support and further the organisational goal, and the civil service is held to a standard of conduct that supposedly reflects that objective. Thus, the legality of the actions of the civil servants, or the treatment of those civil servants by the administration, is judged against an ambiguous goal that is determined by sovereign states that cannot be held accountable. In the UN civil service this gap in accountability has given rise to an informal culture of dispute-resolution,[126] which in turn affects the transparency and fairness of the administrative legal system.

In terms of external responsibilities, the civil service has an obligation to keep the discretion of the Member States, while at the same time the staff is responsible for the transparency activities of the organisation. There are many caveats in the access to documents policies that allow for any information coming from Member

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[125] Goldman C, "Finding The Law Of The International Civil Service In The Jurisprudence Of Sister Tribunals" (May 5, 2017) <https://www.ilo.org/tribunal/news/WCMS_613944/lang--en/index.htm>

[126] This will be addressed in more detail in Chapter 2 in the context of the OAJ creation, and in Chapter 3 as part of the organisational culture debate .

states to remain confidential virtually forever. The international responsibility of the organisation arising from misconduct, or violation of the human rights of staff has led to domestic litigation. The acts of the French peacekeepers in the CAR, or the actions of subcontractors in Iraq, may not be legally attributable to the UN; the same can be said for the cholera outbreak in Haiti. Case law, like the above-mentioned Waite and Kennedy and Jam v IFC, has suggested that international organizations are no longer considered unquestionably immune from domestic prosecution. However, the enmeshment between states and organisation means that governments would be reluctant to allow or compel an organisation to take responsibility, because then the states would be responsible financially and perhaps also indirectly as members and subjects of public international law. This dynamic goes against the spirit of rule of law because it means that states can be above the law for their actions in international organizations, and international organizations cannot be held accountable by anyone but their creators, who are also part of the organisation.

The UN Charter states that the Secretariat is one of the "principal organs" of the organisation (Art 7) and that the Secretary-General shall perform tasks entrusted by the other organs. The relationship between the different organs is thus ambiguous in the hierarchical sense,[127] and a seminal ICJ Advisory Opinion raises a question of whether one organ can bind another with its actions. The Effects of Awards decision, discussed above, stated that the General Assembly had the implied power to establish an administrative tribunal, since,

> *"the power ... was essential to ensure the efficient working of the Secretariat and ... of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.*
>
> *There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of the-future*

[127] See Jenks CW, "Some Constitutional Problems of International Organizations" (1945) 22 BYIL 42 where he postulates 4 different ways of considering the relationship between the Secretariat and the other organs - secretarial, management (like IMF), quasi parliamentary, division of powers.

decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. ... This examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions."

The conclusion on the independence of the tribunal was by far not unanimous. In a dissenting opinion the UNAdT was referred to as a "subsidiary organ" of the GA, which raises different issues about judicial autonomy. The standing of the Office of Administration of Justice, the UNDT and UNAT and their (questionable) independence from the General Assembly will also be discussed later on.

Over the past decade, the General Assembly has asserted its own supremacy over the tribunal, but certain cases from the administrative tribunals and the ICJ put question marks over those claims. In earlier discussions in the Fifth Committee, it was considered possible that the tribunal was allowed to decide its own jurisdiction, but in the case of *Oummih, Gordon and Gruber*, UNAdT rejected such authority -

"The Tribunal is not empowered to question the sovereign authority of the General Assembly to take the decision referred to in paragraph XIX. Indeed, the International Court of Justice has made it clear in paragraph 76 of its advisory opinion of 20 July 1982 in the "Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal" (Mortished) that "the Tribunal has no powers of judicial review or appeal in respect of decisions taken by the General Assembly in conformity with the Charter of the United Nations"[128]

It has been argued that the decision refers to a limitation on the exclusion from jurisdiction that it must be in conformity with the Charter, and therefore it is not absolute. The only decisions that overturn a legislative decision by the plenary organ appear to be from EU/EC courts, which naturally have different characteristics. All other decisions appear to question whether the application of that decision was consistent with the UN Charter or other founding treaty, as

[128] Oummih, Gordon, and Gruber, UNAdT Judgement 395, para XX

codified in the staff regulations or in practice. In 2014, General Assembly Resolution 68/254 established the superiority of the Assembly as a law-making organ, and the expectation that ”*decisions taken by the Dispute Tribunal and the Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management”*.

Thus, the most significant internal segmentation is characterised in the contrast between Member-driven - UN General Assembly and Security Council - and bureaucratic organs - like the Secretariat - as well as the role of the administrative tribunals. The Assembly and the Council take decisions that bind the entire organisation - diplomats and bureaucrats[129] - but the Secretariat's actions are limited so that they do not have unintended legal effect. The representatives of Member States are not legally bound to respect the human rights of staff members, and there is no international legal body that can review the legality of the actions of the General Assembly or the Security Council vis-a-vis the UN staff. The overall framework is such that there is no rule of law that applies uniformly across all layers of the organisation - from the diplomats, through the Secretary-General, the peacekeepers, and the translators - aside from the ethos of the international civil service that will be addressed in chapter 3.

The intra-organizational relations are probably the least addressed in academic literature.[130] The scholarship does refer to the tribunals and the "labour" rules, especially in relation to the privileges and immunities regime, and the role of domestic courts like in the Wayte and Kennedy case, but not to the relationships between tribunals, the relationship between the parliamentary organs and the tribunals, or the tribunals' jurisdiction over the staff of more than one organisation. The next section will summarise the studies of the law of international organisations and their investigation of the issues of autonomy, social context, functional necessity, and ethics.

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[129] For instance, subsidiary organs, like the pension fund UNJSPF, are bound by the Privileges and Immunities convention. See Shamsee, UNAdT Judgement 245.

[130] The generalist studies by Bowett, Schermers, Seyersted, and Klabbers discussed below have devoted chapters on the labour law of intergovernmental organizations, and to a limited extent on the relationships between separate (politically significant) organs like the UN General Assembly and the Security Council. The more detailed analysis can be found in Amerasinghe, who is addressed in Chapter 2.

1.9 Scholarship

This thesis distinguishes three waves of international organisations scholarship - from international relations perspectives in the early 20th century, through a fragmentation in the mid-20th century, to generalist studies at the end of the 20th and beginning of the 21st century. The first scholars of intergovernmental organizations wrote in the very beginning of the 20th century, examining how globalisation gave rise to the new organizations, and how they affected the role of nation-states. Those writings became an ideological codification of the principles that were institutionalised in the first universal international organisation and its bureaucracy - the League of Nations - and can still be found in the ethos and culture of international organisations described in chapter 3. A large part of the field is not dogmatic and the non-legal studies engage with the global social context, but avoid actively addressing issues of state responsibility. The following parts of this chapter will trace the dynamic between states and organizations, and in parallel will demonstrate how different attempts of explaining the legality of global institutions through functionalism have failed to cover the law of the international civil service. These theoretical gaps in functionalism were addressed more generally above as the foundation of the three-dynamics legal model.[131]

1.9.1 Early scholarship

Functionalism was originally an approach borrowed from the natural sciences - biology and anatomy - and used to explain sociological,[132] psychological and anthropological phenomena. In those early sociological interdisciplinary studies, a social unit is viewed as an organism that acts in the pursuit of common goals.

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[131] Klabbers, (n. 46)

[132] In fact, one of the three main theories of sociology is structural functionalism, where society is viewed as an organism and the focus is on social equilibrium rather than on the individual parts. See Spencer H and Taylor M, *Social Statics* (Routledge 2021). The analysis in *Social Statics* is decidedly utilitarian, which leads to the question of whether functionalism is consequentialist in its core. One interesting element therein is the claim that national governments are not eternal, but mark a certain level of human development. See also Giddens A, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1992), which critiques the static version of structure in classical structural functionalism.

Functionalist approaches to the domestic legal science have been utilised in comparative law,[133] in discussing separation of powers,[134] and US constitutional interpretation,[135] to name a few, as well as in public international law.[136]

The application of this methodology to international organizations dates back to the early 20th century in the writings of two US scholars - Paul Reinsch on what he called the "public international unions" and Francis Sayre's work on "international administration"[137]. Thus, the early scholarship on intergovernmental organizations is based on an interdisciplinary method, and is rooted in the political characteristics and context of the time period. Since international organizations were first created in an age of state domination of international affairs, the law of the League and the UN still bears the marks of that dominance. The position of international organizations may have changed in the 21st century (thus creating issues with the interpretation of their function), and there may be new actors in the same field, but the legal logic has not yet caught on.

The two earliest scholars of international organizations put a strong emphasis on the role of states precisely because at the time the practice and theory was very much state-centric. Reinsch and Sayre wrote before the time of the League of Nations and arguably contributed something to the legal philosophy of that first universal international organisation. However, neither of them was a legal scholar, and neither analysed the institutions as law-making entities or in the context of public international law. Those early organizations did not have an independent civil service, so naturally there was no field of law to even mention. The two wrote how law and ethics coexisted even in those earliest international organizations,

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[133] Zweigert K and Kotz H, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press 1998) 33-47. See also Michaels R, "The Functional Method of Comparative Law" in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).
[134] Eskridge W, "Relationships between Formalism and Functionalism in Separation of Powers Cases" [1998] Faculty Scholarship Series. Paper 3807.
[135] Chemerinsky E, "Formalism and Functionalism in Federalism Analysis" (1997) 13 Georgia State University law review 959
[136] Johnston DM, "Functionalism in the Theory of International Law" (1989) 26 The Canadian yearbook of international law. Annuaire canadien de droit international 3
[137] Reinsch PS, *Public International Unions, Their Work and Organization; A Study in International Administrative Law* (Wentworth Press 2019) and Sayre FB, *Experiments in International Administration* (Wentworth Press 2019)

especially in the tension and dynamic between state and global interests and loyalties, but their work is a description of a new phenomenon and how it affected the old European empires. Both Reinsch and Sayre emphasised the role of globalisation and the involvement of states in the institutions, as well as the structural role of international organizations in the larger framework of international politics. What distinguishes the two scholars is their opinion on whether the lack of autonomy is a positive or a negative thing, and their speculation on how states should react to the changing landscape.

Reinsch's starting point is the rise of political, economic and moral cosmopolitanism -

> *"The most important fact of which we have become conscious in our generation is that the unity of the world is real."*

His work recognizes the increasing interdependence of the world and its profound effect on national societies in terms of global awareness and loyalty. However, Reinsch emphasises that the cosmopolitan ideology, though evolved and future-oriented, does not translate directly into action by the global society of his day and there were no alternatives to state action on the global level. It is worth wondering how Reinsch would see his theory in the context of the networked and global civil movements' society of the 21st century. During the first wave of globalisation the non-state actors (save for the East India Company, which is a topic in its own right) were not established enough to take over law-making from governments and empires. If the relevance of states rests on the absence of other alternative structures for communication and coordinated action as Reinsch predicted, then perhaps the global governance of the 21st century could legitimately challenge the centrality of national governments.

In "*Public International Unions*", Reinsch[138] underlined how globalisation has given rise to new issues that require cooperation, specifically due to the "economic unity of the civilised world", but his argument was focused on rejecting supranationalism and enforcing the position of the colonial powers. His writings do dwell on questions of political power as it was focused in the hands of the old empires, but he sees this convergence as a good thing because of the

[138] Klabbers, (n. 46)

“civilizational” moral authority of those countries.[139] In that sense his argument is not truly cosmopolitan in a way that would reflect the global social pluralism of the 21st century, or the public international law perspective on human rights, self-determination, etc. The analysis does not depart from a rule of law and legality perspective, but from considerations of political power and preserving state sovereignty.

Reinsch considered states to be interdependent, but necessary to protect the rights of individuals, and international organizations as administrative units of coordination and management. He provides a commentary on a descriptive compendium of the organizations that existed in his time and their political structures. What is interesting from a legal point of view is that Reinsch sees the function that nation-states have given to the organisation as just as important in determining its status as the position of the global organisation vis-a-vis its creators and the rest of the society. Therefore, even from the very beginning of the scholarship, the organizations revolved around the function not in isolation, but as it existed in the context of the Member States and the society at large.

In a lot of ways Reinsch can be seen as a forerunner of global governance scholarship.[140] One distinguishing feature of his studies is instrumentalization, where he advises states on how to use international organizations in the context of public international law and international politics. From the functionalist angle it is important to note that Reinsch classifies the organizations according to their purposes - communications, economic interests, sanitation and prison reform, police powers, scientific, etc. - and elaborates on how national governments could use them to advance their interests. His argument is very utilitarian, and since his writings were used to develop the League of Nations, it is possible that the line of thinking was taken into the first near-universal organisation. In the early 20th century, Reinsch also published articles on what he called “international administrative law”, where he described how the intergovernmental organizations

[139] This is an interesting argument that weaves together deontology - the empire has a duty to act in a way as to preserve and spread a certain “civilization” - and consequentialist ethics - it is in the interest of the governed to be ruled by the empire. However, this is also the point where a legal scholar would focus on the rights and obligation instead of the power.

[140] Cassese S (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017)

worked, and how they can be used to achieve peace,[141] which is very close to the global administrative law scholarship of the 21st century that will be mentioned in Chapter 2.

The other influential theoretician from the beginning of the 20th century was Francis Sayre, whose most prominent work is the 1919 "*Experiments in international administration*". Similarly to Reinsch, Sayre underlined the international origin and character of the institutions, as well as the dynamics of power between states and organizations. From an ethical perspective, Sayre's view is also quite cosmopolitan, but also completely opposite to Reinsch's, as he writes in the preface

> *"The great age of Nationalism ... is past."*

When comparing the writings of those two scholars, the "unity of the world" somehow appears in contrast to the "age of Nationalism". It is not only that nation-states divide the world with borders, there also appears to be a more profound division between the waves of technical and cultural globalisation, the unifying moral integrity of the world and the interests of the nation-states. Unlike Reinsch, Sayre did not see states as benevolent civilised dictators that realise the combined ambitions of their citizens, or that strive for global public good as an end in itself. In his writings, the empires are described as actors with political motivations that do not act with integrity, both in the sense of structural consistency and moral wholeness. He saw two potential inherent weaknesses in the new institutions, which are very relevant for this thesis.

Firstly, Sayre looked back in history to find the reasons for the failures of the treaties in the past. According to him, the agreements were founded *"upon injustice. ... written in the selfish interest of rulers rather than of peoples."* Thus, he distinguishes between the governors and the governed, between the interests of citizens and rulers, and formulates the justice deficiency in international mechanisms founded on that discord. His analysis is again not legal, but comes very close to a concept of international rule of law. From a functionalist point of view, if the interests of the rulers are "selfish" or unjust, then the purpose of the

[141] See Reinsch PS, "International Administrative Law and National Sovereignty" (1909) 3 The American journal of international law 1

organisation that is bestowed by the leaders of the states cannot be a basis of a fair legal system, or representative of a truly global interest. And the actions of the civil servants taken in pursuit of that interest would not be unquestionably legal and just.

The other fundamental issue with the old intergovernmental treaties that in Sayre's view affected the new international organizations was one of autonomy. In effect, the *"nations have been unwilling to submit to a sufficient amount of external control to make an effective international executive organ possible."* This is probably the most legalistic perspective on the intergovernmental organizations, which represents a real shift from the political approach to a system of law that limits the sovereignty of nations. This argument is also an important difference between Reinsch and Sayre, where the first saw strong national control as crucial, and the latter as detrimental to the success of global mechanisms.

Sayre was one of the scholars that provided the theoretical foundation of functional necessity as a basis for the capacities of global institutions, which was very topical as he was writing just before the League of Nations was established. In his analysis, function is a neutral quality, and the global institutions differ in other ways. Therefore, Sayre classified international organizations not according to the type of function, but the degrees of powers conferred - from no real power (like the UPU), to power over a local situation (like the Danube Commission), to real power over the member states (like the International Sugar Commission and the Rhine Commission). His approach is a mixture between a constitutionalist analysis and an international relations treatise.

It is obvious that from the very beginning of international organizations, the root of their legality was in their function, and it was intrinsically tied to issues of political power of states. Reinsch and Sayre wrote around the end of the age of absolute sovereignty; both scholars based their analysis of the new institutions on the history of relations between nation states. Sayre foresaw the shift to relative sovereignty that occurred later in that century, but they both wrestled with the role of the function, and with the influence of the empires of the time in two distinct ways. And both scholars contrasted the age of nation-states, or the age of absolute sovereignty and empires, with a new age, where international organizations change the political and legal landscape. If (supposedly autonomous) international

organizations are driven only by the interests of the states, and if they cannot exert any influence over the behaviour of states, then they cannot possibly achieve more than the combined body of states. Almost 100 years later, the functionalist international organizations struggle with the same core problems - the political self-interest of national governments, and the conflict between the stated and real purposes. This is not a unique problem in the context of public international law, but it is all the more glaring when considering the interpretation of the purpose in the case of the law of the international civil service and retaliation against whistleblowers who act in accordance with those stated principles. Perhaps it was a consequence of the era that the two were working in, and it is not a coincidence that the approach evolved in later decades.

The technical nature of the functions of the global public unions reflects the level of cooperation in the beginning of the 20th century. It is certainly pertinent to reflect on whether the type of tasks given to the organizations affect not only their internal and external legal qualities, but their ethical makeup as well. These questions became more central in the later scholarship, especially in terms of responsibility. An institution that has a direct influence over a tangible part of individual constituents' lives has a higher likelihood of being accountable than a far-removed general organisation that deals with political negotiations between diplomats. The opposite argument can also be made, that an individual would not be interested in the work of the International Organisation for Standardisation because they are not likely to understand it, unless it has a direct negative effect on their lives. On the other hand, perhaps direct accountability was not a central social issue in the age before the Internet and universal suffrage. In any case, the generalist studies of international organizations gave way to more specific studies in the decades after World War II.

1.9.2 Mid-20th century - fragmentation, convergence and social context

Between Sayre's treatise of 1919 and the 1950s there were no significant studies of the international organizations law as a comprehensive legal discipline. The time period saw the rise and fall of the League of Nations and the birth of the United Nations, as well as the beginning of the decolonization period that began to dramatically change the nature of the relationships between different parts of the world. Some of the technical organizations from before World War I survived the

second world war, although with slightly different mandates - for instance the International Telegraph Union became the International Telecommunications Union in 1932.

The historical period from the end of World War II until the early 90s is characterised by fragmentation of public international law in general, and international organizations law in particular.[142] There are two very significant developments in the scholarship of that era worth analysing in more depth - the first generalist legal studies of international organizations were published in 1963 by Sir Derek Bowett and in 1972 by Henry Schermers; and in 1974 a French professor, Michel Virally, put the concept of functionalism and international organizations law in the global social context. The latter is particularly interesting considering the questions of legitimacy of functionalism after the period of decolonization and the proliferation of states that did not bestow a clear purpose, power, or responsibility on the organizations that were supposed to serve them. The increased number of states with varying levels of economic and political development changed the legal landscape for international organizations law in ways that are hard to quantify, largely because the number of states keep changing even in the 21st century.[143] The absence of a universal global legislative body means that there is no conflict of laws, procedures, or provisions in public international law, and the rising number of sovereign states with very divergent interests resulted in thousands and thousands of treaties, and hundreds of international organizations. The deepening fragmentation of the regimes affected the scholarship of international organizations law, and since then organizations were often analysed as separate legal universes.[144]

The politicisation of international organizations, the turf wars between the institutions, and the cases of organisational mismanagement also shook the image of objective public-good-driven institutions. From the part of public international

[142] On the other hand, the law of the international civil service of the same period is marked by a harmonisation and the planting of the roots of the informal culture that characterises the field.
[143] There has been a marked shift to focus on issues of development in international organizations, made very visible with the Doha Development Agenda, the Millennium Development Goals and the Sustainable Development Goals, and the rising influence of regional groups like the African Group, or coalitions like the G77.
[144] See (analysed in more detail below) Schermers HG, *International Institutional Law, Volume 1: Structure* (A W Sijthoff 1972). The most recent edition is from 2011, see (n. 51).

law there was a focus on institutions as regimes, global governance as a whole,[145] constitutionalism and historical approaches, but there was no further development of functionalism to fit the evolution of the institutions. Therefore, in the 1960s and 1970s, the international organizations scholarship was functionalist in nature, more abundant[146] and for the first time focused on separate issues within the discipline - like treaty-making, privileges, membership, financing.[147] It is important to note that the academic discourse was focused on the written laws, the practice of the organizations, and the jurisprudence of the ICJ.

What made the 60s and 70s groundbreaking in this context is the publication of the seminal editions of the two leading generalist studies of international organizations law, both of which were updated regularly, and also into the 21st century. In 1963 a British academic from Cambridge, Sir Derek Bowett,[148] published the first edition of his "*The Law of International Organizations*". Throughout his career he wrote widely on public international law questions - use of force,[149] law of the sea,[150] the ICJ[151] - and on specific issues of international organizations, but his 1963 study was the first of its kind after Sayre's 1919 work. Bowett's text follows a similar logic to Reinsch and Sayre's early scholarship - an introduction followed by a compendium of descriptions of organizations, classified according to their membership (universal v. regional) and their function (general v. limited), with a separate section on "judicial institutions". What brings his work together is the last chapter on "common institutional problems", which includes personality, powers,

[145] Including from GAL and transnational law
[146] Bowett DW, *The Law of International Institutions* (Stevens & Sons 1964), now in the 6th edition in 2009.
[147] Schneider JW, *Treaty-Making Power of International Organizations* (1959); Ahluwalia K, *The Legal Status, Privileges and Immunities of the Specialised Agencies of the United Nations and Certain Other International Organizations* (Martinus Nijhoff 1964); Singh N, *Termination of Membership of International Organizations* (Stevens & Sons 1958); Plano JC and Stoessinger JG, "Financing the United Nations System" (1965) 9 Midwest journal of political science 104;
[148] For full bibliography see Bowett DW, "Bibliography: Professor Sir Derek Bowett" (*Cam.ac.uk*) <https://www.squire.law.cam.ac.uk/eminent-scholars-archiveprofessor-sir-derek-bowett/bibliography-professor-sir-derek-bowett> accessed October 8, 2023
[149] Bowett D, *United Nations Forces: A Legal Study of United Nations Practice* (Stevens & Sons 1964), p576.
[150] Bowett D, *Law of the Sea* (Manchester University Press 1967); Bowett D, *The Legal Regime of Islands in International Law* (Oceana Publications 1979)
[151] Bowett D, *The International Court of Justice: Process, Practice and Procedure* (British Institute of International & Comparative Law 1997)

privileges and immunities, responsibility, dissolution, and impact on state sovereignty. This structure was largely preserved in the later editions,[152] with added sections on the functions.[153] Bowett's argument is decidedly functionalist, and he makes a point that, while the concept and politics of sovereignty could technically make international organizations and their work towards common interests moot, the practical rules preserve both sovereignty and the organisational goal.

The other comprehensive study is from 1972,[154] by a Dutch scholar named Henry Schermers. Its unique feature is that it did not include separate analysis of different organizations. Schermers delved deep into the issues of membership, the work of different organs, voting and decision-making, financing, dispute-settlement, the differences in mandate between the Member-driven organs and the Secretariat, etc. Perhaps due to his professional background, his starting point is the position of a single Member State - joining, financing, voting, treaties - and drawing principles from the comparison of many organizations. Thus, the text looks at a hypothetical international institution as a limited legal universe, albeit one with external relations, from the perspective of public international law and treaty law and the sovereign rights and obligations of nation-states.

Both Bowett's and Schermer's work were planned and structured like textbooks, since both of the authors lectured - in Cambridge and Amsterdam respectively. Their professional background certainly influenced their work - Bowett was a generalist who mostly stayed in academia, while Schermers started as a legal advisor in the Dutch Foreign Ministry concentrating on the specialised agencies of the UN. What distinguishes them is that Bowett's work focuses on the differences between organizations, reflecting the fragmentation. On the other hand, Schermers' study establishes a structure of the legal field, but does not do so critically or prescriptively and uses domestic legal vocabulary departing from the founding treaty as a constitution.

[152] A similar format was used by Amerasinghe in his work on the international civil service in 1994. See below.
[153] Sands P and Klein P, *Bowett's Law of International Institutions* (6th edn, Sweet & Maxwell 2009). The 5th (2001) and 6th editions were prepared by Sands and Klein.
[154] Shermers (n. 144)

Schermers' underlying assumption is that since the goals of international organizations are considered to be "good" - peace, development, health, communications - they therefore justify the legal qualities necessary to achieve them. He did not address the case where an intergovernmental organisation might act against international law, or against the morals it aspires to.[155] This dichotomy still persists in the scholarship today. Some scholars insist that perhaps different functions affect the legality and legal structure of different organizations - after all, the UN and the Nordic Council have very different activities. Others contest that there could exist a common legal field that contains all organizations, and applies uniformly to all of them, regardless of whether they deal with chemical weapons, tourism, trade, or telecommunications. The organizations exist in the same horizontal legal space as nation states, and in the same global social context. Looking at the practice, it appears that there are both commonalities and differences - for instance voting is different in the World Bank from the UN because the function of the former is tied to contributions, but the Bank and OPEC have the same capacity to conclude contracts under UK law. The same logic applies to the law of the international civil service - each organisation has slightly different rules concerning peculiarities, but there are parallels, overlaps, and a common ethos that binds the bureaucracy together.

As was pointed out above, what brings international organizations as a whole together is their relationship with the Member States (including their founding treaty and lack of independence), their international civil service, and the global social framework in which they operate. Therein lies another important departure by Bowett and Schermers from the earlier scholarship by Reinsch and Sayre. Bowett and Schermers look at (written and customary) formal sources of law - treaties, decisions by the ICJ, resolutions, Charter, voting procedures - and how they affect the Member States and other legal actors in terms of rights and obligations. This is another common trait of international organizations legal scholarship, and it stems from the fact that the legal scientists themselves are educated as domestic lawyers first, mostly in the Western traditions. The legal scholars from this and later periods do not often engage with issues of

[155] Klabbers J, "Schermers' Dilemma" (2020) 31 European journal of international law 565

cosmopolitan ideals, the sociology of international law, its history and political roots and how they influence the law of international organizations.

At the time of writing of this study, almost a century has passed since the inception of the League of Nations and the creation of the international civil service, more than a hundred years since the writings of Reinsch and Sayre, and over seventy years since the birth of the United Nations. It is not a stretch to claim that the social, political, and legal context of global institutions has evolved a great deal. Within the pool of international organisation law scholarship, and with the tendency to focus on separate institutions or fields, very few academics have concerned themselves with the social background as a part of the law of international organizations, or the role of individuals therein. As we have seen in the previous section, constitutionalist scholars see law as a result of social merging, and global governance scholars consider wider social dynamics. Those approaches were only born in the late 1990s and never quite influenced the practice of the ICJ or the administrative tribunals. On the whole, functionalist scholars ignore the social context in favour of formal analysis of documents, treaties, and the work of judicial organs.

The one notable exception from this period is a French lawyer and professor of international law and the law of international organizations - Michel Virally. In 1974, he published a piece titled *"La notion de fonction dans la théorie de l'Organisation internationale"*[156] in a collection of essays dedicated to Charles Rousseau. According to him, a global institution has its roots in the global history and society -

> *"Institution juridique, l'Organisation internationale est tout autant un phénomène social, inscrit dans une histoire qui lui est propre au sein de l'histoire générale des rapports internationaux."*[157]

His main argument is that international lawyers who analyse international organizations need to consider the neighbouring disciplines - the sociological,

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[156] Virally M, "La Notion de Fonction Dans La Théorie de l'Organisation Internationale," *Le droit international en devenir* (Graduate Institute Publications 2016)

[157] Ibid - "As a legal institution, the International Organization is just as much a social phenomenon, inscribed in a history of its own within the general history of international relations."

historical, political, economical, “human reality” phenomenons. As was seen in the previous section, Reinsch’s and Sayre’s earlier arguments were closer to those fields than the later studies by Schermers and Bowett. Virally’s singular contribution to the field that international organizations did not arise from and never existed in a vacuum.

Virally sees interdisciplinarity as an obligatory part of the methodology and perspective on the study of international organizations. He also proposes that a comprehensive international organizations law theory should be usable by other disciplines -

> *“Ce que le juriste nomme « les faits », c’est-à-dire la réalité sociologique, historique, politique, économique, humaine soumise au droit, ne peut être oublié par lui lorsqu’il tente d’analyser une institution internationale particulière ou de construire une théorie de l’Organisation internationale. … pour le juriste plus que pour tout autre spécialiste, l’étude des Organisations internationales présente nécessairement un caractère interdisciplinaire.”*[158]

It is probably not a coincidence that interdisciplinarity was a buzzword in the late 1960s and early 1970s, following the student protests in the US and the large OECD study from 1972.[159] In public international law, and in the law of the international civil service in particular, the informal culture of negotiations and conflict resolution, as well as the practice and how the rules are applied, is of crucial importance.

According to Virally, states satisfy social needs on a domestic level through their legal and institutional frameworks. To develop this further, international

[158] Ibid - “What the jurist calls “the facts”, that is to say the sociological, historical, political, economic, human reality subject to the law, cannot be forgotten by him when he tries to analyse a particular international institution or to construct a theory of international organization. … for the jurist more than for any other specialist, the study of International Organizations necessarily presents an interdisciplinary character.”

[159] Organisation for Economic Co-operation and Development (OECD), *Interdisciplinarity Problems of Teaching and Research in Universities* (OECD Publications Center 1972). For a literature summary see Chettiparamb A, “Interdisciplinarity: A Literature Review” (*The Interdisciplinary Teaching and Learning Group, Subject Centre for Languages, Linguistics and Area Studies, School of Humanities, University of Southampton*, 2007)

organizations are not an extrapolation of states on the global level, nor are they world government, but are a step in the social evolutionary development. Since the global institutions were created based on social needs, it is important to examine the relationship between nation states and international organizations beyond their creator-creation link, but through the prism of the function in the international social context . For a global institution, its function determines the relationship between state and organisation, between the institutions' organs and staff, between organisation and global society, and between different organizations.

It is problematic to claim that the function can exist in isolation from the society, mostly because an international organisation needs to form legal relationships with private and public actors in order to achieve its goals. In the practical political sense it is acceptable to treat those ties as a means to an end, but in the context of rule of law and in the ethical sense it is not justified. Also, the achievement of the goal is not a singular legal action, or the result of several legal steps, and the organisation creates ripples in the background of public international law in more ways than simply working towards its goal. There are questions that need to be addressed - who determines what the need is, how, and how are they held accountable; how those needs are translated into functions and how are they interpreted; and how those functions influence the structure and legal powers of an institution; what other actors are involved and affected, and how is the institution held accountable for its actions in pursuit of that goal. The need cannot be separated from the context because the context - the society - is the source of the need and the recipient of the actions of the organisation.

According to Virally, functionalism is in essence a political theory, but in order to use it as a basis for international organizations law he focuses on the "instrumental character" of the organisation. However, one glaring blind spot is the lack of in-built evolutionary mechanisms -

> *"Le choix du concept de fonction comme base de la théorie de l'Organisation internationale … fait apparaître le caractère fondamentalement instrumental de toute Organisation internationale, mais n'implique aucune prédiction sur l'évolution des fonctions remplies par les*

Organisations internationales, ni sur les modifications du système international qui peuvent résulter de leur accomplissement."[160]

This is a very important point considering the decolonization process that began in the early 1960s, and in some ways continues today. One glaring example of the importance of the context in practice is how ignoring the increased number of states with different levels of development has derailed the work of the WTO in the negotiations of the Doha Development Agenda, which still continue.

Some academics have criticised Virally for "over"-contextualising international organizations to the point where the law is hard to pinpoint. With practically no other theoretician with a similar approach to be compared against, aside from general legal terms,[161] it is not objective to label Virally as too contextualising. Klabbers[162] has argued that international organizations enforce (to an extent) and promote community interests, which means that they also define the social needs. Virally was ahead of his time in introducing socio-cultural analysis in international law. The discipline of sociology of law traces its roots to the 1920s,[163] but sociological methods were not employed by international legal scholars until the

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[160] Virally, (n. 156) - "The choice of the concept of function as the basis of the theory of the international organization... reveals the fundamentally instrumental character of any international organization, but does not imply any prediction on the evolution of the functions fulfilled by international organizations, nor on the modifications of the international system which may result from their accomplishment."

[161] Pavel CE, *Divided Sovereignty: International Institutions and the Limits of State Authority* (Oxford University Press 2014)

[162] Klabbers J, "What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism" in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018)

[163] See Ehrlich E and Isaacs N, "The Sociology of Law" (1922) 36 Harvard law review 130 . Some of his assertions were debated by Kelsen - see Kelsen H and Ehrlich E, *Rechtssoziologie und Rechtswissenschaft: Eine Kontroverse (1915/17)* (Berliner Wissenschafts-Verlag 2001). For a summary of the debate, see van Klink B, "Facts and Norms. The Unfinished Debate between Eugen Ehrlich and Hans Kelsen" [2006] Tilburg University Working Paper.

beginning of the 21st century[164] and have not been systematically applied to international organizations.[165]

1.9.3 The 21st century

The late 1990s and the early 21st century were very turbulent in the field of international politics, and therefore affected the law of international organizations and the law of the civil service. The fall of the Berlin Wall and the end of the Cold War represented a momentous shift in the balance of power, and was immediately followed by large scale conflicts - the breakdown of Yugoslavia, the Rwandan genocide, the Gulf War, the start of the Somali conflicts, among others. Those episodes demonstrated that the "functionalist agents" intergovernmental organizations were not equipped to deal with a complex global social context. In the 21st century, the War on Terror and the wars in Afghanistan, Iraq, and Ukraine have re-emphasized how global institutions, despite their stated functions, have no legal or political capacity to restrain the most powerful nation states. The number of international organizations has increased dramatically, and regional organizations play an ever more prominent role.[166] On the other hand, the last two decades have seen the constitutionalization of global goals and values, embodied in the MDGs and SDGs, as well as rising importance and influence of non-state actors, multinational companies, and even individuals. It is hard to imagine that single entrepreneurs like Bill Gates or Elon Musk, now engage in the fight against AIDS and space exploration, which were the exclusive dominion of nation states in the middle of the 20th century.

The scholarship from this latest period was mostly limited to the studies by Schermers and Bowett, which were updated in the 1990s and in the 21st century. Another novelty in the field was Finn Seyersted's work "Common Law of

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164 Blenk-Knocke E, "Sociology of International Law," *Encyclopedia of Public International Law, vol. 4* (2000). Hirsch M, "The Sociology of International Law: Invitation to Study International Rules in Their Social Context" (2005) 55 The University of Toronto law journal 891.

165 For some socio-legal analysis see for example Johnstone I, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011)

166 The interactions between regional and universal intergovernmental organizations has also influenced public international law, as seen in the Kadi v. European Commission cases.

International Organizations",[167] which was written in the 1970s, but was first published in 2008, after the author's death. Seyersted's main contribution was taking the notion of independent will to a theoretical extreme, analysing global institutions as completely autonomous actors. He thus sees intergovernmental organizations as defined by three factors - objective personality, inherent powers, and organic jurisdiction[168] - which will be discussed in more detail in the context of the standing of Member States. The notion of organic jurisdiction is particularly interesting in the context of the internal law of the organizations, since Seyersted sees jurisdiction as stemming from the existence of organizations and their organs, like the bureaucracy. In some ways, his text is a useful guideline of what the applicable law would look like if Member States and organizations were not enmeshed, but from the perspective of practice and in the context of the law of the international civil service it is little more than intellectual exercise.

The new comprehensive studies of international organizations from the end of the 20th and beginning of the 21st century that are not updates of previous studies[169] were done by Jan Klabbers. Originally a treaty scholar with a global governance focus, Klabbers has argued that functionalism is the only comprehensive theory of the law of international organizations not because of its merits, but because there is nothing better.[170] The parallel with Churchill's views on democracy is perhaps too convenient, but apt nonetheless. Klabbers has written on the colonial origins of the functionalist logic, and has criticised the methods drawbacks in dealing with the intra- and extra-organizational legal dynamics that do not directly involve Member States. He sees the weakness of functionalism in explaining issues of control and responsibility.

The main problem with discussing liability and restraint in the context of intergovernmental organizations is that it requires largely ignoring the enmeshment with Member States; treating organizations as units; and presuming that it is

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[167] He also wrote articles in the earlier period in 1963 see Seyersted (n. 68).
[168] See Klabbers J, "On Seyersted and His Common Law of International Organizations" (2008) 5 International organizations law review 381
[169] There are 3 generalist comprehensive studies discussed above - Schermers, Bowett, Seyersted - and a specialist one on the law of the international civil service that will be discussed in Chapter 2 Amerasinghe.
[170] Klabbers, (n. 28) and Klabbers J, "The Emergence of Functionalism in International Institutional Law: Colonial Inspirations" (2014) 25 European journal of international law 645

possible to hold them accountable as such in the same way as it would be in the domestic context. If the UN General Assembly creates a Resolution, it is the Member States that vote, it is the UN that should be held responsible, but it is the nation states that would finance and allow the realisation of the legal act. As a treaty lawyer trained in the Netherlands, Klabbers appears resigned that the only way to properly conceptualise international organizations law is to depart from legal thinking into global governance, albeit by using domestic legal vocabulary and thought. In order to conceive of a system of public international law that can control states and international organizations, one would have to rely on the simplified model of social evolution - individuals to groups, groups to states, states to organizations - which ignores the strata within states and within intergovernmental organizations like the UN. Classic notions of checks and balances are based on "should" statements, which do not stand to scrutiny in the context of soft law instruments such as the Articles on State Responsibility, or the argument by Shermer arguments about the moral value of the organisational function.

One proposal that Klabbers has made in previous writings is a "constitutionalism-lite" approach, wherein certain principles give rise to power restraint on international organizations,[171] but without enforcement or accountability mechanisms. His newest contribution to the field, as a proposed solution to the failings of functionalism, is an ethical model of accountability that could address the civil service as well[172] -

> *"An important consideration is that they all rely on deontology and punishment in one way or another: organizations are supposed to behave in accordance with external standards, to be castigated when they don't. What is missing here is the consideration that accountability may be better seen as a social relation where learning and adaptation are at least as important as carrots and sticks, and what is also missing here – and quite fundamentally*

[171] Klabbers J, "Setting the Scene" in Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009)
[172] Klabbers J, "Controlling International Organizations: A Virtue Ethics Approach" (2011) 8 International organizations law review 285.

so – is the consideration that rules are not always reliable and airtight guideposts for political action."

This is very true in the case of international organizations and their civil service, as we will see in Chapter 3 and 4 - relying on an internal legal system based on punishment and control that ignores the "social relation" and the organisational culture and ethos. Klabbers' recent work focuses on the ethical qualities of the global leaders - like the Secretary-General of the UN and the broader consequences for the field of international organizations law.

Dag Hammarskjold and Trygve Lie

In the background of public international law, and within the scholarship of international organizations law the legality of international organizations is given by nation states, and international organizations are compared to states, or corporations of states, in order to derive state-like legal qualities. The intergovernmental organizations of today, and their bureaucracy, work with state representatives, state actions and state interests on a daily basis in practice. In his autobiography, the first Secretary-General of the UN, Trygve Lie says

> *"[the Secretary-General's] strategic situation at the very center of international affairs as confidant of the world's statesmen and as spokesman to the world's peoples, attached significant influence to his position; but it was a moral power, not a physical one … ".*[173]

Lie saw the institution of the UN Secretary-General as a position of trust, by both the global society and by the Member States, a similar conflicting dynamic that Sayre saw between nationalism and globalisation in the beginning of the 20th century. The social context for the issues in Lie's view is therefore a very complex one -

[173] Lie T, *In The Course Of Peace* (Palgrave Macmillan 1954), p45

> *"The national delegations ... tend to look at problems from their national points of view ... but a solution to a problem which is truly in the international interest is more than the sum of the national positions".*[174]

He was also very pragmatic and considered the limitations of what an international civil servant could achieve in the world of political power, alliances, allegiances -

> *"... we could not start the work of the United Nations in a [paradise] of unreality - we must begin by taking things as they are."*[175]

It is perhaps the most challenging task of a civil servant - to see "things as they are" - not through the lens of fear, or of ambition, or idealism, but with a breadth and clarity of understanding. On the other hand, there is the vision of where "things should be", which is an even greater responsibility and problem considering the complexity of the context - both dealing with politicians in the institution, country leaders, media, business interests, radical groups, etc. The background is therefore a complex balance between maintaining the trust and interest of states, and of the non-state actors as well, with the limitations of the existing moral and legal mandate.

Despite his claims to morality, Lie was not without faults. Instead of insisting on an independent UN, Lie welcomed the "nominations"[176] by the "great-power accord" for the positions of Assistant Secretary-Generals - the second highest level of UN civil service - despite the fact that there is no provision for that in the Charter or the Staff Rules and Regulations. He saw it as a natural extension of working with the state representatives. This practice has persisted and will be discussed as part of the organisational culture in Chapter 3; it is poignant of how the national governments exert pressure on the Secretariat, pressure that is illegal and immoral, and is unchecked and endorsed. Another important piece of history is Lie's role in dismissing civil servants that were suspected communist, or refused to comply with the US Senate investigations, which led to the ICJ Opinion discussed above.

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[174] Ibid.
[175] Ibid.
[176] Ibid.

The third Secretary-General of the United Nations, Dag Hammarskjold, was a Swedish diplomat who became famous for his ability to resolve conflicts between the world leaders of his day through tireless diplomatic negotiations and the force of his own personality. Whether it was securing a cease-fire between Israel and the Arab states, or breaking a deadlock during the Suez crisis, Hammarskjold has become a symbol of what the international civil service was intended to be - neutral yet committed to peace, working with utmost integrity and competence. His work also provides insights into the dynamics of independence and control in the analysis of the role of functionalism in the law of international organizations.

In 1956, Britain and France joined Israel in attacking Egypt to gain control of the Suez canal in a clear violation of the UN Charter. The Security Council, faced with the opposition of two of the five permanent members, failed to pass a cease-fire resolution. At the session of the Council Hammarskjold said "A secretary-general cannot serve [unless] all member nations honour their pledges to observe all articles of the charter." Ironically, France and Britain offered their troops to act in the name of the UN to secure peace, but Hammaskjold turned them down and instead pushed through the creation of the UN Emergency Force - the predecessor of the UN Peace-keeping Operations.

The Suez crisis is a great example not only of the UN assuming powers that were not expressly given to it by the nation states in the Charter, but also of how the function of the organisation began shifting from its very early years. The interests of some of the most powerful sovereign states, as well as their actions, were in direct opposition to the organisational function of world peace. Moreover, the solution to the conflict that the states envisioned - their own troops as being deployed in the name of the UN - would very likely not have achieved peace that would reflect the principles of the organisation. The United Nations was not bestowed explicitly with a legal personality or with the powers to maintain its own military force, but as mentioned above, in the Certain Expenses Opinion, the ICJ concluded that both were a necessary intendment of the function of the organisation - world peace. The UN is often viewed as a forum for negotiations between states, but it is not only a forum, and limiting the legality of its actions solely to those necessary for the negotiations has proven detrimental to those goals. In the same way, international civil servants do engage in clerical jobs, but are not limited to those, and neither are their principles, rights and obligations.

Both the organisational and the bureaucratic goals are not static, which is an issue that was already discussed in the context of direct attributions of powers. The creation of intergovernmental institutions and their staff, on the one hand, changed the face of public international law, but on the other, reinforced existing tensions. Since the global institutions were created as a result of social evolution, it would make sense to build in a flexibility to adapt the function of the organisation, as its legal core, to the continuous changes in the global society. While organizations have certain tools for amending their constitutive treaties, for admitting new members and for changing their structures, there exists no actual way to amend the core function of an organisation, or how it divides and connects the states and the institution, short of creating a new organisation with an entirely different structure. This has become obvious after the decolonization of the 1960s, as there was no way to amend the object and purpose of the treaty, with the addition of new members. Moreover, there is no flexibility of interpretation, even when there are provisions for revision of the treaty. For example, in the case of the UN, the Charter states that subsidiary bodies are established as the need arises.[177] The determination of that need is placed in the hands of the Member States and the Member-driven organs.

The political autonomy of the organisation, or the lack thereof, is a reflection of the separate will of the entity (the *volonte distincte*), and its independent legal personality.[178] The organisational independence is formed not only in the mandates, but also in the actions of the individual agents of the organisation - the bureaucrats. The assumption of this thesis remains that, just as the nature of the public international legal system affects intergovernmental organizations, so does the law of international organizations affect the work of the international civil service, and the internal administrative law - an assumption which will be expanded in the next chapter. This is not to say that there is a hierarchy with public international law at the top and the law of the international civil service at the bottom, but rather through interconnected contexts - the global bureaucrats do not have direct standing in public international law, but they do influence and are

[177] See UN Charter Art 22, 29, 68.

[178] d'Aspremont J, "The Multifaceted Concept of the Autonomy of International Organizations and International Legal Discourse" in R Collins and ND White (eds), *International Organizations And The Idea Of Autonomy* (Routledge 2011)

influenced by that law through the legal dynamics of global institutions. To put it another way, the purpose of the bureaucracy should also be interpreted in the context of the organizations and the public international law and legal dynamics of the institutions, in the same way as the function of the organizations needs to be interpreted in the global social context. The actions of international civil servants in pursuit of that goal is not an expression of a simple labour contract, but a complex legal and ethical system; and a conflict that arises between and individual and organisation in this system exemplifies the fault lines inherent therein.

Chapter 2. The law of the international civil service

Diliana Stoyanova

" ... in this "theatre of nations", on the stage where in theory there is room only for these "representatives" of States, a third person has appeared who by definition is neither a protagonist nor a referee, who, by virtue of constitutional provisions in force, "represents" no one, who thus occupies a special place without precedent in history."

(Langrod, 1963)

Introduction

Chapter 1 of this thesis outlined the background of public international law and the role of sovereign states, and set out the international organizations functionalist framework. The argument thus far is that the traditional model of international organizations law, which aligns the organisation's function with the intent, interpretation, and political interests of Member States, may not fully align with the collective aspiration in the context of a multi-actor global governance. Using the three-dynamics model, we introduced the intraorganizational legal dynamic in the context of functionalism, which should in theory include the law of the international civil service. Yet, the connection between the fields is neither seamless nor robust; the bureaucracy of the global institutions has been treated as either trite or removed both in the scholarship and in the practice of public international law and of the law of international organizations.[179] These wrongful assumptions and limitations exacerbate and reinforce the existing organisational, legal, and moral issues and the analysis of their growing impact on the work of the organisations and the actions of international civil servants.

Until relatively recently the law of the global bureaucracy affected a limited number of people worldwide, but the change has been significant. The League of

[179] One recent exception is Sinclair GF, "The International Civil Servant in Theory and Practice: Law, Morality, and Expertise" (2015) 26 European journal of international law 747

Nations began with 160 staff in 1920; in the late 1980s/early 1990s[180] there were about 6 thousand international civil servants; in 2020 there are over 100 thousand worldwide. The number of tribunal cases has also increased dramatically. The League of Nations administrative tribunal dealt with 37 cases in its 17 years; the now-defunct UNAdT delivered 252 judgements in the first 30 years of its existence (1950-1980), and 1247 in the last 30 years (1980-2009); and in the current UN system the UNDT has delivered over 1500 decisions in a decade (2009-2019). The field has expanded and become more complicated because of the number of organizations, their presence and activities on different continents, and in problematic humanitarian situations.[181] It is in these novel contexts where several key whistleblower cases took place, as elaborated in Chapter 4.

The law of the international civil service is relevant not only as the legal system that is supposed to protect bureaucrats in general, but also as embodiment of the institutional principles and the vehicle for realisation of the organisational goals. This chapter will demonstrate that the law of the international civil service has a host of contradictions and lacks some key features of the rule of law, legal certainty, human rights protection, accountability and fairness championed by the same international organizations as general principles of law applicable to the sovereign states. In this background, whistleblower protection, external accountability, and transparency have low priority; and the only way to resolve issues is the source of those same problems - an ad-hoc approach based on the will of sovereign states not to be bound by international organisations. From a broader perspective, an organisation that diminishes the rule of law with regard to its own staff cannot reasonably claim to be a champion of the rule of law for the world. Individuals who function in this environment can develop a skewed perspective of their rights and responsibilities, and towards their own influence over world affairs - either as "above the law" or "powerless". And it is the character of those

[180] When the nominal and leading study by Amerasinghe was written. The study is still considered relevant even though several of the organizations analysed do not exist and some of the mandates have changed dramatically. See section 2.4 below.

[181] See previous chapter on the issues concerning immunities and the applicable law; the division between the law applicable to the bureaucracy and the external obligations of the organisation is not very clear. In many scenarios domestic courts would also have a claim to jurisdiction over the civil servants, if it were not for the immunities and the administrative discretion on waivers.

individuals that determines the realisation of the core principles of the organisations, like the whistleblowers themselves.

An inquiry into the law of the international civil service requires an analysis of the relevant rules and issue clusters, but not as a technical question in isolated cases in isolated organizations. A non-critical dogmatic approach to the law of the civil service undermines the rule of law because it justifies an extensive informal and secretive process of conflict resolution, selective sources of law and interpretation, and very limited public accountability, which will be addressed in the context of the culture in Chapter 3. One needs to take into account the public international law background, the concept of functionalism and its political implications, and to note the analogies to domestic labour and administrative law. At the same time, it is vital to be critical towards unqualified parallels to domestic law, when the applicable law and the claim to independent jurisdiction are based solely on the (political) will of sovereign states. The international civil service was created to serve the needs of the Member States and to facilitate the realisation of the organisational function. However, as was pointed out above in the discussion of responsibility of the institutions, not every action in pursuit of such a goal can be justified and legal, especially if individuals in the legal system are neither accountable, nor sufficiently protected and have no recourse to an independent judiciary.

This chapter will examine the nature, history, and scholarship of the UN civil service in this context; the sources of law and interpretation of the international civil service; the jurisprudence and general themes; and will conclude with a summary of the structure and work of the administrative tribunals. The role of non-legal bodies and the relationship with the tribunals will be discussed in Chapter 3 in the context of the organisational culture. The sexual harassment/abuse of power, misconduct investigation and whistleblower policies will be discussed in Chapter 4 to provide direct background for the cases.

2.1 Nature of the law

The law of the international civil service consists of the written rules that regulate the behaviour of the staff of international organizations, as well as the organs and administrative tribunals established to apply and enforce those rules. Individuals enter into a relationship with the organisation through acceptance of an offer letter and the signing of a contract that includes an oath of loyalty to the purpose and principles of the organisation. There are different categories of staff, with different duties, protections, types of contract, etc.[182] The conditions of employment of staff are listed in the offer letter and the contract, and are governed by the applicable law referred therein - usually the internal regulations of each organisation that are promulgated by either the parliamentary organs, or the head of the organisation. The international bureaucracy is immune from prosecution in domestic courts for official acts committed in pursuit of the organisational function. Also, there are no supranational courts that have the mandate to deal with administrative matters and organizations are immune from prosecution in domestic courts.[183] Therefore, the system of applicable law is limited to the internal rules; and their application - to the internal administrative tribunals, unless the organisation has accepted the jurisdiction of the tribunal of another global institution.

This relatively simple model describes the perception, rather than the reality of contradictions, of the status of individuals in an intergovernmental organisation that is not an autonomous legal entity. Sovereign states have jurisdiction over their citizens, and the will of those states is the main source of public international law; that will is not limited internationally as it is domestically by parliamentary elections, national administrative and criminal law, and the court system. Nation states have a long history of influencing international organizations through their nationals staff members, and of lobbying to position their nationals in key positions - including Assistant Secretary-Generals, ICJ judges, and administrative tribunal judges. There are very obvious questions of loyalty and conflict of interest, as well as very basic transparency concerns with the "rotation" and secretive elections and appointments. These concerns also reflect the issues of leadership selection and the

[182] Perhaps most significantly certain categories are not considered staff for the purposes of immunity - interns, volunteers, contractors, as well as peacekeepers.
[183] See immunity discussion above.

organisational culture discussed in Chapter 3. Becoming an international civil servant does not entail relinquishing one's nationality, and nationals of powerful states have a higher degree of protection against punishment and hope of advancement than nationals of smaller and poorer countries.

The source of the authority of international organizations - their capacities and personality - is the founding states in the principle *pacta sunt servanda* (agreements must be honoured) and the organisational function. The founding treaties do carry the ethical core of the international bureaucracy and bind their loyalty to the pursuit of the organisational goals. However, this is problematic when discussing individual civil servants and the independent authority over their rights and responsibilities. The constitutive documents of the global public organizations like the UN Charter, which create the civil service, are intergovernmental treaties governed by public international law and international organizations law, and the subjects of those treaties are nation states. A treaty cannot directly bind specific individuals, nor can it confer specific rights and responsibilities to specific individuals without the agreement and involvement of states. These treaties, like the Privileges and Immunities Convention, can only be amended and enforced through the ICJ by states and there is no way for individuals or international organizations to directly challenge those rules or their effect.

It is the diplomats - who are not public officials, but agents of the executive arm of their governments - that create and amend the rules and conditions of employment in accordance with their interpretation of what is necessary for the functioning of the organisation, or with the interest of their respective governments. The UN administrative legal system is defined and financed by, and accountable to the parliamentary organs - the General Assembly amends the Staff Rules and Regulations, as well as the statute of the UN Dispute and Appeals Tribunals, and determines the budget of the Secretariat.[184] The other big tribunal - the ILOAT - is a part of an organisation that has a rather different makeup. The ILO is a tripartite organisation and the parliamentary and executive organs - the Governing Body and the International Labour Conference - consists of government, employer and worker representatives. It has been claimed that the representation provides better

[184] Including the "independent" Office of Administration of Justice, Ethics Office, etc. See Section 3.3.2 below.

protection of international civil servants' rights, but it is difficult to measure definitively. There is no alternative to a constitutional court that could assess the legality of the decisions of the representatives of Member States vis-a-vis the civil service.

The internal law of the organisation is therefore not an unambiguously independent source of authority and neither are the tribunals despite the considerable linguistic gymnastics involved in creating both. The law as such exists as a system that regulates behaviour through sanctions according to the will of authority[185] and applied by a court-like body. However, the classical[186] concept of the rule of law presupposes that the governing body must act in accordance with the law; that all individuals are equal before the law; and that the constitution of a state arises from the "ordinary law of the land", and that no individual can be punished if a law hasn't been broken. Some general principles have been derived in more modern interpretations of the concept of rule of law - legality, due process, maintaining public order, etc. A system that functions in accordance with the rule of law presumes a balance between rights and obligations, hierarchical institutions that arise from a relationship between governors and the governed, society-law cohesion, distinction between private and public, certain accountability, as well as a clear division between inside and outside of the entity.

None of the above elements are unambiguously present in intergovernmental organizations, and as an extension - in the law of their bureaucracies. The practitioners in the system work on the assumption that it is a framework of administrative law promulgated by the Member States for the realisation of the purpose of the institution, and based on a contract between the staff and the organisation. There is a very specific role for domestic law and legal education as well, because the professionals who apply the law - judges, lawyers, registrars and human resource practitioners - were educated, qualified and most often practised in a national context first and use basic assumptions that are not international per

[185] It is difficult to find a commonly agreed definition of law and legal system. On international human rights law see Robertson G, *Crimes against Humanity: The Struggle for Global Justice* (4th edn, Penguin Books 2012). He states that "if … a great preponderance of authority is in favour of a particular principle, it may be said to have crystallised into a 'rule' of international law".

[186] See Dicey AV, *The Law of the Constitution* (JWF Allison ed, Oxford University Press 2019) originally published in 1885

se.[187] By accepting an offer of employment in an intergovernmental organisation, an individual "exits" the domestic legal space to a degree,[188] although the applicable legal thought - concerning concepts of contract and bureaucracy - is heavily influenced by national traditions and by the political will of Member States. Human rights law is supposed to apply universally to all individuals, which would make the law of the international civil service a part of the hierarchy of international law, or at least a separate system of law that interacts with human rights.[189] Conversely, the tribunals and the organizations implement elements from other systems and the law of the bureaucracy is lex specialis in the international organizations law.

Scholars stress the "psychological" need for an independent system of law, rather than just a dedicated "machinery" to settle disputes according to a municipal law based on pressure.[190] The field exists in a unique dynamic between public international law, international organizations law, global governance and the general transnational principles of administrative law. Yet, both academic scholarship and the practice of the law instrumentalizes the domestic and international legal vocabulary which separates the law of the international civil service from a genuine rule of law. This rift is exemplified in the UN Appeals Tribunal limiting technical use of domestic vocabulary when adjudicating whistleblower cases.

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[187] With the internationalisation of the UN Secretariat, civil servants often work in a language that is not their native, which probably affects their perspective on issues. In the case of legal specialists there is also the element of division between civil and common law jurisdictions, which in my personal opinion influences their view on the UN internal legal system as well - for example on issues of stare decisis, the binding force of legal precedent. These are interesting theoretical questions that unfortunately have not been investigated to date.

[188] See above about different types of immunity.

[189] Human rights protection was not part of the international administrative law discourse until 1980 with the creation of the World Bank Administrative Tribunal. See Memorandum to the Executive Directors, dated 14 January 1980, from the President of the World Bank, Documents R80-8, and IFC/R80-6, pp. 1–2. See also Bastid S, "Les Tribunaux Administratifs Internationaux et Leur Jurisprudence" (1957) 92 Recueil des cours at p. 367. And Amerasinghe CF, "Reflections on the Internal Judicial Systems of International Organizations" in Olufemi Elias (ed), *The Development and Effectiveness of International Administrative Law: On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal* (Martinus Nijhoff 2012), p. 35.

[190] Amerasinghe (n. 12) p9

2.2 Terminology

The persistent ambiguity of terms describing the law of the international civil service has allowed for a form of "concept shopping" that has at least partly diminished the rule of law, transparency and human rights in the inner world of international organizations.[191] The legal jargon used by practitioners is borrowed from domestic law while there are key institutional elements missing; and academic studies often adopt the language of political science and global governance. This vocabulary creates a false sense of domestic and global parallels, as well as "false friends" that confuse the academic discussion and the general understanding. It would appear that defining the field through its subject - the bureaucracy - would provide the most accurate description, although the most popular term is "international administrative law". The latter is misleading for the reasons described in this section and the arising internal contradictions, but is still preferred by practitioners and academics alike.

Firstly, it is problematic to use the modifier "international" because the subject of study is not the legal relations between national governments. Leading scholars argue that it is a system of "municipal" law that applies to individuals rather than a system that is "situated in and derived from" public international law.[192] The law of the international civil service as such exists in a space that is neither domestic nor global, but fuses elements from both. Expanding this model would require a new type of thinking that incorporates a new role of individuals and a new concept of "internationality" that goes beyond the nation states, but so far it has not been considered.[193]

The law is international inasmuch as it is derived from the consent of sovereign states and is therefore part of global governance dynamics and international rule of

[191] See below the discussion on UNAT and res judicata and stare decisis.
[192] Amerasinghe (n. 12) p25
[193] See UN Charter Art 100 (2) - "the exclusively international character of the responsibilities of the Secretary-General and the staff". See also Art 1.1 of the Staff Regulations of the League of Nations - "The officials of the Secretariat of the League of Nations are exclusively international officials and their duties are not national, but international."

law more broadly, even if it does conflict with the traditional sense of public international law doctrine and the practice of states. In the alternative, perhaps the term "global" would be more accurate because it does not refer to nation states. However, in the past decade the label "global administrative law" (GAL) has been used to denote a popular approach to global governance. The GAL scholars conceptualise the whole of international legal action as a series of administrative procedures, whose purpose is to resolve global issues. Therefore, the term GAL and the use of administrative terminology brings confusion to the use of "international administrative law" to denote the law that affects the international civil service. Between GAL and IAL, there is no clarity on the most basic questions - administration of "what", by "whom", on "whose" authority, and responsible to "whom". If both global governance and the law of the UN bureaucracy were both "global" and "administrative" there would be no boundary between the internal and external legal frameworks. Potentially, the same legal principles would govern a labour contract as would a treaty for instance - and the issues of agency, personality, authority and responsibility would become extremely complicated. GAL scholars have analysed the internal law of international organizations as part of their study of global governance without distinguishing between the organisation as "administrator" of global governance externally and the staff as "administrators" of the internal affairs of an organisation, and the staff of the organisation as the subjects of the legal system.[194]

Historically, earlier scholars of international organizations law, specifically Paul Reinsch and Francis Sayre (see previous chapter), have also used the term "international administrative law" when discussing the global institutions of their day and their external law- and policy-making activities, similarly to GAL scholars from the 21st century. However, Reinsch and Sayre wrote before the time of the League of Nations, which means before universal organizations, before decolonization, and before international civil service even existed. The international organizations of the early 20th century were staffed by seconded national civil servants and dealt with very technical issues that mostly called for harmonisation of national administrations - like telecommunications for instance.

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[194] See Villapando S, "Managing International Civil Servants" in S Cassesse (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2017)

The near-universal global institutions of the 20th and 21st centuries have very different memberships, different functions, and very different bureaucracies.

The use of the term “administrative law” in an international context is an issue in and of itself because at the national level it signifies the relationship between a governing body and its subjects.[195] The term “administration” relates to the branch of government that is vested with the executive powers, although in the US it also specifically refers to the current presidency; in the UK “executive”, “administrative” and “senior civil service” denote different grades of officers; and in France *le pouvoir executif* in addition to administrative functions also represents the state in judicial cases as the prosecution.[196] The latter has been implemented in the UN, as will be demonstrated later on, which is problematic because of the lack of judicial recourse to challenge the legality of the internal regulations without a specific case and plaintiff.

The nature of international organisation's “administration” is part legislative action - creating law by virtue of the Assembly or Security Council resolutions - or by custom. It is also part executive - either in the agents of sovereign states or the executive heads of organizations - and part internal human resources. International organisations have no separate “executive” branch, and the Preparatory Commission of the UN did not define their use of “administration” and “executive”. As pointed out in the discussion of GAL above, there is a difference in the use of administration “from outside” - ie to designate the entirety of the Secretariat - and “from the inside” - when referring to actions by the Office of Personnel (now OHRM) regarding staff - ie the actions of the organisation with regard to its staff.[197]

In a domestic legal framework, the branch of “administrative law” regulates how government agencies operate - their powers, mandate, and the relationship with the public. However, the United Nations is not a world government, and the UN bureaucracy is not a government agency, although it is a public body that is an

[195] Sossin L, “An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law” (2002) 2 Queen's Law Journal 809
[196] See Langrod G, *The International Civil Service : Its Origins, Its Nature, Its Evolution* (Sythoff 1963)
[197] Ibid. p15

agent of the collective of governments. The technical terminological difference between "agent of governments" and "government agency" is very significant in this context. In very specific terms, perhaps "governance agency" would be the most accurate descriptor, but that does not clarify the standing of the individuals in international administration. The "administrative law" under question does not address the rights and responsibilities of the global citizens, or the governments, vis-a-vis the UN. It is strictly the system of internal law that governs the relationship between the bureaucrats and the organisation, it is not governed by nationality and neither does it confer a citizenship-like status.[198] On the other hand, human rights principles and some general principles of administrative law, mostly from the Western administrative tradition, have been referred to by international administrative tribunals. Typically, the utilisation of domestic and international legal elements in the law of the international civil service is based on what is considered necessary for the functioning of the bureaucracy. That determination is not always objective and is often done on a case-by-case basis - as per the above-mentioned concept-shopping.

For the purposes of this study, "law of the international civil service", or "law of the international bureaucracy" appear to be the most accurate since those describe the object of law. The definition of what constitutes an "international civil servant" has been debated as well - with regard to interns, temporary contractors and local staff[199] - but the rules have been refined to clarify which rule applies to what category of staff.[200] However, there is no alternative term to refer to the international administrative tribunals because it is often part of their official designations, and the law that the tribunals apply by mandate is defined as the "internal law" of each organisation.[201] The law of the international civil service as

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[198] Although nationality plays a role in determining certain benefits.

[199] According the "Scope and Purpose" of the UN Staff Rules and Regulations (ST/SGB/2017/1) "For the purposes of these Regulations, the expressions "United Nations Secretariat", "staff members" or "staff" shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter."

[200] On the other hand, the same cannot be said about ethics - for instance, it is not clear whether the international character applies to locally-recruited staff in the same way as to international staff.

[201] See de Merode case discussion below.

a regime is defined by more than terminology, but by its nature, sources, institutions, and practises.

2.3 The "law" or "laws"

This thesis deals with the organisational and legal issues of intergovernmental organizations exposed by whistleblowers, but can be seen as problematic to make broad conclusions based on individual cases from different organizations, because each institution has its own internal law. This is especially true when viewing the differences between the UN tribunals and the ILO administrative tribunal below. Klabbers has elaborated on the wider issue of the existence of law or laws of international organizations, but the question is more concrete in the case of the civil service because of the jurisdiction and jurisprudence of the tribunals. International civil servants in different organizations often work on similar issues and in comparable legal frameworks, which arguably amounts to a legal regime.[202] There are several theoretical arguments and evidence from practice that support the claim that a shared legal space of the international civil service exists.

Firstly, as argued previously, even though the law of the global bureaucracy is often referred to as "internal", it is not completely isolated from the rest of domestic and public international law, and neither is the responsibility accrued from it. While it is true that "external" regulations are not binding "internally" - i.e. domestic laws and the Human Rights Convention are not directly binding on the UN staff as they exercise their professional duties - the system would absorb certain elements based on subjective determinations. Additionally, the responsibilities of the international civil service that are based on internal regulations have external effects in a great many cases - like the health regulations affecting peacekeepers in Haiti and the confidentiality of documents. The

[202] One definition would be "legal rules that are derived from the existence of the legal institution called 'international civil service' make up its legal regime" Dhinakaran R, "Law of the International Civil Service: A Venture into Legal Theory" (2011) 8 International organizations law review 137, at p. 163

"internal" law also affects relationships with contractors and partners in the field that are not members of the bureaucracy.[203]

Additionally, the hierarchy of the rules is mirrored across intergovernmental organizations, despite their differing purposes and sizes. The internal administrative law of the UN is based on the relevant Articles of the UN Charter, and the organisational goals and ideals, which is the realm of public international law and international organizations law. The core of the law thus reflects the Western administrative tradition, and the predominantly Western founders of the international civil service, which will be touched upon in Chapter 3. The application of the law is divided in the practice between misconduct and personnel issues - a de facto separation between "criminal"-like and "contractual"-like issues.[204] Other global institutions apply a similar logic in terms of the sources and types of issues, and smaller organizations often develop their mandates following the example of the UN and other universal organizations. This is especially true in relations to the whistleblower policies and the Ethics Offices across organisations. It is not a coincidence that the same countries are members of the UN and of other organizations, so if something works in one such setting it would be promulgated in another. The perception of diplomats representing national governments of what is working is not an impartial judicial standard, and it reflects the perception of what a "good" administration is, without the system of impartial courts, human rights, citizenship, etc.

The universalization of the law is also supported by the fact that many organizations do not have a dedicated administrative tribunal, but instead use either the UN or ILO tribunals. The ILOAT has stated that there are "general principle[s]"[205] of international administrative law that could be elevated to "fundamental right"[206]; and those could even deviate from the written rules - "Quite apart from that written rule, the Tribunal has often declared...".[207] The

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[203] Even though non-staff members do not have recourse to the international administrative tribunals.

[204] In practice, personnel issues are further divided into "substantive clusters" - appointment-related issues, benefits, separation, classification of posts, and others. This is not a classification used by Amerasinghe.

[205] Gracia de Muñiz v. FAO, ILOAT Judgement 269, 1976, consid. 2 (emphasis added).

[206] C., D., F., G. and K. v. CDE, ILOAT Judgement 3238, 2013, consid. 10.

[207] de Roos v. ESO, ILOAT Judgement 1745, 1998, consid. 7.

existence of the international civil service as an epistemic community bound by a common ethos, which will be discussed in the next part, would be counterintuitive if there was no diffusion of law between the organizations, and between organizations and the transnational legal background.

The unity of the law is more apparent in the jurisprudence and work of the newer tribunals because they often use the reasoning of the older tribunals on similar issues. The Statute of the Bank for International Settlements Administrative Tribunal, provides that "[in] the absence of applicable rules, the Administrative Tribunal shall base its judgments on general principles of the law of the international civil service ... whereby it is understood that neither judgments delivered by other administrative tribunals of the international civil service nor those of national courts shall be binding upon the Tribunal".[208] IMFAT Statute Art III states that the "internal law of the Fund" incorporates "generally recognized principles of international administrative law concerning judicial review of administrative acts". The Statute Commentary states that the applicable law can be a "unwritten sources" as well as "certain general principles of international administrative law, such as the right to be heard … [that] 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".[209] Most significantly,

> *"The IMFAT finds this jurisprudence of its sister tribunals pertinent because the Fund's written rules prohibiting discrimination, harassment, retaliation and a hostile work environment give expression to fundamental principles of workplace fairness, and those principles are to a significant extent shared among international intergovernmental organizations."*[210]

There are a multitude of cases from different tribunals that refer to judgements of other tribunals, even though there is often emphasis that those are not binding. It is

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[208] Article IX, para. 2, Statute of the Bank for International Settlements Administrative Tribunal,13 January 2014, available at http://www.bis.org/about/atbis/s14.pdf [accessed 9 August 2017].

[209] International Monetary Fund, Administrative Tribunal of the International Monetary Fund, Commentary on the Proposed Statute, 1992, (amended 2009 and 2020) p.18

[210] Ms "GG" (No. 2), IMFAT, Judgement No. 2015-3, 29 December 2015, para. 187.

worth noting seminal cases like WBAT's first case *de Merode*;[211] also *Lindsey* where the ADBAT cites the World Bank AT;[212] and the first judgement of the NATO AT from 2013 which referred to decisions by World Bank and ILO ATs relating to non-extension of a contract, to performance-based decisions, and to the "consensus among international administrative tribunals".[213] There are emerging issues like fundamental human rights[214] and the legal status of judges and access to justice, wherein tribunals are looking to each other's jurisprudence to find a coherent legal thought.[215]

Academics generally agree that the law of the international civil service is not a collection of isolated organisation's rules. Villalpando writes that "international organizations face the same categories of issues relating to employment and will tend to adopt solutions that are coherent with the general trend regarding the status of the international civil service …This tendency is supported by certain institutional mechanisms … for example, … the UN Joint Staff Pension Fund…"[216] Villalpando concludes

> *"[i]t appears therefore to be justified to consider the law of the international civil service from a coordinated and comprehensive perspective, searching for the common trends in the status of international civil servants and having recourse, when necessary, to a comparative perspective to settle debated issues".*

The unity of the law of the international civil service does not automatically correct the above-mentioned concept-shopping regime - i.e. an organisation adopts and adapts a practice from outside of the law of the international civil service that suits its pertinent needs, and other institutions follow suit - that is highlighted in the whistleblower cases. The influence of the UN in the whistleblower policy development in the international organisation ecosystem and the ethics office

[211] de Merode and others, WBAT, Decision No. 1, 5 June 1981.
[212] Carl Gene Lindsey, ADBAT, Decision No. 1, 18 December 1992. Para 12 and 43
[213] JF v. NATO Support Agency, NATOAT, 4 November 2013, Judgement Case No. 885.
[214] Ms "M" and Dr "M", IMFAT, Judgement No. 2006-6, 29 November 2006, para. 125.
[215] *Mindua*, UNDT/2018/097 para 27-31 quotes ILOAT
[216] Villalpando S, "The Law of the International Civil Service" in Katz Cogan, Jacob Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2017) p. 1075

practice perpetuates questionable practices and legal interpretations. The history of the scholarship also supports that conclusion; and demonstrates how in the background of public international law the law of the international civil service fails to address crucial issues on the rule of law.

2.4 History and Scholarship

In the case of the law of the international civil service, there are no dedicated research centres or training programmes on the topic, and a very limited number of courses at universities worldwide. From a general research perspective, the matters of the civil service do not directly concern intergovernmental agreements, treaties, or "traditional" public international law - like trade, environment, peace, etc. - which diminishes academic interest on the topic. However, the binding nature of the law of the international civil service is based on the *pacta sunt* servanda of international treaties, and the sources of law are created by sovereign nation states. In other words, international civil servants are individuals who are affected by and affect public international law, but not by virtue of their being subjects of states, their international legal crimes, or their universal human rights - which deviates from the prevalent international legal thought.[217]

Practitioners of the law of international civil service are usually recruited from a pool of domestically-trained lawyers, judges, human resource specialists, etc. Because of the isolated nature of the internal legal system of an intergovernmental organisation, those professionals are neither expected nor trained to look for answers outside of their own organisation and the jurisprudence of the tribunals, which perpetuates the existing issues. According to Amerasinghe the lack of

[217] This contradiction is very apparent when dealing with whistleblowers because of the expression of loyalty to a purpose outside of the immediate duties of the individual - a loyalty that contradicts the rules and / or long-standing practice of keeping the internal dealings of the organisation confidential. There is an obligation to report misconduct, but the enforcement is practically nonexistent; it is thus more of an ethical responsibility than a legal one, and does contradict confidentiality obligations that are strictly enforced.

interest is due to the "limited practical significance in the sense that the answer to it has not had a particular impact on the operation or application of such law".[218]

Against this background of limited interest and undefined area of law, analysis of the field of the international civil service law have been done in an encyclopaedic fashion - as a collection of issues, or as a "labour law" chapter in textbooks on the law of international organizations - by a limited number of public international law or administrative law scholars. The existing studies are mostly descriptive of the nature of the work of the bureaucracy, enumerating the structure and history of the tribunals, and singular jurisprudence on specific legal topics - such as admissibility, remedies, awarding costs, etc - which are defined using the domestic legal vocabulary described above. Similarly to the international organizations legal scholarship, there are several waves of studies on the law of the international civil service, as well as some significant non-legal studies.

The first prominent articles were written in the mid-1940s, around the time of the Preparatory Committee of the UN; there was another boom in the late 1950s and early 1960s; then in the late 1980s and early 1990s in the work of Amerasinghe that is still canon. Finally, a revival appears to happen in the 2010s in French in the work of Alain Plantey and François Loriot[219] and of Germond on the work of the ILOAT;[220] as well as in English by Gerard Ullrich[221] and Niamh Kinchin.[222] It is worth noting that the topic of the administration of intergovernmental organizations appears as a PhD thesis topic in French-speaking scholarship; and that articles and books in French focus on the ILOAT rather than the UN tribunals, possibly because of the proximity of Geneva to the Francophone administrative legal scholarship centres. In parallel, there have been interdisciplinary scholarly analyses of the global bureaucracy from the perspectives of international relations, administrative science, and human resources, which are significant in the context

[218] See Amerasinghe, (n. 12)
[219] Plantey A and Loriot F, *Fonction Publique Internationale: Organisations Mondiales et Européennes* (CNRS Éditions 2005)
[220] Germond L, *Les Principes Généraux Selon Le Tribunal Administratif de l'O.I.T* (Pedone 2009)
[221] Ullrich G, *The Law of the International Civil Service, Institutional Law and Practice in International Organizations* (Duncker & Humblot 2018)
[222] Kinchin N, *Administrative Justice in the UN: Procedural Protections, Gaps and Proposals for Reform* (Edward Elgar Publishing 2018)

of this thesis because they sometimes fill in the gaps left by the legal scholarship.[223] Those studies are also significant because issues like whistleblower retaliation have not been “fixed” by a policy change or by the institution of new tribunals.

2.4.1 Wave 1

The international civil service was created with the League of Nations, and the first significant mention of the bureaucracy outside of the mandates can be found in the Balfour Report from 1920[224]:

> *"I emphasise the word 'International' because the members of the Secretariat once appointed are no longer the servants of the country of which they are citizens, but become for the time being the servants only of the League of Nations . . . The members of the staff carry out as I have explained, not national but international duties."*

The Balfour Report has become a recurring and dogmatic reference to the defining divergence between domestic and international bureaucracy, and of the creation of an entirely new institution with a unique characteristic. The key questions in this early stage were issues of loyalty stemming from the influence of the member states through their nationals on the staff. An important source of analysis and perspective on the creation of the international staff and their position in the League can be found in the writings of the first Secretary-General and architect of the League, Sir Eric Drummond.[225] He was the one who pushed for an international, rather than seconded, staff of the League, but also emphasised the necessity for organisational loyalty and a shared ethics of the new body of civil servants -

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[223] See Langrod below; also Plantey A, *The International Civil Service: Law and Management* (Masson Publishing 1981) and Botham-Edighoffer A, “The New Human Resources Management of the United Nations, A Study of the Reform Process between 1985 and 2005” (Freie Universität Berlin 2006). Also Venzke I, “International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law” (2008) 9 German law journal 1401 <http://dx.doi.org/10.1017/s2071832200000523>

[224] Report presented by the British Representative, Mr. A.J. Balfour, “Staff of the Secretariat” (1920) 1 League of Nations Official Journal 136.

[225] Drummond E, “The Secretariat of the League of Nations” (1931) 9 Public Administration 228

"The two great qualifications for these posts apart from general efficiency seem to me to be firstly a belief in the League and a desire to serve it, and secondly the capacity of placing yourself in the position of the other man. It is by these qualities that the members of the Secretariat have been able to acquire the confidence of the fifty-four Governments whom it is their duty to serve impartially and to the best of their ability; if this spirit can continue to permeate the organisation, the Secretariat will, I think, remain one of the most important factors in the development of international life, "

Drummond's efforts were severely undermined by his successors, which eventually led to the failure of the League through the pressures of the governments to influence the organisation following the example of Moussolini's approach to administration. But the notions of internationality, geographical balance in hiring, independence, etc. were vigorously discussed in the process of creating the scion institution. As the United Nations was being planned, practitioners and theoreticians considered whether the League civil service principles should be preserved and how that would affect the law and the organisational culture -

"It is not healthy that anyone should be above the law, especially if he is living in a community which may lack established standards. A psychology of privilege would be so incompatible with the kind of world public services which we require that adequate institutional checks upon the development of any such psychology are indispensable, and it is equally essential to the maintenance of a proper sense of public responsibility that international civil servants should be legally accountable for their official acts."[226]

Those arguments did not stop the creation of the Privileges and Immunities Convention, as the need to protect the organisation took precedence to the push for control. Yet, others urged that "[i]t was not possible to jump straight from national individualism to denationalised officialdom; something intermediate was needed."[227] But despite the criticism and lack of trust stemming from Weberian

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[226] Jenks CW, "Some Problems of an International Civil Service" (1943) 3 Public administration review 93

[227] Salter A, "Conference on International Administration: Concluding Remarks by the Chairman" (1945) 23 Public administration 1, p. 2.

notions of the power of bureaucracy, Drummond's approach and character was greatly respected -

> *"Looking back upon 1919, one cannot help but admire the first secretary-general of the League for the boldness with which he attacked the question of establishing an international staff. There was no analogy, no precedent, to guide him in his decisions. It would have been comprehensible had he tried to link up his experiment with the experience of the Inter-Allied wartime agencies, as some of his most influential associates urged. Had he followed such advice, the new international agency would have been staffed with temporarily detached national officials, grouped into national delegations."*[228]

The importance of the international civil service and their mandates for the work of international organizations globally was also discussed in the administrative, [229] management,[230] and labour law,[231] scholarship on the structures of the UN bureaucracy.

2.4.2 Wave 2

The 1950s-60s noted the rising tension between the autonomy of the international civil service and the political will of the sovereign states, which peaked with the hunt for communists among UN staff by the US government.[232] This development prompted academic scholarship mostly in the field of political science,[233] but also in legal theory, on the international civil service ethics in the context of loyalty[234] and autonomy. The first significant focused studies on the international civil

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[228] Ranshofen-Wertheimer EF, *International Secretariat, A Great Experiment In International Administration* (1945)
[229] Tead O, "The Importance of Administration in International Action" (1945) 23 International Conciliation 7.
[230] Wen C, "The Personnel System of the United Nations : A Study of International Civil Service" (1951).
[231] Richardson ILM, "The Legal Relation between an International Organization and Its Personnel" (1956) 2 Wayne law review 75.
[232] See chapter 1 for the ICJ Effect of Awards case.
[233] Loveday A, *Reflections on International Administration* (Praeger 1974).
[234] See Young TC, *International Civil Service: Principles and Problems* (International Institute of Administrative Sciences 1958)

service are by Carlston,[235] Langrod,[236] and Akehurst, all of which engage directly with the international administration in the context of public international law and international organizations law. Probably the most influential non-legal scholar on the international civil service - Professor Thomas Weiss - started writing in 1963 and has published as recently as 2019.[237] In 2010 he delivered the famous "people matter" Holmes Lecture, which underlined the value of the idealism of the international civil service.[238]

In 1959, Kenneth Carlston published an article on international administrative law from the perspective of theory, wherein he formulates 13 postulates of the law of the international civil service in a very Hartian fashion, with evidence from the ICJ, the ILOAT, the League Tribunal and the UNAdT. He defines the purpose of the law as protecting the individual from the organisation, but balances that with the integrity of the bureaucracy, and separates the internal law from both public international and national laws. According to him the nature of the law as "cooperative social action" and addresses the issue of unbridled power of international organizations with relation to their staff:

> *"For we here come to grips with as yet a largely untouched issue of organizational power. Shall the modern corporate organization, employing in a number of cases as many as over one hundred thousand workers of all types, be immune from law in its exercise of its authority over the individual worker in the aspects of his association with the organization? Shall the internal administration of the modern corporate organization remain beyond the law?"*[239]

Carlston derives the legitimacy of the authority of intergovernmental institutions and their secretariat from the values that they serve, from the access to justice

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[235] Carlston (n. 92)
[236] Langrod (n. 196)
[237] Weiss' takes an international relations perspective on the international civil service, and his persistent argument over the years is that the structures of bureaucracy are counterproductive to the global interests that they are charged with. See Weiss TG, "International Bureaucracy: The Myth and Reality of the International Civil Service" (1982) 58 International Affairs 287
[238] Weiss TG, "The John W. Holmes Lecture: Reinvigorating the International Civil Service" (2010) 16 Global governance 39
[239] Carlston (n. 92)

through an independent judicial body. He analyses in detail the cases brought to the ICJ in the context of his postulate 8 -“*The resolution of conflict by the judicial organ requires that the integrity of the system of law and the independence of the judicial organ be respected by the other organs of the organization.*” He questions the equality of parties before the ICJ, the requests for Advisory Opinions as a way to circumvent the independence of the Tribunals, the role of non-judicial bodies like the Joint Appeals Board in the judicial system. However, his overall conclusion is that international administrative law has achieved a balance between guaranteeing the rights of the civil servants and controlling their actions because the ICJ ruled in favour of the staff members. The only significant limitation of Carlston’s study is the lack of foresight on the danger in the overall behaviour of the parliamentary organs of intergovernmental organizations. Carlston’s scholarship is rarely referred to and the postulates have not been discussed in detail or argued.

Born Jerzy Stefan Langrod in Krakow, the Polish academic Georges Langrod published extensively in the field of administrative law and public administration. During World War II he was captured by Germany and spent time in a POW camp for officers, where he organised courses on law and politics, as well as wrote his first study on administrative law. After the war he quickly fell into disfavour with the Polish government and moved to France, where he taught at the École pratique des hautes études and was research director at the National Center for Scientific Research. He was also Professor of Public Comparative Law at the University of Saarbrücken and lectured in London, Lisbon, Puerto Rico, Bologna, Luxemburg, etc. until the end of his life.

Langrod’s interest in the international bureaucracy began in 1949 with his study on international administration and public administration training, whereafter he proceeded to analyse the administrative tribunals, procedures, and mandates in various papers. His book “The international civil service : its origins, its nature, its evolution.” from 1963 is the first comprehensive analysis of the international civil service from administrative, legal, political and historical perspectives. Methodologically, he takes an “administrative” approach, in the sense of the administration of common global resources for the achievement of an idea. His legal argument in this context echoes a sentiment that Virally would express a decade later - that the existence of international civil service is bound by the

common social needs.[240] He also argues that the body of people grows organically rather than in an organised fashion, and in that sense the function is neither determined nor controlled by the nation states.

Langrod positions the legal aspect of the international civil service in the context of the psychological one - i.e. the need for independence from the national governments. In the case of the UN, the relationship between the Secretariat (as an independent organ) and the other organs like the General Assembly, as well as the selection of the Secretary-General and the types of appointments, are found in the UN Charter. Langrod's interpretation of the Charter as it relates to individuals is not a legal analysis, but a study of how the historical development of the global social needs were gradually institutionalised through a legal document.

> *"The author intends to draw the reader's attention to the historic origins of the international administration – born of the pressure of events, gradually institutionalized and endowed with a competent staff. In the course of a process of organic growth ... the staff, at first "borrowed," ... has become stabilized, has increased in numbers and has constituted a new human category which must be analyzed owing to its originality in relation to the past and the permanent role which it is bound to play on the international scene. In the eyes of a superficial and uninformed observer, he may and often does appear as a paradoxical and hybrid creation, a strange creature half national, half international, and ill adapted to the contemporary reality of inter-State relations."*[241]

The international duties of the bureaucracy, as well as their loyalty to the organisation, rather than to the interest of Member States, is at the core of the institution of the international civil service. Unlike Weiss, Langrod sees the structure of the UN Secretariat as an evolutionary step towards achieving the goals, but like Weiss he criticises the political pressures and compromises that diminished the efficiency of the administration. On the other hand, his assertion is that the Western administrative models are superior in terms of civilizational development and are logically linked to the independence of the global bureaucracy. This statement is at odds with the evidence of continued and mounting political

[240] Langrod (n. 196) p 45
[241] Ibid.

pressures from diplomatic representatives that have not lessened in the 50 years since. The Western “benevolent civilizer” administrative model does not contribute as clearly to economic development as Langrod would like us to believe, and the obligations in the Charter do not influence the behaviour of states to the degree necessary to claim that the organisation is autonomous.

It is perhaps not a coincidence that Langrod’s writings coincided with the term of Dag Hammarskjold - the UN Secretary-General who stretched the limits of the powers of the office the furthest, and who is often quoted as the epitome of the international civil servant. Despite the control exerted by governments on recruitment and the staff regulations, Hammarskjold managed to achieve the “neutral statesman” status that Langrod would characterise as “maximalist” both internally and externally in administering international cooperation and negotiating peace between states.

Finally, in 1967[242] a British international lawyer Michael Akehurst, who is perhaps more famous for his 1970 work “*Modern introduction to international law*”, published a treatise titled “*Law governing employment in international organizations*”. Like Langrod, he takes a stance that is very biassed with regard to administrative models and international civil servants by stating that “officials from underdeveloped countries, … are from inferior quality”. Akehurst underlines that the pressures exerted on UN officials and the informal dispute resolution committees - the Joint Disciplinary Committee and the Joint Appeals Board - run contrary to the existence of a judicial body like that tribunal. One very interesting aspect of his analysis is that he looks at the nationality and therefore the Common/Civil law background of the judges in different tribunals - ie common law in UNAdT (although he acknowledges the presence of Mme Bastid) and “big name” civil law judges in ILOAT - and compares the language and interpretations arising thereafter. He equates the law of the international civil service to military law, and emphasises the need for rules that would protect the bureaucracy from attacks on their independence, but does not suggest an actual framework to that end.

[242] Akehurst M, *The Law Governing Employment in International Organizations* (Cambridge University Press 1967)

2.4.3 Wave 3

Chittharanjan Felix Amerasinghe is a Sri Lanka-born lawyer, who received his LLB, PhD, and LLD in Cambridge. He has worked as legal counsel at the World Bank; he was the first director of the World Bank Administrative Tribunal for 15 years and a judge at the UNAdT. He has published one of the leading analyses in international organizations law[243] and has lectured all over the world. His "*The Law of the International Civil Service: As Applied by International Administrative Tribunals*" (Vol 1 and 2 together over 1200 pages) was published in 1988 and a second edition was released in 1994. It is the undisputed canon of the field and constitutes an extensive legal study, from the nature of the legal system and its relationships with national and public international law, through the structure of the tribunals that existed at the time, to the legal principles and their application by different tribunals.

Amerasinghe's work is undoubtedly as broad and deep as a study could possibly be at the time. The author is not only a distinguished scholar of international law, but has worked as a tribunal judge, at the tribunal that issued one of the most influential decisions in the field - the de Merode judgement of 1981. He examines legal questions from every possible perspective, starting with the governing law of the system and the relationship between the law of the international civil service and public international law. He conceptualises the entire bureaucratic system as "corporate", but without defining the term in detail. Amerasinghe rejects the direct applicability of public international law and domestic law because of the individuals as subjects, and settles on "internal labour law with international elements". In essence, Amerasinghe concentrates on the internal dimension of the legal system, without addressing questions of political pressures and diplomatic immunity and resulting international responsibility of states, rule of law, the external dimension (except privileges and immunities), socio-legal implications, human rights, etc.

The bulk of the study consists of a detailed description of the international administrative tribunals - their structure, and the authority to establish them (including the Effect of Awards decision and the implied powers doctrine), the

[243] Amerasinghe CF, *Principles of the Institutional Law of International Organizations. Cambridge Studies in International and Comparative Law* (Cambridge University Press 2005)

sources of law, their jurisdiction, etc. - and technicalities - the procedure, remedies, and costs awarded by different tribunals. In other words, he focuses on why tribunals exist, what is their legal core and mandate, and how they resolve disputes between an intergovernmental organisation with specific rules, and an individual staff member with a specific complaint based on a specific contract. His approach is enumerative, stating the principle as formulated in the decision and listing several cases in the footnotes. There are certain general references to a model of the law of the international civil service based on the rule of law rather than effectiveness -

> *"The argument that organizations should have untrammelled freedom and be governed entirely by expediency in their relations with employees rather than by law is not convincing. ...*
>
> *A legal order is necessary not only to establish authority but also to control authority and allocate and determine responsibility."*[244]

Those are, however, not offering a model of the legal order that would achieve that control, or offering examples of where that control is lacking or overextended. Amerasinghe avoids religiously any criticism of violation of the civic and human rights of the staff of international organizations, the lack of sufficient legal representation, the non-legal dispute resolution, or any reference to conflicts over geographical distribution in hiring, or mentioning any cases of disputes that were not adjudicated by the tribunals. His analysis of the McCarthy cases,[245] and the misconduct framework is decidedly non-critical and apologetic.[246] And, since it has not been updated since 1994, the volumes do not contain any analysis of the

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[244] Amerasinghe (n. 12)

[245] Amerasinghe CF, *The Law of the International Civil Service: Volume II* (2nd edn, Clarendon Press 1994) p 87 "The UNAT had no hesitation in holding that there was freedom of political opinion under Staff Regulation 1.4 … "

[246] Ibid - p189 "The fact that the written law of so many international institutions has fairly extensive provisions on disciplinary measures testifies at the same time to the importance attached to such measures in the administration of such institutions and also to the need to have well-defined rules … particularly for the protection of staff members. In spite of the solicitude reflected in the extensive nature of the provisions of the written law of organizations on the subject, international administrative tribunals have often been asked to interpret and apply these provisions, because they do not always provide the answers to problems that have arisen."

corruption scandals, Oil-for-Food, whistleblowing mandates, freedom of expression, social media, or of the 2009 UN administrative justice reform.

2.4.4 Wave 4

Between 1994 and 2005 there have been almost no publications in the field of the law of the international civil service. Considering the number of management reform proposals, the new mandates and offices established, the number of new cases by the old and new tribunals, as well as the very public scandals there appears to be only one reason behind the dearth of scholarship. There was a certain finality - as in, it has all been explained - after the publication of Amerasinghe's work that is reminiscent of end-of-history. However, the francophone scholarship and the GAL scholarship would experience a revival in the following decade.

In 2005,[247] Alain Plantey - a French lawyer, former president of the Academy of Moral and Political Sciences, former member of the French delegation to the UN, former ambassador, former member of Conseil d'Etat, among others - and Francois Loriot - a former chief counsel to the UNDP, UNFPA, and UNOPS, as well as a private counsel that represented staff members in front of various administrative tribunals - published *"Fonction Publique International, Organisations Mondiales et Européennes"*. Their work adopts an administrative approach - from the political appointments, the nature of the duties, the hierarchy and remuneration, and the disciplinary procedure (particularly the human resources policy). The analysis of the legal system focuses on judicial procedure and how it affects the rights of the staff members, and the references to actual case law is enumerative following the example of Amerasinghe. Considering that the book is less than half the size of Amerasinghe's, and the size of the case law from different tribunals, this is not surprising, but it underlines the lack of critical legal scholarship in the field. Other French scholarship from the latest period includes Germond who focuses on the jurisprudence of the ILOAT,[248] and an edited volume by Govaere & Vandersanden.[249] The newest contributions in English are by Gerard Ullrich[250] and

[247] Plantey & Loriot (n. 219)
[248] Germond (n. 220)
[249] Govaere I and Vandersanden G (eds), *La Fonction Publique Communautaire: Nouvelles Règles et Développements Contentieux* (Pratique du Droit Communautaire 2008)
[250] Ullrich (n. 221)

Niamh Kinchin,[251] which proposes using the international administrative justice system as a solution to global accountability deficit through an analysis that uses global governance, public international law, and global administrative law (GAL) terminology and approach. They do not address the rights and duties of the international civil service, the jurisdiction of the tribunals; or the issues with using "administration" to signify both internal and external issues. None of the new studies includes more than a mention of the whistleblower policies or related case law, but they do provide a new perspective on the external dimension of the law of the international civil service, which has been previously ignored.

The above-mentioned four waves of scholarship constitute a non-exhaustive summary of over 70 years of analyses of the law of the international civil service. It appears that the scholars that were academics who never worked in an intergovernmental organizations - like Langrod - did not perceive the external dimension of the legal system and therefore did not formulate criticism based on public international law; while the international civil servants - most notably Amerasinghe - did not criticise the organizations or the application of the law because of their training and experience. The scholarship of the law of the international civil service is somewhat influenced by the historical developments, although less so than the scholarship of the law of international organisations in chapter 1.

Despite the existing contradictions with the global legal background and the terminology, the law of the international civil service as written in the documents does function as a legal system. The next section will look into how the application of the rules and legal principles, as well as the relevant structure of the tribunals affect the rule of law in the law of the global bureaucracy.

[251] Kinchin (n. 222)

2.5 Administrative tribunals and law

The previous sections discussed the dynamics inherent in the nature of the law of the international civil service in the context of public international law and the law of international organizations, the organisational function, the terminology, and the scholarship. This section will look at how the bodies tasked with adjudication of disputes were created and how they apply the rules. The issues with the application will make more sense in the context of the organisational culture and ethos described in the next chapter.

2.5.1 Independence and capacity

The UN Charter vests the Secretariat with law and principles, but does not contain express provisions for adjudicating disputes between staff members and the organisation. The UNAdT was created by Resolution 351 A(IV) of 24 November 1949, which also appointed the first justices. One important point to keep in mind when analysing cases and the work of the tribunals more generally, is the intraorganisational conflict and hierarchical power struggles between the tribunals and the system of justice and the political organs, as noted in the municipal dynamics section 1.8 above.

In the Effect of Awards Advisory Opinion, the ICJ stated that having no judicial recourse would be inconsistent *"with the expressed aim of the Charter to promote freedom and justice for individuals"* and that the power to establish an independent judicial body *"was essential to ensure the efficient working of the Secretariat and ... the highest standards of efficiency, competence and integrity."*[252] The General Assembly had asked whether the tribunal had the power to bind the organisation to pay significant damages; the ICJ affirmed the standing of the tribunal as a judicial body rooted in the ideals of the Charter. From there, administrative tribunals are considered necessary for the organisational function by virtue of implied powers[253] doctrine and efficiency, and from the aim of the organisation to promote justice.

[252] Effect of Awards of compensation made by the U. N. Administrative Tribunal, Advisory Opinion of July 13th, I954 : I.C. J. Reports 1954, p. 47.
[253] Although Seyersted has argued for the "inherent capacity". See Chapter 1.

The ICJ asserted that in creating the Tribunal, the Assembly was not creating a subsidiary organ by "delegating the performance of its own functions" because the Assembly, under the Charter, did not have the power to adjudicate such disputes. The Court pointed out that

> *"The contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted. It cannot be justified by analogy to national laws, for it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being.*
>
> *The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ ... [it] depends on the intention of the General Assembly in establishing the Tribunal, and on the nature of the functions conferred upon it by its Statute."*[254]

As argued in Chapter 1, despite the efforts of the ICJ to assert the independence of the UNAdT,[255] the General Assembly has reiterated its supremacy over the internal justice system in clear dissent with the ICJ. The question remains whether these claims to supremacy also affect justice as the goal of the tribunals and the adjudication of disputes. Both the tribunals and the parliamentary organs have confirmed that the tribunals do not have the powers to examine the legality of the actions of the Assembly and the Council; while the capacity of the Assembly to amend the internal laws is only restricted by the doctrine of acquired rights, analysed below. General Assembly Resolution 68/254 from 2014 appears to establish the hierarchy and dynamic of decision-making, law-making, and judicial review, as it -

> *"3. Reaffirms that the resolutions of the General Assembly are binding on the Secretary-General and on the Organization;*

[254] See n. 252

[255] The structural/organizational independence of the tribunals will be further examined in section 2.5.3..

4. Stresses that all elements of the system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly, and emphasizes that the decisions of the Assembly related to administrative and budgetary matters are subject to review by the Assembly alone;

5. Reiterates that decisions taken by the Dispute Tribunal and the Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management;

6. Acknowledges the evolving nature of the system of administration of justice and the need to carefully monitor its implementation to ensure that it remains within the parameters set out by the General Assembly;"

Therefore, the General Assembly has affirmed its control over "administrative" issues, without clearly separating "administrative" from "legal" issues; that the decisions of the tribunals are to conform with the Assembly's decisions on human resources policy without mentioning legal principles; and has even hinted that the Assembly controls the evolution of the administration of justice regardless of its "independence".

In this tug-of-war between politics and justice, the existence, history, legal framework, legal inconsistencies by and of the tribunals exposes a side of institutional issues that relate back to the role of nation states in the municipal legal dynamic; and forward to the organisational culture in the selection of judges, the non-judicial framework for conflict resolution, and the role of the Ethics Office in the whistleblower cases. The next sections will outline and contrast the legal framework and history of the ILO and UN administrative justice, the hierarchy of their sources, the role of contract, the rules of interpretation, and the key judicial questions - including acquired rights, res judicata, due process, damages, equality before the law, and the separation between disciplinary and non-disciplinary issues.

2.5.2 Legal Relationship

Because of the lack of a dedicated legal vocabulary, the minutiae of the law of the international civil service are defined by imperfect analogies to (mostly Western)

domestic administrative law, contract law and law of obligations,[256] general legal principles, etc. but the parallels are not based on relevant normative similarity.[257] This applies even to the general structure of the bureaucracy of an intergovernmental organisation. As pointed out above, Amerasinghe has likened IOs to corporate structures with dedicated internal rules, even though "corporate" most often refers to a private legal person that is subject to private international law and domestic labour law, as well as principles of independence, fairness, transparency, etc. as determined by the legal system rather than the entity itself.

The nature of the legal relationship between staff and organisation is based on an equivalence to contractual relation, which gives rise to a number of inconsistencies. A contract is a binding agreement based on offer and acceptance, where the terms are precise and clear for both parties, as well as intention to create legal relations and consideration (in common law). It is not unreasonable to have a document that would regulate the relationship between international civil servants and an intergovernmental organisation, and that the agreement of both parties would be tied to the validity thereof. However, private international law does not apply to intergovernmental organizations. As was pointed out by Judge Michael Adams of the UNDT,[258]

> *"the relationship between the subject and the State is in no sense the same as the relationship between a staff member and the Organization. The latter is governed entirely by the contract of employment which incorporates the various legal instruments ... a contractual obligation is not discretionary unless the discretion is conferred, either explicitly or implicitly, by the terms of the contract, nor is any policy consideration relevant unless it is part of the terms of the contract."*

The first reasonable question is how an individual can enter into a valid contract with an entity, when the applicable law is the internal law of that entity that only applies to individuals already in a legal relationship with that entity. There are no

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[256] A combination of both continental and common law, as we will see in the next section.

[257] Bordin FL, *The Analogy between States and International Organizations* (Cambridge University Press 2018)

[258] Wasserstrom, Order No.19 (NY/2010). See conclusion of chapter 3 and the discussion of the Wasserstrom case for more on Judge Adams.

general international rules, binding on both individuals and global institutions, concerning when such an agreement is considered valid or invalid, or what conditions are fair or unfair. There is jurisprudence from the tribunals, which however only have jurisdiction over current and former staff members. There has been discussion on what constitutes offer and acceptance,[259] and whether the contract resembles and agreement between private or public parties,[260] but tribunals do generally agree that the contract binds an individual civil servant to the internal law of the organisation in question.

The ICJ in the UNESCO case found that contracts are not contained only in the offer letter, but the way that they were applied in the context of the organisation, and the "body of practice" that "is a relevant factor in the inter- pretation of the contracts in question"[261] in the context of renewing a fixed-term contract.

> *"In the practice of Unesco-as well as in the practice of the United Nations and of the Specialized Agencies-fixed-terin contracts are not like an ordinary fixed-term contract between a private employer and a private employee."*

It is worth noting that, in the current UN Staff Rules and Regulation, a phrase was added to specify that a fixed-term appointment carries no expectation, legal or otherwise, of renewal (Staff Rule 4.13(c)). Staff Rule 9.4 further provides that a fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.

The UNAT has made some contradictory claims about the content of the agreement - that the employment relationship is limited to the specific terms of the

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[259] See ILOAT Judgments Lindsey No. 61 1962, Labarthe No. 307 1977, Kennedy No. 339 1978; Also WBAT Judgement 1 (de Merode et al), Mortished UNAdT Judgement 273 (1981). More recently, UNAT found that unconditional acceptance by a candidate of the conditions of an offer of employment before the issuance of the letter of appointment can form a valid contract in Gabaldon, 2011-UNAT-120.

[260] A UN employment contract is not considered the same as a contract between private parties (James, 2010-UNAT-009), but neither are the parties defined as a public entity or a public official.

[261] Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the UNESCO, Advisory Opinion of October 23rd, 1956 : I.C. J. Reports 1956, p. 77.

employment contract,[262] but it is the letter of appointment[263] that governs the conditions of the employment relationship along with the UN internal rules.[264] In *Lindsey*, the ILOAT ruled that Mr. Lindsey's contract of appointment stated that his "duties and rights as an official of the International Telecommunication Union are laid down in the Staff Regulations and in the Rules of the Staff Provident Fund". The judgement also states that,

> *"The terms of appointment of international civil servants and, in particular, those of the officials of the [Organisation], derive both from the stipulations of a strictly individual character in their contract of appointment and from Staff Regulations and Rules, which the* ***contract*** *of employment by reference incorporates. Owing, inter alia, to their increasing complexity, the conditions of service mainly appear not amongst the stipulations specifically set out in the contract of appointment but in the provisions of the above-mentioned Staff Regulations and Rules."*[265]

No judgement specifically addresses the source of the binding power, other than the ICJ Advisory Opinion Effects of Awards cited above.

The second point on agreements is a normative claim on the specificities and prior knowledge of UN law. The UN Official Document System was only opened for general free access on December 31, 2004, and before that the internal regulations - provided that they were not classified - could only be accessed at the depository libraries. Therefore an individual entering into a contract with the UN would have to access the applicable law at a depository library in order to familiarise themselves with the law. Because of legal certainty the knowledge of the terms of employment is imputed on the individual entering into a contractual relationship in domestic law. But considering the number, complexity, availability, confidentiality, and specificity of internal regulations of international organizations, as well as the fact that not every depository library, or even online resource, contains all of the applicable rules; it should not be readily expected that

[262] Hepworth, 2015-UNAT-503

[263] The issuance of a letter of appointment signed by the appropriate United Nations official or someone acting on his or her behalf is more than a mere formality - El Khatib, 2010-UNAT-029.

[264] Muwambi, 2017-UNAT-780

[265] From ILOAT Judgment Lindsey No. 61; See also Lindsey (No.2) Judgement No. 209, 1973.

any individual entering a relationship with the organisation before 2004 would have detailed knowledge of all of them, especially since there is no targeted legal training on offer.

Since the Staff Rules and Staff Regulations form part of the contract, all staff members are deemed to be aware of the provisions at the moment of signing.[266] It is the responsibility of staff members to be acquainted with the Staff Regulations and Staff Rules, and to know and understand the provisions and implications of Administrative Instructions.[267] This also applies to the Staff Regulations and Rules (over 100 pages), several hundreds of Secretary-General's Bulletins, several hundred Administrative Instructions, over a hundred Information Circulars, guidelines and manuals, as well as all the judgements of the tribunals. Considering how limited the scholarship is, there are very few practitioners and academics that can claim knowledge of all of these.

Another way to approach the legal relationship would be through treating international civil servants as public servants that are appointed.[268] This is problematic because the accountability of the administration as a whole is limited to the jurisdiction of the tribunals over "administrative matters" between individual staff members and an organisation. The notion of citizenship and the public itself is terminologically blurred between the role of the collective of Member States as the recipient of the service (which they themselves authorise), or the global society that includes the nation states, non-member states, non-state entities (NGOs, individuals, private parties).

2.5.3 Individual Tribunals

The subjects of the jurisdiction of the international administrative tribunals are the labour disputes between an intergovernmental organisation and an individual staff member. The internal administrative tribunals of international organizations are neither part of a domestic court system, nor are they intergovernmental dispute-settlement bodies, nor are they a part of an official shared judicial system across organizations. Each tribunal has its own statute and rules of procedures, which

[266] Diagne, 2010-UNAT-064; Jennings, 2011-UNAT-184; Christensen, 2012-UNAT-218
[267] Samardzic et. al, UNDT/2010/019. See also, Gripari, Judgement No.620.
[268] See Plantey & Loriot (n. 219)

defines the election of judges, rules on time limits, evidence, hearings, judgements, etc. The case law is not binding on the organisation, although for the sake of judicial continuity the tribunals do refer to earlier decisions, and some decisions are considered leading interpretation of the law. As pointed out above, different tribunals often refer to each other's jurisprudence,[269] and the larger tribunals have jurisdiction over disputes from different intergovernmental organizations (sometimes with very different memberships).[270] The first international administrative tribunal was created nearly 100 years ago, closely following the birth of the international civil service itself.

2.5.3.1 League of Nations and ILOAT

The first recorded case of a dispute between a staff member and an international organisation is between a Mr. Monod and the League of Nations. At first, an ad hoc Commission of Jurists was selected in 1925 to resolve the problem, but, following criticism and discussions between the Member States, the League of Nations Administrative Tribunal was founded in 1927. At the time, the international civil service was only seven years old and counted several hundred

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[269] See WBAT Judgement 1, de Merode et al, paragraph 28 "The Tribunal does not overlook the fact that each international organization has its own constituent instrument; its own membership; its own institutional structure; its own functions; its own measure of legal personality; its own personnel policy; and that the difference between one organization and another are so obvious that the notion of a common law of international organization must be subject to numerous and sometimes significant qualifications. But the fact that these differences exist does not exclude the possibility that similar conditions may affect the solution of comparable problems. While the various international administrative tribunals do not consider themselves bound by each other's decisions and have worked out a sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different. It even happens that the judgments of one tribunal may refer to the jurisprudence of another. Some of these judgments even go so far as to speak of general principles of international civil service law or of a body of rules applicable to the international civil service. Whether these similar features amount to a true corpus juris is not a matter on which it is necessary for the Tribunal to express a view. The Tribunal is free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribunals, particularly those of the United Nations family. In this way the Tribunal may take account both of the diversity of international organizations and the special character of the Bank without neglecting the tendency towards a certain rapprochement."

[270] The ILOAT has jurisdiction over disputes in many large and small intergovernmental organizations, regional international organizations, and international non-governmental organizations.

individuals across a few bodies based in Geneva. The *Monod* decision formulated key questions about the status of the international civil servants and the nature of their relationship with the organisation -

> *"The legal relation which existed between the Secretary-General and M. Monod was not based **merely** upon a contract for the hire of service or labour …"*[271] *[emphasis added]*

One of the longest ongoing disagreements in the field regards the status of global bureaucrats - whether the employment relationship is based on a contract, or on the status of public officials. This question rests on the definition of global public that was addressed in Chapter 1 in the discussion of the Reparation for Injuries Opinion, and the relationship between that public and the intergovernmental organizations. The Monod decision uses a tone that echoes the work of Sayre, and his insistence/hope that the age of nationalism is past -

> *"The public administration must always, in all its acts, have regard to the public interest and respect the principles of justice."*

The Monod decision does recognize the discretionary powers of the administration over the individual civil servants, explicitly because of the public duties conferred on the organisation.

The League Tribunal had jurisdiction over not only the staff of the League, but also the staff of the other institutions and agencies - the ILO, the Health Organisation of the League of Nations (the precursor to the WHO), the Permanent Court of International Justice (the precursor to the ICJ), the Committee on Intellectual Cooperation (the precursor to UNESCO), and the Committee on Refugees (the precursor to the UNHCR).[272] The number of cases adjudicated by the League of Nations Tribunal was very limited - 37 cases between 1927 and 1946 - and therefore did not form consistent legal thought on theoretical issues.

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[271] Monod v. The League of Nations, League of Nations Administrative Tribunal Judgement 1. League of Nations, Official Journal 1925

[272] Currently the membership of the ILOAT is 60 international governmental organizations and NGOs ILOAdministrativeTribunal, "Organizations Recognizing the Jurisdiction of ILOAT" <https://www.ilo.org/tribunal/membership/lang--en/index.htm> accessed October 9, 2023

During the work of the Preparatory Commission of the UN there was no recorded discussion on the transfer of function from the League of Nations tribunal to the United Nations; some writers[273] have asked why it was not, but there has been no official answer, and ultimately the League of Nations Tribunal became the ILO Administrative Tribunal in 1947. The International Labour Conference adopted the Statute of ILOAT in 1946 and it was last[274] amended in 2019. The ICJ established the status of the ILO administrative tribunal in its 1955 opinion -

> *"The Court does not deny that the Administrative Tribunal is an international tribunal. However, the question submitted to the Tribunal was not a dispute between States. It was a controversy between Unesco and one of its officials."*[275]

To date, the ILOAT has delivered over 4700 judgements, which amounts to a considerable jurisprudence across organizations, and without experiencing a major overhaul like the UN system.[276] The ILOAT has significant structural differences in its hierarchical relationship with the rest of the ILO system which contrast some of the contradictions inherent in the UN internal justice system. In the report on harmonising the ILOAT and UNAdT statutes,[277] the JIU[278] found three major differences between the two - the selection of judges, authority to order specific performance; and compensation. The ILOAT judges are appointed by the International Labour Conference - which sets the policies of the organisation and is composed of governmental, worker, and employer delegates - following a nomination by the Director-General of ILO. The ILOAT decides whether to order

[273] See Megzari A, *The Internal Justice of the United Nations: A Critical History 1945-2015* (Brill - Nijhoff 2015), p10
[274] The amendments in between were in 1949, 1986, 1992, 1998, 2008, 2016. There is no explanation in official documents or scholarship for the large gap between 1949-1986.
[275] UNESCO Advisory Opinion, (n. 261)
[276] There have been proposals and movements for amending the ILOAT. See Gallo D, *The Administrative Tribunal of the International Labour Organization (ILOAT),the InternationalCourt of Justice (ICJ) and the Right of Access to Justice of International Organizations:The Need for a Reform in Light of the ICJ Advisory Opinion of 1 February 2012* (Working Paper 2014)
[277] There were previous attempts to harmonise the Statutes in 1979-1989, unsuccessfully. See Megzari, (n. 273) Ch15 p375
[278] JIU Report, Administration Of Justice : Harmonization of the Statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal, 2004. JIU/REP/2004/3. See chapter 3 on the history, structure, and role of the JIU.

rescission or monetary compensation, whereas at the UN the Secretary-General decides between the two, and the ILOAT Statute does not put limits on compensation. The JIU recommendations were never implemented in practice, and the two systems of law continue to be separate and divergent.

The discrepancies between the two largest and oldest international administrative tribunals underline a subtle difference in approaching the function and autonomy of these judicial bodies. The ILO was created with the intent to establish "universal and lasting peace … based upon social justice"[279] and those were considered inseparable from conditions of labour. Thus the function of the organisation is explicitly to ensure justice for workers, and the purpose of the civil service is to promote that function. While political frictions would still arise, there is a clearer unity of purpose and of interpretation of the interests of the organisation in applying the law.

2.5.3.2 UNAdT, UNDT/UNAT

The UN inherited the physical property of the League and also the core legal principles, including the international character and ethical fundamentals of its civil service, the organisational privileges and immunities, and the basic provisions of the staff regulations. However, the status of the tribunal was not handed down, and from the very establishment of the UNAdT there was a question of whether there was a need for a legal body, or for an administrative council. There is plenty of evidence that Secretary-General Lie preferred a non-legal means for conflict-resolution, and even pushed for excluding disciplinary cases from the jurisdiction of the tribunal.[280] Amerasinghe[281] has argued that the creation of the Tribunal is evidence that the judicial resolution was considered meritorious, but the fact that administrative bodies are also part of the judicial process speaks otherwise.

During the creation phase of the tribunal there were contentious questions of jurisdiction and judicial review - whether the Tribunal could interpret the general administrative decisions, or only the contractual issues - and authority hierarchy -

[279] International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO)*, 1 April 1919
[280] United Nations General Assembly, Report of the Secretary-General. Establishment of an Administrative Tribunal. 21 September 1949, A/986, page 2 para 5
[281] Amerasinghe (n. 189)

whether the Tribunal could bind the Secretary-General, who is the “chief administrative officer”. The latter could be considered to go against the Charter, but if the Secretary-General would be able to overrule a judgement, then the Tribunal would not be a real judicial body. There was a long debate on whether to call the body a tribunal or a staff complaint body, or whether the judges would be called judges or “members”.[282] Also, before 2009 a staff member had to go through a pre-judicial process involving administrative bodies - the Joint Disciplinary Committee and the Joint Appeals Board. All of these facts seem to contradict the ICJ Opinion that the General Assembly unambiguously intended to create an independent judicial body.

The UN administrative tribunal issued its first judgements in 1950, and a total of 1499 judgements before its dissolution in 2009. According to some statistics, 625 of those judgments were in favour of staff fully, almost fully or in part, which accounts for 35,7 percent of all decisions; this percentage decreased from 39 in the first 30 years to 34 in the second 30 years.[283] Such statistics does not yet exist for any other tribunal,[284] and it does not represent concrete evidence either way, but it does raise a question about the fairness and impartiality of the tribunal. Moreover, the UNAdT budget was part of the budget for the Office of Legal Affairs, and the offices of the tribunal were in the same building as the OLA - the office which represented the Secretary-General in disputes before the tribunals. After the 2009 reforms, it is the OLA that represents the Secretary-General at UNAT, and the OHRM represents the organisation at the lower-tier UNDT.

The UNAdT was heavily criticised for the lack of appeal procedures, the lack of access to qualified and independent counsel, the lack of oral hearings, the lack of administrative law experience among the judges, among others, and reform

[282] Megzari, (n. 273)
[283] Ibid, Chapter 11.
[284] The OAJ publishes activity reports, which include outcome statistics. However, the terminology of the statistics is not consistent across reports. The last report (2018) includes an overview for 2009-2018, which has a new separate section for judgements where the application was not receivable. Because of the ongoing confusion about time limits and non-judicial processes, as well as the fact that the tribunals have dismissed every staff claim that did not very strictly conform to the time limits, but not enforced the same on the Secretariat, it is not a clear trend. “United Nations Office of Administration Of Justice” (*ACTIVITY REPORTS*) <https://www.un.org/en/internaljustice/oaj/activity-reports.shtml> accessed October 9, 2023

attempts dating back to the 1970s. According to the report of the Redesign Panel on the United Nations system of administration of justice from 2005,

> *"the administration of justice in the United Nations is neither professional nor independent. The system of administration of justice as it currently stands is extremely slow, underresourced, inefficient and, thus, ultimately ineffective. It fails to meet many basic standards of due process established in international human rights instruments. For all these reasons, staff of the Organization have little or no confidence in the system as it currently exists."*[285]

The UNAdT was abolished by the General Assembly on 31 December 2009 and a two-tier system consisting of first instance, the UN Dispute Tribunal (UNDT), and of an appellate instance, the UN Appeals Tribunal (UNAT) was created by way of Resolutions 61/261 of 4 April 2007 and 63/253 of 24 December 2008. In addition, the Assembly created the new Office of Administration of Justice (OAJ) to manage the UNDT and the UNAT, as well as the Office of Staff Legal Assistance (OSLA) - established by General Assembly Resolution 62/228 from 2007.

The redesign was hailed as a resolution to most, if not all, of the above-mentioned issues. The OAJ has its own budget and separate offices; the OSLA offers legal advice and representation to staff in New York, Geneva, Nairobi, and Addis Ababa. However, the issues of selection of judges, the organisational culture, and the non-judicial process were not affected considerably; and the resources of OSLA are very limited.[286] The civil rights, judicial review, and rule of law issues will be further discussed below, and the effects on the organisational culture will be addressed in chapter 3.

The most significant issue with the new UN administrative justice system is the role of the UN Appeals Tribunal - a clear example of a use of parallels to domestic

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[285] Redesign Panel on the United Nations System of Administration of Justice, Report, 28 July 2006. A/61/205

[286] See, among others, Reinisch A and Knahr C, *From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal: Reform of the Administration of Justice System Within the United Nations* (Max Planck Yearbook of United Nations Law 12 2008); Otis L and Reiter EH, *The Reform of the United Nations Administration of Justice System: The United Nations Appeals Tribunal after One Year"* (The Law and Practice of International Courts and Tribunals 2011);

law. The Statute of the UN Appeals Tribunal establishes that the judgements are binding on parties (Art 10.5) and final (Art 10.6 subject to Art 11). However, UNAT itself has assumed the much wider power of *res judicata* (final judgement) and *stare decisis* (binding precedent) in a series of judgements, an action that was not disputed by the General Assembly.

Res judicata is a principle in both civil and common law jurisdictions that prevents endless litigation on the same matter, unless the matter concerns due process. Civil law countries have much narrower application of *res judicata* - the claim, remedy, and parties would have to be identical - than in common law - where a different remedy sought on the same issue could be dismissed. The UNAT has adopted a very wide such competence in *Shanks*, ruling that "[t]here must be an end to litigation and the stability of the judicial process requires that final judgments by an appellate court be set aside only **on limited grounds and for the gravest of reasons**" [emphasis added].[287] So far the Tribunal has used *res judicata* to refuse to re-adjudicate any case, although the history of jurisprudence is still relatively short to make final conclusions.

Further, the Appeals Tribunal held in in *Hepworth*, that

> *"The principle of stare decisis ... [creates] foreseeable and predictable results within the system of internal justice. The Appeals Tribunal has the power of judicial review of the Dispute Tribunal's decision making, and the Dispute Tribunal should recognize, respect and abide by the Appeals Tribunal's jurisprudence. ... the Appeals Tribunal finds that the Dispute Tribunal acted unlawfully in issuing an Order in direct contravention with the Appeals Tribunal's jurisprudence."*[288]

Stare decisis is a principle in common law systems, wherein the precedent is binding on lower tribunals in subsequent cases with similar facts and questions of law. It is supposed to create a stable system of consistent interpretation of rules. In civil law jurisdictions, precedent is guiding, but not binding, and court decisions refer to statutes. The judgements of the administrative tribunals are binding on the parties as per their statute, but giving the tribunals the power to bind future

[287] Shanks, 2010-UNAT-26bis;
[288] Hepworth 2015-UNAT-503

judgements of the lower-tier goes against general principles of justice such as *patere legem* - that an authority is bound by its own rules, as long as such rules have not been changed or abolished.[289]

According to Art 6 of the UNAT Statute, the Appeals Tribunal has the power to establish its own rules of procedure, subject to the approval of the General Assembly. The Appeals Tribunal was not given either *stare decisis* or *res judicata* powers by the UN General Assembly, but instead added to its own mandate by way of adjudicating a dispute between two parties. As will be demonstrated in Chapter 4, the UNAT excluded the UN Ethics Office from judicial review in a similar way, which amounts to editing its own mandate and the internal legal system of the organisation.

The appeals circuit exists to provide a system for reassessing judgements, but the above-mentioned trends at the UNAT to assume powers, and the tendency of the UN tribunals to side with the administration does not bode well for the independent and fair system of justice. And, with the elimination of the recourse to the ICJ, the appeal and oversight of the UN administrative justice system is now entirely internal and subject to all of the above-mentioned independence issues.

2.5.3.3 Appeal and Role of the ICJ

The ICJ has played an important role in the law of the international civil service through several advisory opinions.[290] According to the Statutes of both the ILOAT (Art VI.1) and the UNAdT (old Art 11) their judgements "shall be final and without appeal". However, the parliamentary organs of the organizations can request a legal advisory opinion from the ICJ, which becomes binding (Art XII.2 of ILOAT). This is made possible through Art. 65.1 of the ICJ Statute and Art. 96

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[289] Unsurprisingly, patere legem is not applied uniformly at ILOAT and UN tribunals. The ILOAT has ruled, for example "une organisation internationale a le devoir de respecter ses propres règles internes et d'agir de manière qui permette à ses employés d'avoir l'assurance que ces règles seront respectées" A.E.L v. ITU, ILOAT Judgement 2170 2003, which has been quoted many times. The UNDT has mentioned only in one case -"The Administration was bound as a matter of law to follow its own rules, in accordance with the principle of patere legem, which requires the Administration to act in good faith towards its staff by making decisions that are in accord with the rules of the Organization". Johnson, UNDT/2011/124

[290] Gomula J, "The International Court of Justice and Administrative Tribunals of International Organizations" (1992) 21 Michigan Journal of International Law 83

of the UN Charter. The ICJ Statute provides that "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Charter states, that: "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question"; and that "[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities". These provisions create a very odd caveat to the jurisdiction of the ICJ, as stated in Art 34.1 "[only] states shall be parties in cases before the court"; technically, an advisory opinion is not a "case", and neither individuals nor international organizations are states. Some authors argue that labour disputes do not fall within the jurisdiction and expertise of the ICJ at all.[291] Also, only international organizations can request Advisory Opinions and be represented before the ICJ, which creates inequality of arms between the parties as pointed out by the ICJ in its 2012 Advisory Opinion on Judgement No. 2867 of the ILOAT.[292] The Opinions are influential in the interpretation of the law, and are rarely disputed openly.

The first such Advisory Opinion was the above-mentioned Effect of Awards in 1954, after which the General Assembly Resolution 957 (X) of 8 November 1955 amended the tribunal Statute, introducing Art 11; through that provision the ICJ served as appellate court on three applications for review of UNAdT judgement - Judgement 158, 237, and 333. Art 11 of the UNAdT Statute was abolished in 1995 through General Assembly Resolution 50/54, but the ILOAT Statute has not been amended to exclude Art XII.2. It is probably significant that the ICJ has always sided with the employees against the organizations, and as a world court it has the independent, external authority to bind the General Assembly. As was pointed out above, the Assembly has repeatedly asserted its its power to interpret the highest source of the law of the UN civil service - the UN Charter.

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[291] See Webb P, *International Judicial Integration and Fragmentation* (Oxford University Press 2015), p211, note 39

[292] Judgement No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012, p. 10

2.5.4 Hierarchy of sources and interpretation

This section will outline the concrete hierarchy of laws in the UN internal administrative legal system, with few examples from other organizations to provide context. The basic structure of rules is quite similar across organizations, with the exception of terminology and labels.

The UN internal legal hierarchy of the sources of law is governed by the UN Charter, followed by the Staff Regulations, Staff Rules, Administrative instructions and Secretary-General Bulletins, reports and non-legal instruments[293]. The UN Charter contains the goals and function of the entire organisation, which justify the mandate of the Secretariat and provide the legality of all actions of the bureaucracy. Certain Charter provisions directly regulate the UN civil service specifically - Article 8 (gender equality), Article 97[294] (SG appointment), Article 100 (independence, impartiality, international character), Article 101[295] (GA role, organs, highest standards of efficiency, competence, integrity), Article 105[296] (privileges and immunities). Underneath the Charter are the Staff Regulations and Rules, which are published in the same document and are usually interpreted together. The Regulations are legislated by the General Assembly and contain the basic principles of the internal justice system and human resources policy of the UN. The Rules are legislated by the Secretary-General contingent on the approval of the General Assembly, containing a more detailed legal system. The lowest level of binding rules are the Administrative Instructions and Secretary-General Bulletins, which deal with particular legal questions - staff selection; delegation of authority, internal organisation, etc. Certain instruments are considered non-binding rules and are sometimes interpreted by Tribunals as guidelines:[297]

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[293] The hierarchy was established by the UNDT in the case of Villamoran, UNDT/2011/126, which was confirmed by UNAT in Villamoran, 2011-UNAT-160, and upheld in virtually all subsequent decisions.
[294] See Koda, 2011-UNAT-130
[295] See Abbassi, 2011-UNAT-110;
[296] See Staff regulation 1.1 (f) ST/SGB/2017/1
[297] See Stoykov, UNDT/2013/070

"Information circulars, office guidelines, manuals, memoranda, and other similar documents are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances. …

Circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, but only as long as they are consistent with the instruments of higher authority and other general obligations that apply in an employment relationship."[298]

The UN Appeals Tribunal has ruled in *Mashhour* that the assumption is that there is no conflict of law between legal and non-legal instruments, but that the former have a greater authority. There is a certain discrepancy in the fact that tribunals distinguish between legal and non-legal instruments of internal administrative law law - ie between law and human resource management - but the General Assembly does not. To repeat Resolution 68/254 2014, where the Assembly,

"5. Reiterates that decisions taken by the Dispute Tribunal and the Appeals Tribunal shall conform with the provisions of General Assembly resolutions on issues related to human resources management;"

In fact, the Staff Rules and Regulations are discussed and amended in the 5th Committee ("Administrative and Budgetary Committee") rather than the 6th Committee ("Legal Committee"), while the non-legal instruments are promulgated by the Secretary-General and agents acting in his authority. Therefore, the binding "administrative issuances" are part of the Assembly's "human resource management", while the non-legal instruments are not part of the human resource management or strategy.

As pointed out above in *Stoykov* and in Section 2.3, some tribunals refer to "general obligations", "general principles", and "custom", hinting at a unified law of international civil service. According to Amerasinghe, there are several common principles of international administrative law - independence, neutrality, the

[298] Villamoran, UNDT/2011/126

application of internal law, hierarchy & efficiency - but there is no authoritative interpretation. As was pointed out in *Sanwidi*,

> *"There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reasons interfere with the exercise of administrative discretion."*[299]

In *Kallon*, the UNAT held that,

> *"Mutual trust and confidence between the employer and the employee is implied in every contract of employment. And both parties must act reasonably, fairly and in good faith."*[300]

These decisions create the space for a lot of uncertainty in the law of the international civil service. In essence, general terms from domestic administrative law, taken from across jurisdictions, can be applied at the discretion of judges from various jurisdictions, to a body of law that is removed from the domestic backbone of law of those legal systems. On top of that, the interpretation of those principles in the jurisprudence is not uniform.

The interpretation of the law - whether plain text, original intent, or context - should be guided by functional necessity. However, the tribunals are neither allowed to interpret the organisational goals, nor allowed to deviate from the principles set in the Charter as per the General Assembly assertions. The tribunals have respectively formulated a case-by-case approach to interpretation. In an attempt to interpret a "temporary-indefinite contract", which has no counterpart in domestic law, in 1951 the UNAdT noted that,

> *"[the tribunal's] interpretation of legal rules must respond to the following requirements: (1) the interpretation must be a logical one; (2) it must be based upon an attempt to understand both the letter and the spirit of the rule under construction, and (3) the interpretation must be in conformity with the*

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[299] Sanwidi 2010-UNAT-084
[300] Kallon 2017-UNAT-742

> *context of the body of rules and regulations to which it belongs, and must seek to give the maximum effect to these rules and regulations."*[301]

The decision concluded that the Assembly did not intend to give the Secretary-General unlimited discretionary powers to terminate such contracts.[302] It is worth noting again that the Assembly does not openly dispute the judgements of the tribunals, but does occasionally amend the regulations to reflect a different interpretation of the law.

There is a lot of evidence that the UN administrative tribunals have gone back and forth between a literal and contextual interpretation. In *Kremer and Gourdon* from 1994, the UNAdT stressed that construction is to be made of the text as a whole, and not of one section alone.[303] In Judgement No 1225 *(Applicant)* in 2005 and Judgement 1486 *(Applicant)* in 2009, the UNAdT based its decisions on an interpretation according to the "ordinary meaning" of the terms "in their context and in the light of [their] object and purpose".[304] In *Adrian,* in 2004, the core issue was whether the interpretation of spouse included in the Staff Regulations was to be interpreted to include gay spouse. The decision concluded that the "Tribunal should ... ensure that this interpretation does not conflict with the letter and spirit of the Staff Regulations and Rules." The Tribunal upheld the right of the Secretary-General to issue information circulars which are applicable as the leading interpretation of the current law, including the interpretation of the term "spouse" to include same-sex spouses.[305]

Finally, the new UN Appeals Tribunal appears to have taken a turn to a much more conservative and literal approach to interpretation. In *Scott*, the Appeals Tribunal concluded that,

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[301] Howrani et al, UNAdT Judgement 4, 1951

[302] The issue of administrative discretion has been complicated and recurring in the jurisprudence of the UN administrative law, inasmuch as the tribunals cannot define the limits of the power vested in the Secretary-General because that is up to the General Assembly. On the other hand, the judges do have to decide whether the actions of the administration infringe on staff's conditions of employment, or violate certain "rules of justice and equity".

[303] Kremer and Gourdon, UNAdT Judgement 656, 1994

[304] Applicant UNAdT Judgement 1225 and Applicant UNAdT Judgement 1486

[305] Adrian UNAdT Judgement 1183

"The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in the hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author."[306]

This decision was upheld later on, even when the Tribunal referred to other provisions to create a context. This technical interpretation has affected the whistleblower judgements as well. In contrast, the ILOAT has avoided literal interpretation, stating that such an approach "frustrates the purpose and object of the provision" to create fair employment conditions (Judgement 3429) and "any ambiguity in a provision should be construed in favour of staff and not of the Organisation" (Judgement 3310). The dichotomy underlines the ILO's emphasis on worker's rights as the overriding spirit of the law of the international civil service.

The sources of international administrative law and their interpretation are the building blocks of the internal legal system; the manifested contradictions and tug of war between law, politics, and human resource policy-making are reflected in the defining legal issues listed in the next section.

2.5.5 Jurisprudence and issues

This thesis aims to focus on whistleblower cases - their background, the actions of related structures and their policies, the applicable rules and mandates, the interpretation in the tribunal decisions, and the outcome for both individual and society - which will be analysed in detail in Chapter 4. This subsection provides the bridging dogmatic framework for those cases - the jurisdiction, procedure, and substance - and which connects the public international law framework to

[306] Scott 2012-UNAT-225

individual cases. Chapter 3 will further supply an outline of the authority of the organisational leadership, and the relevant departments - the Office of Legal Affairs, OHRM, OIOS, and the Ethics Office.

Article 101 of the UN Charter tasks the UN Secretary-General with hiring and running the Secretariat, and Art 101(3) vests the Secretary-General with the discretion to hold staff members to the highest standards of "efficiency, competence, and integrity". Chapter I of the Staff Rules and Regulations contains the "Duties, obligations, and privileges" of staff, and their basic rights and obligations are set out in Staff Regulation 1.2 and Rule 1.2, detailing the core values, general rights and obligations, and specific rules regarding honours, gifts and remunerations, conflict of interest, outside employment and activities, use of property, etc. Chapters II-VII contain provisions on salaries, leave, post classification, etc. and Chapter X deals with disciplinary measures, which will be discussed in more detail below in the substantive issues. Chapter XI outlines the appeals process - i.e. the formal system of administration of justice, consisting of informal and administrative steps (Rule 11.1 and 11.2), the lower-tear UN Dispute Tribunal (Rule 11.4), the second-tier Appeals Tribunal (Rule 11.5). The Staff Rules and Regulations are separate from the Statutes of the tribunals.

Between 2009-2020 the UNDT has delivered just under 2000 judgements and hundreds of orders, and the UNAT has pronounced on over 1000 appeals. As pointed out above, between 1950-2009 the UNAdT made only 1499 judgments. The UNDT/UNAT jurisprudence is therefore large and complex and cannot be covered in detail, but one defining characteristic is the dichotomy between misconduct and appointment/administrative issues.[307] This is not an official classification that is used to mark judgements and it is therefore difficult to estimate a ratio, but between 450-550 (out of 2000) of UNDT judgements, and around 250 appeal judgements (out of 1000) deal with disciplinary matters. Some professionals liken the division to domestic criminal vs. civil law, a parallel that is problematic because of the above-mentioned non-applicability of private law, and the application of internal organisational law on a contract with an individual before they are the subject of the legal system. Moreover, the tribunals have

[307] Non-disciplinary issues have been divided by practitioners into appointment-related, benefits and entitlements, separation and non-renewal, post classification, and performance.

stressed that misconduct cases differ from criminal cases in key areas - chiefly burden of proof and due process - which create a number of issues that will be examined below.

This thesis will not analyse non-disciplinary cases or issues in detail because whistleblower cases by definition address misconduct - the behaviour of individual civil servants against a certain principle or rule, the notification of that behaviour by another civil servant, and the consequences (often also misconduct) for the latter, also including actions by the administration organs. However, some important questions cover both non-disciplinary and disciplinary cases. One such key question is the exclusion of certain administrative acts from judicial review under receivability.

2.5.5.1 Jurisdiction / competence

Article 2.1(a) of the UNDT Statute defines the scope of the Tribunal's jurisdiction:

> *"The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ... against the Secretary-General as the Chief Administrative Officer of the United Nations ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment."*[308]

The term "administrative decision" was defined by the UNAdT in *Andronov*, which held that "administrative decisions are characterised by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences".[309] The definition was adopted by both UNDT and UNAT in a series of cases[310] -

> *"an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order [...]*

[308] This formulation differs from the Statute of the UNAdT, wherein the jurisdiction was limited to "applications alleging non-observance of contracts of employment ... or of the terms of appointment" of staff members. Art 2.1
[309] Andronov UNAdT Judgement 1157
[310] For example Manco, UNDT/2012/104; and Larkin, 2011-UNAT-135.

Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences."

There are several issues with that definition. First and most significantly, it creates a vacuum of non-decisions - ie the difficulty of challenging the decision of the Administration not to take certain action. On one hand, non-decisions or omissions may be contestable,[311] and in *Tabari*, the UNAT held that "not taking a decision is also a decision". A staff member cannot contest non-appointment to a post,[312] but can contest the decision to appoint another candidate. However, a decision by the administration not to conduct an investigation or institute disciplinary action against another staff member is not a contestable decision;[313] and neither is the decision not to confer whistleblower status, as will be pointed out in Chapter 4.

Secondly, the tribunals have created categories of "intermediate"[314] and "conditional"[315] decisions, "implementations",[316] "general policy",[317] "advice from technical bodies", and "recommendations" that are not contestable. There is no concrete definition of any of those terms, but the reasoning is based on the fact that only a "final" administrative decision produces "direct legal consequences" for the individual staff members contesting the decisions. Early decisions by the UNDT have questioned such exemptions, citing that -

"limiting judicial review only to decisions which were or could have lawfully been made by the Secretary-General would entail leaving entire areas of the Administration's activity out of any meaningful control of legality. This appears hardly compatible with a legal order which, like that of the United Nations, postulates the principles of rule of law and access to justice (see Comerford-Verzuu UNDT/2011/005 and Kunanayakam UNDT/2011/006). Additionally, it seems logical to assume that, had the General Assembly intended to exempt certain sectors of the Organization

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311 Porter, 2015-UNAT-507.

312 Planas, 2010-UNAT-049.

313 Nwuke, 2010-UNAT-099; Ivanov 2015-UNAT-519.

314 Ishak, UNDT/2010/085, affirmed in Ishak, 2011-UNAT-152.

315 Lee 2014-UNAT-481.

316 Saeed, 2016-UNAT-617.

317 Lebeouf et. al, UNDT/2010/206

from scrutiny under the new internal justice system, it would have done so clearly and explicitly."[318]

Despite several UNDT decisions deeming the cases receivable, the UNAT has repeatedly and unequivocally exempted the "recommendations" of the Ethics Office from judicial review because they are not "final" decisions.[319] This is evidence that not only has there been a conflict between the two tiers, but that the second-tier has modified the jurisdiction of the tribunals by use of jurisprudence and the above mentioned *res judicata* and *stare decisis*.

The Tribunals have made a case-by-case determination of what constitutes a contestable decision, undermining the legal certainty of the system. In *Sanwidi* the UNAT defined the Dispute Tribunal's judicial review function as follows:

"When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General."[320]

This decision somewhat undermines the independence of the Dispute Tribunal, as well as creates a hierarchy where the Secretary-General (and his agents) are above scrutiny.

Further, in order for an administrative action to be reviewable, it has to be "so unreasonable that no reasonable decision-maker could have taken it".[321] That reasonableness depends on "the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of

[318] Worsley, UNDT/2011/024.
[319] See Chapter 4 on Wasserstrom, Hunt-Matthes, Reilly, etc.
[320] Sanwidi 2010-UNAT-084
[321] Sina UNDT/2010/060. Also see Kallon 2017-UNAT-742

the decision on those affected by it."[322] Judicial review based on rationality "requires only that a decision be rationally connected to the purpose for which it was taken and be supported by the evidence. … [and] must also further the purpose for which the legislative power was given to the administrator". There is an overriding presumption that official acts have been regularly performed,[323] and a staff member may only contest decisions that impact them personally and negatively.[324] This affects the burden of proof and participation of staff representatives, discussed in the following sections.

This subsection reflects on some bias in the legal reasoning by the tribunals on the side of the administration. The right to judicial review is a fundamental right, but tribunals have managed to exclude a significant portion of the acts of administration just based on *ratione materiae*. There are further barriers in the non-judicial and judicial procedures, *ratione temporis*, as well as the burden and standard of proof applied in the adjudication.

2.5.5.2 Procedure / due process

Procedural chains differ somewhat between disciplinary and non-disciplinary cases. A staff member who wishes to formally contest an administrative decision has to first make a request for management evaluation (Staff Rule 11.2(a)) to the MEU in the Department of Management, within 60 days of being notified of that decision.[325] Before the establishment of the MEU, staff members were obligated to contest administrative decisions at the Joint Appeals Board. Requesting management evaluation is mandatory[326] and decisions that are not included in the request for management evaluation and have not been reviewed may not be contested in an application before the Tribunal.[327] A staff member cannot seek judicial review of the management evaluation process itself.[328] Upon receipt of the management evaluation request, the MEU has 30 days (for headquarters) and 45

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[322] Kallon 2017-UNAT-742
[323] Rolland, 2011-UNAT-122. See below on burden of proof
[324] Obino 2014-UNAT-405, Pedicelli 2015-UNAT-555. A staff member must show that a contested administrative decision affects their legal rights. See Larkin, 2011-UNAT-135.
[325] See GA resolution A/RES/62/228.
[326] Gehr, 2012-UNAT-331.
[327] Syed, 2010-UNAT-061.
[328] Nwuke 2016-UNAT-697.

days (field offices) to provide a written answer. A staff member wishing to contest the administrative decision has 90 days from receiving the MEU answer, or from being informed of a disciplinary measure, or after the expiry of the relevant response period from the above deadline. Any of the parties to the dispute can file an appeal within 60 days of receipt of a UNDT judgement, and the respondent has 60 days to submit an answer.[329] It is important to note that currently those time limits, forms, and instructions are available online, but that wasn't the case until about 20 years ago.

Historically, time limits have been a contested issue in the administrative justice of the UN. The UNAdT had a strict 90 days rule for applications by staff members, but the tribunal regularly granted extensions of several months and even years to the Secretary-General as the Respondent.[330] Article 7 of the UNDT Rules of Procedure lists the time limits for filing applications, and Article 7.5 provides a procedure for seeking a waiver to the time limits. The parties can also file a joint motion for extension of time, in cases where remedies are discussed out of court.[331] The Appeals Tribunal noted in *El-Kathib* that only circumstances beyond the staff member's control that would actually prevent the staff member from pursuing legal action may be regarded as "exceptional circumstances" warranting such a waiver.[332]

On the other hand, a staff member is not required to seek management evaluation of disciplinary measures imposed against them (Staff Rule 10.3(c)). The Provisional Staff Rules, approved by Secretary-General Lie in 1946[333] contain the first rule[334] on disciplinary measures, and the first Staff Rules approved by Lie in

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329 There are different time limits for appealing an interlocutory order, pension fund decisions, and some others. See "UNOAJ" (*UN APPEALS TRIBUNAL TIME LIMITS - WHEN TO FILE*) <https://www.un.org/en/internaljustice/unat/time-limits.shtml> accessed October 10, 2023

330 See Jensen, UNAdT Judgement 1030 - 2 and a half years.

331 See below in the case of Hunt-Matthes.

332 El-Kathib, 2010-UNAT-029.

333 Provisional Staff Rules, SGB/3, 9 March 1946

334 Rule 24 "Disciplinary measures may be imposed upon any staff member in the event of misconduct or unsatisfactory work. In order of severity, disciplinary measures shall include oral warning, written censure, transfer to an inferior post, reduction of salary, suspension with or without pay, discharge or summary dismissal. If a charge of serious misconduct is made against a member of the staff and the Secretary- General considers that the charge is prima facie well founded and that the staff members continuance in office pending an investigation of the charge

1950[335] contain Chapter IX on "Disciplinary Measures and the Joint Disciplinary Committee". Between 1950-2009, disciplinary measures were handled on first, non-judicial instance by the Joint Disciplinary Committee. Following General Assembly resolution 31/26 of 1976, the Secretary-General established further informal panels (ST/AI/246) that would deal with disciplinary questions before resorting to formal investigation and charging. Naturally, this led to further delays that affected the effectiveness of the legal system.

From 1991[336] until 2017, administrative instruction ST/AI/371 governed the disciplinary investigation and charging process, including due process rights to be afforded a staff member against whom misconduct is alleged. The disciplinary procedures utilised a three stage process - an investigation, a referral to OHRM, and a "formal allegations of misconduct" process. The Tribunals have often grappled with what constitutes an investigation, the threshold for investigation, and the difference between fact-finding by the managers and investigation. In terms of due process, in one of the whistleblower cases,[337] the UNDT stated that staff members are entitled to "some" due process rights during the investigation process, which includes standards of confidentiality, objectivity, impartiality, fairness, and the avoidance of conflicts of interest.[338]

In *Johnson*, the UNDT ruled that

> *"The distinct procedural steps for disciplinary matters are:*
>
> *a.An initial "reason to believe" that a staff member has engaged in unsatisfactory misconduct (sec. 2);*
>
> *b.A preliminary investigation to determine whether the belief of unsatisfactory conduct is "well founded" and whether the matter "should be pursued" further through formal investigation (secs. 3 and 4);*

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would prejudice the service, the staff member may be suspended from his functions pending investigation, the suspension being without prejudice to the rights of the staff member."

335 Staff Rules, ST/AFS/SGB/81/Rev.1, 16 June 1950

336 The pre-1991 corresponding document PD/1/76 is not publicly available.

337 Nguyen-Kropp UNDT/2013/028 and Postica UNDT/2013/029

338 See also Makwaka*,* UNDT/2013/002.

c.An evaluation by the relevant responsible official recommending whether to pursue the matter further (sec. 4);

d.A decision by the ASG/OHRM, whether the matter should be pursued with written allegations of misconduct (sec. 5);

e.The initiation of a formal investigation with the filing of formal charges against the staff member (sec. 6);

f.The implementation of due process rights for the staff member and right of the reply for the staff member (sec. 6);

g.The review by the relevant official of the entire dossier on whether the matter should proceed further (sec. 9(a)); and

h.Where it appears that misconduct has occurred, referral to the Joint Disciplinary Committee (sec. 9(b)).”[339]

It is a significant problem that the decision to impose a disciplinary measure or not is entirely internal and confidential, and made not by the independent OAJ or OIOS, but by the OHRM. The main obvious issue with this process is that the staff member was not notified of the charges, nor afforded due process rights until very late. The tribunals have held very contradictory points on whether until a staff member is formally informed of the investigation and the charges, they have a right to counsel.[340] In some cases the tribunals have emphasised that staff members should be allowed a lawyer during investigations in order not to unknowingly incriminate themselves.[341] The UNAT held in the case of *Applicant* (2012-UNAT-207) that due process rights “apply once the disciplinary proceedings have been initiated. They obviously cannot apply during the preliminary investigation because they would hinder it.” However, in *Stoykov*, the UNDT has criticised and contradicted *Applicant* (2012-UNAT-209). Judge Boolell stated:

“With due deference to UNAT this Tribunal cannot agree with that proposition. The UNAT has not explained how counsel would hinder an investigation. This Tribunal has not seen any evidence in the UNAT

[339] Johnson, UNDT/2011/123.
[340] Zoughy, UNDT/2010/204.
[341] Ibrahim, UNDT/2011/115.

> *judgment about this wide proposition and no court of law should either assume that the presence of counsel would hinder an investigation without clear evidence or take judicial notice of such a fact"*

In the early years of its existence, the UNDT criticised heavily some investigations whose conclusions were "not based on any scientific examination but emanated from the impression formed by investigators"[342] and that failure to conduct an investigation was a violation of due process rights.[343] In *Abboud*, the tribunal stated that all decisions must be "objective judgment free from bias or error, not the personal opinion of the decision-maker"[344] and that investigators have to investigate particular breaches of UN rules rather than taking "shots in the dark". [345] An internal investigation was expected to be impartial, to collect all evidence,[346] and to begin with a presumption of innocence.[347] In *Messinger*, the UNDT found that both investigators were "hopelessly compromised",[348] an issue that was also found in *Cook*,[349] and which features heavily in one of the whistleblower cases - Nguyen-Kropp & Postica - where the misconduct was committed by an investigator, who then launched a retaliatory investigation against the whistleblowers. The structure and organisational culture of the investigator's office - OIOS - will be analysed in the next chapter.

In *Borhom*,[350] the UNDT ventured to define misconduct cases as "quasi-criminal" in nature, and thus the burden of proof would be higher than a "civil" burden, and that the "more serious the allegation, the more convincing the evidence must be." The standard of proof is therefore defined as "clear and convincing evidence", which, however, is considered lower than the "beyond reasonable doubt" standard. The burden of proof is on the staff member who challenges a disciplinary measure to produce evidence to show that the Administration's decision was biassed,

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[342] Lutta, UNDT/2010/052
[343] Borhom, UNDT/2011/067
[344] Abboud, UNDT/2010/001
[345] Massah, UNDT/2010/218
[346] Lutta, UNDT/2010/052
[347] Borhom, UNDT/2011/067
[348] Messinger, UNDT/2010/116
[349] Cook, UNDT/2012/154
[350] Borhom, UNDT/2011/067

improperly motivated or flawed by procedural irregularity or error of law.[351] With regard to witnesses, on one hand, the Administration is not held to produce witnesses before the tribunal because the UN operates globally.[352] On the other, written statements need to include some form of oath of truthfulness, and statements from former staff members who would bear no consequence for lying are not considered clear and convincing evidence.[353]

Another interesting point covers the questions of allowing staff members access to evidence and investigation reports. The UNAT decided in *Applicant* (2013-UNAT-280) that the staff member's due process rights were not breached by his not having a copy of the complaint against him. The UNDT in *Cook* held that an investigator could not ask questions of the alleged perpetrator without informing him of the investigation. Some judgements maintained that the staff member did have the right to access the investigation report,[354] others concluded the opposite.[355]

Finally, a staff member who has reported misconduct, like a whistleblower, has no interest in contesting a decision by the administration not to effect a disciplinary measure. In *Ishak*, the UNDT held that

> *"It is clear that the [staff member] has a right and a duty to report to his management any misconduct that comes to his notice. However, when, as in this case, the alleged misconduct does not in any way affect his rights, the [staff member] has nothing to gain by contesting the management's follow-up to his report" .*[356]

As mentioned above, a decision by the administration not to conduct an investigation or institute disciplinary action against another staff member is in and of itself not a contestable decision, unless, in theory, the staff member can demonstrate that their legal rights were affected directly.

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351 Abu Hamda, 2010-UNAT-022
352 Applicant 2013-UNAT-302
353 Nyambuza 2013-UNAT-364
354 Adorna, UNDT/2010/205
355 Ivanov, UNDT/2014/022
356 Ishak, UNDT/2009/072

Administrative instruction ST/AI/371 was the subject of lengthy internal negotiations before it was finally updated in 2017. The new ST/AI/2017/1 has only been applied in a handful of UNDT cases so far, and in half of those it was wrongfully applied retroactively.[357] There is therefore no evidence on how the tribunals will apply the instruction, but there are two tangible differences between the two policies - there are more parties involved in investigations, including heads of missions, heads of offices, etc; and there is a preliminary step of "unsatisfactory conduct" which undergoes "preliminary assessment" before official investigation. In terms of due process, the new instruction allows only for an "observer" to be present at interviews, rather than counsel, which is problematic. The new policy appears to "fix" recurring challenges against the administration in the jurisprudence, an approach that is also applied in the whistleblower protection policy reform.

This section outlined some key procedural and due process issues present in the UN internal justice system. In addition to the tribunal jurisprudence and administrative issuances, those problems also stem from the substantive core of disciplinary cases - the definition of misconduct.

2.5.5.3 Substantive issues

Not all cases of misconduct end up before the tribunals, since disciplinary measures are the purview of the Office of Human Resource Management; if OHRM decides to impose no disciplinary measure on a staff member, there is no way for third parties to dispute that. Tribunal cases only record the instances where staff members disagree with a disciplinary measure that has been imposed on them individually, and the judicial reasoning applied by the tribunals on the applicable regulations.

[357] In late 2020, the UNDT issued several orders addressing ST/AI/2017/1 and in particular the provisions addressing the power of the Administration to place a staff member suspected of misconduct on Administrative Leave Without Pay (ALWOP). The Tribunal noted that ALWOP is an extraordinary measure that requires justification; the UNDT also declared certain parts of ST/AI/2017/1 to be "illegitimate" because they are incompatible with the Staff Rules and Regulations.

Staff Regulation 10.1 contains the legal basis for disciplinary measures regarding misconduct, and it is elaborated in Chapter X of the Staff Rules dealing with disciplinary procedures and measures. The recent amendments of the Staff Regulations have added sexual exploitation and sexual abuse to the Regulation, rather than hierarchically lower Staff Rules or the Administrative Issuance ST/AI/2017/1 that lists types of misconduct (3.5). Regulation 10.1 is further elaborated within Chapter 10 of the Staff Rules. Generally, a failure by a staff member to comply with his or her obligations under the terms of the contract and the Staff Rules and Regulations, or to observe the required standards of conduct may amount to misconduct and may lead to a disciplinary process and the imposition of disciplinary measures (Rule 10.1 (a)). Another recent amendment is Rule 10.1(c) which formally reserves the discretion to conduct investigation and to institute disciplinary measures for the Secretary-General, perhaps in an attempt to avoid further litigation. Rule 10.2 lists possible disciplinary measures - from written censure, to loss of step in grade, to fine, to separation with compensation to dismissal. Rule 10.3 contains the due process guarantees within the disciplinary procedure, a requirement of proportionality of penalties, the right to challenge disciplinary procedures.

The rules contain no actual definition of misconduct, or what type of misconduct would deserve what disciplinary measure. Rule 10.3 emphasises the proportionality of measure,[358] but staff members who committed sexual abuse 10 years ago were often only reprimanded, while in recent years have been separated from service. In all of the whistleblower cases in Chapter 4 there have been no disciplinary measures for gross misconduct - large-scale corruption, sexual abuse, abuse of power, etc. - and there is no way to challenge those decisions.

Misconduct cases often feature a claim for compensation for damages, or costs - loss of earnings, moral damages, etc. In order for compensation to be awarded by the tribunals, three elements must be demonstrated – (1) an unlawful administrative action; (2) the existence of damages to the staff member;[359] (3) causation.[360] Compensation is limited up to an amount equivalent to two years' net base salary (article 10(5)(b)). This threshold limits the total of all compensation

[358] Doleh, 2010-UNAT-025.
[359] James 2010-UNAT-009, Abboud 2010-UNAT-100, Nwuke, 2016-UNAT-697.
[360] Israbhakdi, 2012-UNAT-277.

that may be ordered under articles 10(5)(a) and 10(5)(b) , except in cases of exceptional circumstances like abuse of power, harassment, etc.[361] The jurisprudence on moral damages has not been consistent. In *Eissa* , the Tribunal found that an award of moral damages for a fundamental breach of a staff member's rights, does not require evidence of harm.[362] However, in 2017, UNAT released a number of judgements that overturned that principle and insisted that the staff members have to bring evidence of harm directly arising from procedural issues.[363]

As with the previous section, substantive issues demonstrate that the tribunals have made conflicting case-by-case interpretations of the vague rules and regulations; some conflicts have come up between the two tiers of the administrative justice system, and the higher-tier has amended the content of the rules with its own jurisprudence. There is more and more evidence that the Appeals Tribunal sides with the administration against the individual staff members, a troubling trend that undermines a basic tenet of the rule of law - equality before the law.

2.5.5.4 Equality before the law

Important general principles relating to justice and fairness – such as equality of arms[364] – and specifically to labour law – like "equal pay for equal work"[365] – have been raised in the jurisprudence of the Tribunals. Other principles from labour law have not - for instance the representation by unions. The Tribunal has determined that it does not have jurisdiction in relation to applications filed by a staff member in a representative capacity on behalf of a Staff Union.[366] In *Gehr*, the Tribunal endorsed the view that "the principle of equality means that those in like case should be treated alike and that those who are not in like case should not be treated

[361] Kasmani, 2013-UNAT-305.
[362] Eissa, 2014-UNAT-469.
[363] Krioutchkov, 2017-UNAT-712.
[364] Argued in Bertucci 2011-UNAT-121, but not addressed by the Tribunal directly.
[365] Chen 2011-UNAT-107
[366] In Faye 2016-UNAT-654 the UNAT held that staff associations do not have standing to bring suit on behalf of members, just amicus curiae.

alike", which supports the approach of admissibility of actions that affect individual members, rather than the collective of staff.[367]

To date, no staff member at the level of Director or above has been disciplined for misconduct, and there have been no disputes involving a tribunal judge. There exist no rules for excusing a judge for a conflict of interest or abuse of power, except for a decision by the General Assembly. As was demonstrated above and will be discussed further, impartiality is an important quality in an investigator, and when an investigator is compromised or biassed it can negatively affect the system of justice, as well as individual staff members. This applies even more to judges and to the human resource management USG and ASG who make decisions on disciplinary matters. It is argued that by creating such an unequal system the organisation is not fulfilling a basic responsibility towards the staff - the duty of care.

Duty of care is a problematic area in the administrative law of the UN because of the above-mentioned non-admissibility of non-actions. In essence, a staff member has to prove that by not doing something, the organisation has breached the terms of contract. In *Ouriques*, a dissenting opinion in Judge Halfeld reads

> *"Unlawfulness: the failure of the Administration to fulfil its duty of care*
>
> *The Organization has a duty of care towards its staff members. This duty of care required the Administration in this case, as the UNDT concluded, to inquire further into the staff member's mental health once it was on notice of its possible relevance prior to concluding the disciplinary investigation and to making a final determination vis-à-vis the staff members' disciplinary sanction. It is not good practice to separate a staff member suffering from a mental health condition without first fully discharging its duty of care. "*[368]

Regulation 1.2 (c) holds that

> *"In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security*

[367] Gehr, 2012-UNAT-331.
[368] Ouriques, 2017-UNAT-745

arrangements are made for staff carrying out the responsibilities entrusted to them"

This provision was only included in 2009, four years after the first whistleblower policy came into force. Unlike the ILOAT,[369] the UN administrative tribunals and regulations have shied away from the term duty of care. Several decision mention that the organisation has a duty of care,[370] but not its extent, and there have been no cases where the tribunals have upheld a breach of that obligation.

Michael Adams and Rowan Downing

The problems of the law of the international civil service have been noted in strong terms by some of the judges who were tasked with applying it. In *Abboud*, Judge Michael Adams pointed out glaring gaps in the UN Staff Rules with relation to misconduct -

> *"It is a strange and unfortunate feature of both the old scheme and the new that there is no reference to any requirement that the staff member actually be found guilty of misconduct before imposing either a disciplinary or non-disciplinary measure."*[371]

> *"[The new rule 10.3] seems to have been drafted for the specific purpose of conferring as wide a discretion as possible on the Secretary-General (and his or her delegates)… to do from beginning to end whatever they happen to think is reasonable and give the staff member as little traction as possible to question the process. This offends the important requirement of transparency. It is also inefficient (and other more critical language readily comes to mind) to construct a system whose elements will only gradually be*

[369] This is not the case at the ILOAT, where over 400 cases deal with duty of care. See Germond L, "L'omniprésence Du Devoir De Sollicitude Dans La Jurisprudence Récente Du Tribunal Administratif De L'organisation Internationale Du Travail" in Dražen Petrović (ed), *90 years of contribution of the Administrative Tribunal of the International Labour Organization to the creation of international civil service law* (2017)

[370] See McKay, UNDT/2012/018, affirmed by the Appeals Tribunal in McKay 2013-UNAT-287.

[371] Abboud UNDT/2010/030 Paragraph 41

discovered by both management and staff when the latter have the fortitude to litigate.”[372]

“The description in the heading of this rule as providing ‘due process’ is a misrepresentation. Of all the examples of bad drafting to which I have been exposed in my short term as a judge of the Tribunal, this is the worst.”[373]

He also pointed out that the Under-Secretary General of the Department for General Assembly and Conference Management, was “at the very least, careless about whether he told the truth or not and his evidence was untruthful in a number of significant respects.” (para. 22)

In Orders on Receivability and Production of Documents from 3 February 2010,[374] in the case of Wasserstrom v. Secretary-General of the United Nations, Judge Adams very vocally criticised the UN approach to internal law-making and human resources management -

“Undertaking intellectual acrobatics is fun for solving cryptic crosswords but resolving the questions of legal rights and obligations should not require them. It involves fudging boundaries, filling gaps, re-constructing language and deriving conclusions that far too much depend upon the accidental mind-set of a particular judge of the Tribunal. This is one of a number of unfortunate examples of bad drafting. It does not need a degree in management to understand that significant responsibilities must be conferred in such a way as to make it completely clear who is charged with undertaking them. ”

It is difficult to add anything of value to those statements by way of analysis. The law of the UN civil service is somewhat badly written, overly complex, with confusing rules, multitude of steps and bodies, deadlines that are only applied arbitrarily, and a huge jurisprudence; the procedural rights of the staff members are routinely violated. Adams was the judge in the Wasserstrom cases before the UNDT and delivered the seminal decisions for the whistleblower protection

[372] Ibid, Paragraph 42.
[373] Ibid, Paragraph 44.
[374] Wasserstrom, Order No.19 (NY/2010).

jurisprudence that will be analysed in Chapter 4. That decision was overturned by the UNAT, and Judge Adams was not selected for a second term at the UNDT.

Between 2014 and 2019 Rowan Downing was a judge at the UNDT; he previously worked for United Nations Assistance to the Khmer Rouge Tribunal (UNAKRT) at the Extraordinary Chambers of the Courts of Cambodia and numerous aid projects. He was dismissed in 2019, several days before delivering a judgement in the case of Emma Reilly, an OHCHR whistleblower, in what he called "attack upon the independence of the judiciary".[375] See Chapter 4 for further information on Reilly's case.

In 2021 Downing wrote an article[376] criticising the independence of the UN tribunals, the attitude of the Secretary-General, and the administration towards the internal justice system throughout his term as a tribunal judge. Downing pointed out a number of issues concerning accessibility, hearings, accountability, remedies, etc. He raised the question of the disclosure of documents by the administration, who is a party to the proceedings -

> *"All correspondence leading to decisions is held by the organisation. There is no rule of procedure forcing the respondent to produce all of the relevant documentation. In many cases when hearings are held, questioning by judges results in additional fundamental documents being discovered and witnesses being identified."*

Crucially, Downing claimed that the UN internal justice

> *"lacks systemic independence. Further, it does not serve the needs of the parties and leaves managers largely unaccountable."*

He pointed out that every decision under review by the tribunals is ultimately made by the Secretary-General through delegations, and it's the Secretary-General, not

[375] Feldman J and Bagshaw E, "Australian Judge Accuses UN of 'Coup d'Etat' after Dismissal from Case Involving Chinese Dissidents" *The Sydney Morning Herald* (March 21, 2022) <https://www.smh.com.au/world/asia/australian-judge-accuses-un-of-coup-d-etat-after-dismissal-from-case-involving-chinese-dissidents-20220318-p5a5zd.html> accessed October 4, 2023

[376] Downing R, "The Judge's View: The UN Justice System Is Not Independent and Needs to Be Fixed" (*UN Today*, April 8, 2021) <https://untoday.org/the-judges-view-the-un-justice-system-is-not-independent-and-needs-to-be-fixed/> accessed October 9, 2023

"the Organization," or “the Administration”, who serves as the respondent in all cases. Additionally, all the staff assigned to the tribunals ultimately report to the Secretary-General, who is also the respondent. The OAJ is funded by and reports to the Secretary-General; its offices are in the same building as the judges. Downing also points out that the Internal Justice Council report has raised multiple accounts of interference by the OAJ with the work of the Tribunals. These arrangements raise concerns about the perception of independence from the respondent.

Judges cannot be considered whistleblowers in the strictest sense, but Adams’ and Downing’s decisions are recorded examples of speaking out against the systemic failings of the UN internal law. The consequences of those judgements - appeals that were granted for vague reasons, judges being dismissed, and rules being rewritten to deprive civil servants of their rights - demonstrated the attitude towards criticism, change, and fairness. The internal administrative legal system is neither reasonably accessible, nor evenly fair, and it gives rise to an organisational culture that does not promote the respectful dissent that would be in line with the UN organisational principles and goals.

Chapter 3 Organisational dynamics and cultural paradigm

"How can a man know what is good or best for him, and yet chronically fail to act upon his knowledge?"

Aristotle

Introduction

So far this thesis has emphasised the lack of independence of international organisations from nation states more generally, as well as specific theoretical and practical issues in the internal administrative law - the role of the General Assembly, the jurisdiction of the tribunals and limits on judicial review, the disciplinary process and the definition of misconduct, and finally rule of law and fairness problems. A simple, if pessimistic, conclusion is that the law of the international civil service does not function as an fair system of justice, inasmuch as intergovernmental organizations do not have an internal governing system properly separated into independent judicial, executive, and legislative branches, as they would be in a domestic government. This would be the final conclusion if this thesis were to contain only two parts - law and cases.

The question remains as to why the internal legal system is not a fair one, but the answers and the potential fixes thereof are not unilaterally found in the legal analysis. Introducing a new policy for whistleblower protection does not automatically mean that whistleblowers are protected and encouraged; creating a new tribunal does not institute a new fair system of justice; writing an ethics code and founding an ethics panel does not make ethics clearer or a stronger driving force in the institution. Moreover, the UN is an enormous system of organs, programmes, and organisations that works on different continents and in different languages over decades, and the work of the organisation is thus based on isolation, segmentation, rigid hierarchy, and leadership that is beholden to the member states. The size of the UN, the politics of leadership selection, and the

history of the internal structures are very organisation-specific, but some of the policies and issues are common across the system. Chapter 2 argued that there exists a “law” of the international civil service - a legal field that encompasses different intergovernmental organizations that each have their own internal rules. This argument can be stretched to encompass a shared ethos of international civil servants and an organisational culture of international organizations, based on the ICSC Standards of Conduct, on the cross-fertilization of the international organisation internal policies and practices, and the work of bodies like the ICSC, the UNCEB, the JIU, and the ethics networks. Chapter 4 will put forward that this common culture and ethos affects not only the treatment of whistleblowers and international civil servants as individuals, but also their work in international organisations in pursuit of the institutional goals.

This thesis argues that, in the context of international institutions, both the everyday and extraordinary actions and choices of bureaucrats affect the global society. Whether it is speaking up against or tolerating sexual harassment, implementing paperless office environment or abusing power, participating in a march for women’s rights or a townhall meeting, or replying to an email by a student, a multitude of minute steps form the movement of the entire machinery. All of these choices are prompted not only by law and legal consequences, but also by the prevalent culture that binds the organisation together. It is also worth investigating whether each separate intergovernmental organisation has the basis of organisational culture that encourages or suppresses speaking out against wrongdoings, as well as asking broader questions of accountability in a changing global political and legal context.[377]

The international duties and leadership, the status of international civil servants as global public officials, and the perception of isolation and power dynamics, are all common factors that bring the international civil service culture together. Chapter 3 will develop the argument that the UN internal law and ethics maintains an environment where speaking up is not encouraged and the staff do not trust in the values and protection of whistleblowers because of the “tone at the top " and the intraorganisational conflicts between different organs. Several studies on the

[377] See Peabody JW, “An Organizational Analysis of the World Health Organization: Narrowing the Gap between Promise and Performance” (1995) 40 Social science & medicine 731

attitudes of staff members towards organisational integrity, culture, protection from sexual harassment, and specifically on the whistleblower policy provide scientific evidence on the institution-wide perspective that is impossible to glean from anecdotal evidence alone. This data will lay the foundation for the analysis of the whistleblower cases in the context of the law, ethos, and culture combined.

Chapter 1 of this thesis provided the wider background of public international law and the law of the international organizations, to set the stage for a critical analysis of the law of the international civil service. In a similar way, in order to examine the organisational ethos and culture of the UN in order to contextualise the law and the cases, Chapter 3 will first build the outline of what brings the UN together as a system that also serves as an example for other organisations in terms of whistleblower protection in particular and ethics in general. Afterwards it will demonstrate with evidence what values are embodied through the leadership of the organisation.

The chapter covers three key aspects: firstly, it examines the unifying infrastructure of international civil servants; secondly, it delves into the articulated values and the implicit assumptions underlying them; and finally, it explores how leadership demonstrates these values. Each section contains a commentary on the theoretical background of the practice - (1) The work of the ICSC, the UNCEB, the JIU, and the networks of Ethics officers addresses many issues - from mundane to controversial - that affect individual staff members across the world and their history emphasises the intra-organisational conflicts and the lack of autonomy from states; (2) the espoused values of the international civil service are in conflict with their practice, which is demonstrated in several studies of the attitudes of UN system staff; (3) the secretive leadership selection and the political power involvement of nation states in the the history of the culture and ethos formation.

3.1 Common ethos

The fragmentation between the UN programmes and agencies is an issue with manifest political and legal, but also with ethical components that stretch across the UN system. The efforts to bridge over the differences and harmonise the

organisations exemplify the conflict between the written and the embodied principles of the international administrative practices, and the influence of member states. The bodies and mechanisms described in this subsection also demonstrate the lack of and need for autonomous oversight and the importance of building a culture that encourages constructive discussion based on accountability, as well as polite dissent.

3.1.1 CEB

The United Nations System Chief Executives Board for Coordination (CEB), previously the Administrative Committee on Coordination (ACC), is the earliest means of coordination between UN agencies and affiliated organizations. The ACC was established in 1946 under the UN Economic and Social Council (ECOSOC) Resolution 13 (III) to execute the agreements between the UN and its Specialized Agencies. This move indicates that it was expected that administrative overlaps between different UN system components would inevitably emerge and that a consistent approach across the system would be the most effective solution right from the outset of the UN's formation. The ACC was to be a "committee of administrative officers consisting of, [the UN Secretary General], as chairman and the corresponding officers of the specialized agencies",[378] implementing international agreements.

The Committee served as a formal meeting place for representatives of the global public administration, free from the influence of diplomats, for 56 years. According to some insiders, the Specialized Agencies were frequently absent from ACC meetings and expressed opposition to the participation of UN funds and programs, as they were already represented by the UN Secretary-General.[379] The issues with political and legal fragmentation at the international level were compounded by practical hurdles such as uncooperative staff behaviour, overly bureaucratic processes, overlapping mandates on the regional level, and conflicting

[378] ECOSOC Resolution 13 (III)

[379] Idris K and Bartolo M, *A Better United Nations for the New Millennium A Better United Nations for the New Millennium: The United Nations System - How It Is Now and How It Should Be in the Future* (Brill 2021).

public information.[380] The early attempts at reform emphasised the conflict within the hierarchy of the UN, and between written and practical priorities. In 1977, General Assembly Resolution 32/197 established the role of Director General to oversee and centralise the inter-agency coordination.[381] The resolution acknowledged the leadership of the Secretary General and the ACC in inter-secretariat cooperation, and recommended streamlining their mechanisms and using ad hoc arrangements when possible. The functions of the new post essentially duplicated those of the committee charged with the same role, and it was created by the General Assembly instead of ECOSOC, which created the ACC. Also, recommending ad hoc arrangements contradicts the goal of centralising coordination. The Director Generals were never officially confirmed by the General Assembly and their responsibilities were not documented in writing. Secretary-General Boutrous-Ghali abolished the post in 1992.[382]

Another effort at transformation came by way of Francis Blanchard, a former Director-General of the International Labour Organization and an ACC member, who delivered two reports on the workings of the Committee in 1992 and 1993. Blanchard pointed out that the core issues of the ACC came from "a lack of transparency in the system … and inadequacies in the dissemination of information".[383] His most significant observation was that,

> *"The time has come for ACC to move from its administrative function, which still remains important, to a 'policy' function required by the new realities of the international situation."*[384]

The ACC had already functioned as a committee of bureaucrats responsible for implementing international legal agreements, thereby engaging in global governance, for nearly 40 years. Its scope broadened further after Agenda 21 to encompass the identification and resolution of global issues requiring cooperation

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380 Hill M, *The United Nations System : Coordinating Its Economic and Social Work: A Study Prepared under the Auspices of the United Nations Institute for Training and Research (UNITAR)* (Cambridge University Press 1978).
381 GA Resolution 32/197
382 Childers E and Urquhart B, *Renewing the United Nations System* (Diane Publishing 1999)
383 In Idris, K., & Bartolo, M. (n. 379)
384 In Effros MRC, *Current Legal Issues Affecting Central Banks* (International Monetary Fund 1997)

between international organizations. From 1992 to 2002, the ACC evolved into the CEB, which created sub-committees for inter-organizational coordination focused on environmental, development, and gender equality concerns. These efforts ultimately led to the creation of independent organizations and mechanisms such as UN Women and UN Oceans.

In its first written submission to ECOSOC, the CEB presented an overview of the restructured committee and also provided a distinctive self-evaluation of the subsidiary machinery of the ACC, describing it as a "multilayered and somewhat rigid array of inter-agency committees".[385] This suggests a level of organisational maturity by recognising publicly some of the past weaknesses. In 2018, the CEB founded task force on sexual harassment and sexual exploitation and abuse, which in its second meeting arrived at the conclusion that the widespread issues cannot be addressed through mandates and punitive measures alone -

> *“In taking the work forward, attention will, as a priority, be given to addressing a pervasive culture of silence”*[386]

The CEB is one of the linchpins of the organisational ethos of the UN system. Its history demonstrates that the common culture of the international civil service, while conflict-ridden and problematic, has continued to evolve and grow in mandate and maturity. It also points out the lack of inclination in the global bureaucracy to embrace a policy-making function.

3.1.2 ICSC

The internal conflict between the GA and ECOSOC, and the fraught authority dynamics, are also visible in the work of the International Civil Service Commission (hereafter ICSC) and its contribution to the UN civil service ethos. The ICSC is an independent expert body created by UN General Assembly Resolutions 3042 (XXVII) of 19 December 1972 and 3357 (XXIX) of 18 December 1974. The predecessor of the ICSC, the International Civil Service Advisory Board (hereinafter ICSAB), was set up in 1948 by the ACC, which was created by ECOSOC.

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[385] See E/2002/55
[386] In CEB/2019/3

The ICSC's primary responsibility is to formulate, harmonise, and provide guidance to legislative bodies and executive leaders of organizations regarding the employment terms of the United Nations common system staff. According to its mandate,

> *"On some matters (e.g. establishment of daily subsistence allowance; schedules of post adjustment, i.e. cost-of-living element; hardship entitlements), the Commission itself may take decisions. In other areas, it makes recommendations to the General Assembly which then acts as the legislator for the rest of the common system. ... On still other matters, the Commission makes recommendations to the executive heads of the organizations; these include, in particular, human resources policy issues."*[387]

The independence and hierarchical position of the ICSC is somewhat controversial. The members of the Commission are nominated by the UN Secretary-General, and appointed and reappointed by the UN General Assembly; the budget of the ICSC is also determined by the UN Secretary-General and confirmed by the General Assembly. In *Pedicelli*, the UN Appeals Tribunal found that the ICSC is answerable to the General Assembly and not the Secretary-General, and arguably also not to the heads of other international organisations, regardless of the influence of the Commission over the UN system. It is interesting to consider that UNAT again determines the discretion and authority of an independent body based on a dispute between a single staff member and the UN.

The UN as a whole does not have a uniform code of ethics, but the ICSC Standards of Conduct hold a considerable weight across organisations. The ethical standards of the UN system are diverse, with some adopting the ICSC Standards as is, and others like the WHO and UNDP adopting their own dedicated codes of ethics that align with the Standards.[388] According to the JIU,[389]

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[387] See "ICSC Mandate" (*icsc.un.org*) <https://icsc.un.org/Home/Mandate> accessed October 10, 2023

[388] The Ethics Offices of the various institutions, programs, and agencies are responsible for administering the ethical framework of the UN system. See below about the Ethics Panel, and in the next section about the UN Ethics Office in particular.

[389] JIU/REP/2021/5

"five of the organizations reviewed have developed neither their own code of conduct nor their own code of ethics in addition to the universally applied ICSC standards of conduct.[390] Four have a code of ethics,[391] seven others have a code of conduct,[392] and five others have both.[393]"

Within different groups of staff, only the blue helmets[394] and the UN volunteers[395] have a code tailored to their duties; and the only UN diplomat who has a code of ethics is the president of the General Assembly.[396] The 2008 report of the UN Ethics Office contains a draft code that was "formulated as a values-based framework built upon the purposes, values and principles espoused in the Charter of the United Nations, in applicable staff regulations and rules, as well as in the Standard of Conduct for the International Civil Service."[397] The proposal was presented to the General Assembly in September 2009 but was never voted on. The implementation of ISCS standards can be found in the Secretary General's Bulletin entitled "Status, basic rights and duties of United Nations staff members", which was originally released in 2002 and updated in 2016.

The role of the ICSC within the UN system's ethos is thus complex and significant. The Commission does not have the authority to independently establish or modify the Standards of Conduct - it proposes a draft to the General Assembly, which is approved by a vote and then considered and applied across the organisations. The first "Standards of Conduct in the International Civil Service" were compiled by

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390 UNICEF, UNOPS, UN-Women, IAEA and UNWTO.
391 UNDP, WIPO, FAO and UNIDO (the latter two in the form of a "code of ethical conduct").
392 UNFPA (for suppliers), UNHCR, UNRWA, WFP, UNAIDS, UNESCO and UPU.
393 The United Nations Secretariat, IMO and ITU (standards of conduct and code of ethics), ICAO (framework of ethics as an annex to the service code and standards of conduct), and WHO (code of conduct for experts, code of conduct for responsible research and code of ethics and professional conduct).
394 UN, "Ten Rules: Code of Personal Conduct for Blue Helmets" (*Www.un.org*) <http://www.un.org/en/ethics/assets/pdfs/ten_rules.pdf> accessed October 10, 2023.
395 United Nations Volunteers programme, "International UN Volunteer Handbook Conditions of Service" (*Www.un.org*) <http://www.un.org/en/ethics/assets/pdfs/International_UN_Volunteer_Conditions_of_Service_2015.pdf> accessed October 10, 2023.
396 A/RES/70/305
397 A/64/316

the ICSAB in 1954, and a new preface was adopted by the ACC in 1982.[398] The Standards were first revised and renamed by the ICSC to "Standards of Conduct for the International Civil Service" in 2001, and amended in 2013. The Forward references the 2000 ICSC Framework for Human Resources Management, which emphasises that "although organizations' internal cultures may vary, they face similar ethical challenges"[399] and expresses that the Standards are "part of the culture and heritage of the organizations". The first version of the Standards contained an obligation for staff members "to understand and exemplify" the principles therein, but that text was excluded from the amendments, which included more legalistic language.[400] Even though they are not legally binding, the Standards hold legal weight and have been referenced in the decisions of the UN and ILO administrative tribunals as a basis for disciplinary actions. The judicial role can be seen as taking away from the aspirational and unifying power of the Standards for the international civil service.

The history of the ICSC underlines the importance that the UN Secretary-General and GA have a central role in the formulation of the common ethos of the UN system. On the other hand, the application of the ethical principles is concentrated in the work of the Ethics Offices and their networks, and the impact of that work is measured by the Joint Inspection Unit reports, referenced in section 3.2.2.

3.1.3 Ethics Panel, Affinity Group, Ethics Network

Ever since the UN Ethics Office was founded in 2005 by Secretary-General Kofi Anan,[401] the UN system organisations, funds, and programmes have slowly grown into a system-wide ethical infrastructure.[402] The coordination between those organs is fragmented and problematic in a similar way to the early days of the ACC, as it

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[398] de Cooker C (ed), *Accountability, Investigation and Due Process in International Organizations* (Martinus Nijhoff 2005)
[399] ICSC Standards of Conduct, 2013
[400] Stoyanova D, "Standards of Conduct for the International Civil Service, 1st January 2013 (UN Doc A/67/30, Annex IV), OXIO 388" (*Ouplaw.com*) <https://opil.ouplaw.com/display/10.1093/law-oxio/e388.013.1/law-oxio-e388> accessed October 10, 2023
[401] See subsection 3.3.2 on UN organs and specifically on the Ethics Office. See also Chapter 4 on the standing of the Ethics Office at the UNDT and UNAT.
[402] See JIU reports in 3.2

is ad hoc and only involves the leaders of the Ethics Offices instead of permanent structures that involve staff at all levels.

The Ethics Panel was set up in 2007 (under the name UN Ethics Committee) as an effort to harmonise the activities of the ethics offices and the ethical frameworks of the different organizations in the UN system, in parallel with the implementation of the first UN whistleblower protection policy and the similar policies instituted across the UN system soon after. It is composed of ethics practitioners from seven UN funds and programmes (UNDP, UNFPA, UNHCR, UNICEF, UNOPS, UNRWA and WFP) and is chaired by the director of the UN Ethics Office. The 2010 JIU report[403] on the UN ethics function recommended expanding the Panel, but has since rescinded that recommendation in the 2021 report because members of the Panel expressed that the small size of the group makes frequent meetings possible. Aside from coordinating ethics policies, the activities of the Panel include reviewing drafts of the annual report of the members before finalising it and submitting it to the executive head of the organisation. Most importantly, the Ethics Panel is the only instance of appeals of the Ethics Office decision on whistleblower protection, which places some decision-making power somewhat outside of the organisations, and consolidates the ethos because the chair of the Ethics Panel is the chief ethics officer of the UN. According to the 2018 JIU report on whistleblowing, between 2012 and 2016 the Panel reviewed 5 cases, and overturned the initial determination in 2 of them.[404] The Panel does not publish reports on its activities, or on the cases under review, so not much can be said about trends or reasoning behind its decisions.

The other two important ethics coordination mechanisms are the Ethics Network of Multilateral Organizations (ENMO) and the CEB affinity group within ENMO. The ENMO is a conference of ethics professionals from intergovernmental organisations that has been meeting annually since 2010. Membership is open to UN systems organisations, regional organisations, financial institutions, etc. It has been noted that the ENMO meetings have fostered an informal network of ethics officers internationally, which supports the argument of a wider ethos of the international civil service taking root in the ethical infrastructure. Finally, the CEB

[403] See below in 3.2.2.
[404] JIU/REP/2018/4 Paragraph 86. See below for more detail.

affinity group was set up in 2019 to promote greater coherence between heads of the ethics offices of the UN. The group has annual meetings within the context of ENMO, and in 2021 discussed the lack of appeals recourse of the whistleblower protection decisions made at organisations not members of the Panel.[405] The ILO has opted to use independent experts in that scenario,[406] although considering the fact that the organisation only hired an ethics officer in 2022, it remains to be seen how it would work.

While some elements of ethics coordination are quite new, it appears that ad hoc arrangements and regular informal meetings between heads of the ethics offices are the preferred method so far. The participation of the UN SG in the last meeting of the ENMO shows that the UN is the linchpin of the ethos of the international civil service. ENMO and the Ethics Panel are still to publish formal reports of their meetings to the public; most of the available information comes from the reports of the JIU. The ethical implications of the ethics network not being fully transparent are somewhat ironic.

3.1.4 Oversight

The UN has several mechanisms for oversight, including its internal audit and evaluation functions, external auditors, and independent oversight bodies. The role of the “internal watchdog” OIOS will be evaluated later in this chapter as it pertains to the culture and ethos formation and whistleblower protection. Another important oversight mechanism is the Board of Auditors, which is responsible for auditing the UN's financial statements. The Board of Auditors is composed of three members appointed by the UN General Assembly, and their reports are presented to the General Assembly's Fifth Committee, which oversees the UN's budget and finances. In addition to internal and external auditors, the UN has established independent oversight bodies, such as the Joint Inspection Unit (JIU) and the Independent Audit Advisory Committee (IAAC). The IAAC provides advice and recommendations on audit-related matters to the General Assembly, while the JIU conducts system-wide evaluations of UN programs and activities.

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[405] JIU/REP/2021/5 p 48. See below for more detail.
[406] ILO office directive IGDS No. 551, Para 35

Section 3.2.2 includes evidence from several JIU reports on key elements of the UN system ethos on the embodiment of the written values of the international civil service. The JIU is an independent body of 11 auditors, creating reports on various aspects of the UN system, with participating organizations including the United Nations Secretariat, its departments and offices, United Nations funds and programs, other UN bodies and entities, the United Nations specialised agencies, and the International Atomic Energy Agency (IAEA). Some criticisms have been levelled at the JIU, including claims that it serves as a tool for the G77, is poorly resourced and lacks follow-up on its reports.[407] The selection process for JIU inspectors has also been flagged as problematic, as it prioritises representation of certain countries over the qualifications of experts. Despite being criticised for producing reports that are often viewed as pro forma, the JIU has also been commended for providing valuable information on mechanisms within the UN system that are not well known.

An important note needs to be made concerning independence, which will be reiterated later when discussing OIOS and the Ethics Office; in the context of the UN system, an independent internal office or an independent external body means that the office or body sets its own agenda and has the authority to conduct investigations without additional approval necessary. The Board of Auditors, JIU, IAAC are all bodies that are funded by the UN budget, the members are selected or appointed by the General Assembly, and their reports are presented to the GA. The implementation is left to the Member States, and oversight itself is considered to be the responsibility of Member States, delegated to the different bodies of the Secretariat.[408]

The common UN ethos is thus complicated and fraught with conflicts and secrecy, but certain elements have endured. The influence of member states governments and the parliamentary organs - GA and SC - introduces tension and lack of transparency; there is conflict and imbalance within the system, yet both formal and informal networks bring it together; the leadership of the UN Secretary-

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[407] Andersen MS and Sending OJ, *Accountability in the United Nations* (Norwegian Institute of International Affairs 2011)

[408] JIU/REP/2006/2. The recommendations of the 2006 review of the oversight functions were highly contested by the CEB, except for recommendation 8 on establishing whistleblower protections and establishing ethics functions.

General is affirmed in the written documents and the unspoken elements of the ethos. The global values such as gender equality, transparency, and whistleblower protection become part of the UN internal culture as they filter through the evolution of the international civil service.

3.1.5 Ethics and international organizations

The question of whether a shared global ethics exists has been debated extensively in academia, but is not simply an intellectual exercise.[409] Morality is strongly embedded in the foundations of law,[410] and so are justice,[411] equality,[412] human and social rights,[413] as well as personal choices.[414] In chapter 1, we discussed how Reinsch's focus on the civilizational authority of states to advance economic interests contrasted Sayre's criticism of the "selfish interests" of rulers. Some authors[415] argue that international relations is a practice of defending foundational values, including in conflict,[416] while others claim that an international community is not possible because morality is not objective.[417] It is evident that the principles are constantly evolving, and there is a key conflict between the interests of nation states and the interests of society as a whole.[418] This same conflict lies at the heart

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[409] Widdows H, *Global Ethics: An Introduction* (Acumen Publishing 2014).
[410] Bentham J, "An Introduction to the Principles of Morals and Legislation" in JH Burns and HLA Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Oxford University Press 1789)
[411] Caney TS, *Justice beyond Borders: A Global Political Theory* (Oxford University Press 2005).
[412] Jenkins R, "Globalization, Corporate Social Responsibility and Poverty" (2005) 81 International affairs 525.
[413] Singer P, "Famine, Affluence, and Morality," *International Ethics* (Princeton University Press 2022)
[414] Gaskarth J, "The Virtues in International Society" (2012) 18 European journal of international relations 431.
[415] Frost M, *Global Ethics: Anarchy, Freedom and International Relations* (Routledge 2009)
[416] Coates AJ, *The Ethics of War* (2nd edn, Manchester University Press 2016)
[417] Goldsmith JL and Posner EA, *The Limits of International Law* (Oxford University Press 2005)
[418] See Frost, (n. 415) on "Society of Sovereign States" vs. "Global Civil Society". On the side of doubters of cosmopolitanism is Calhoun C, "Cosmopolitanism and Nationalism" (2008) 14 Nations and nationalism 427.

of the issues of the law of the international civil service discussed in the previous chapters, as well as the organisational culture of the UN discussed below.

The terms morality and ethics are often used interchangeably to describe a social system of principles that influence the behaviour of individuals, although in some cases morality is taken to refer to a set of personal convictions, while ethics are group standards. There are three general theoretical approaches to ethics - duty-based (deontology), consequence-based (consequentialism), and character-based (virtue ethics). The first of the three[419] approaches is a decidedly legalistic one - Kantian ethics - that strongly relates to the UN. The deontology school of ethics is virtually always associated with the writings of Immanuel Kant[420] and his notion of the categorical imperative. There is an appeal in a deontological approach to global institutions; the UN could be considered an ethical deontological environment, which transcends cultural and national borders, and puts a rational individual and the enforcement of human rights in the centre. Consequentialism[421] is thus often regarded as the opposite of deontology, in that it focuses on the outcome of actions as a measure of their moral value. The standard is increased utility[422] for the largest number of people, even at the expense of the individual. In the context of international organizations, functionalists tended to view actions taken in pursuit of goals like world peace as generally acceptable from a legal and ethical standpoint. The third influential approach is the Aristotelian virtue ethics,[423] - the belief that an individual with certain morally positive characteristics would make the morally positive choice - which has been revived in the late 20th and early 21st centuries.[424] The focus of virtue ethics is on the character of the individuals and human growth, "be" as the basis of "do". This approach has been used by Klabbers as a method of

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[419] For a discussion of ancient ethics see Meyer S, *Ancient Ethics: A Critical Introduction* (Taylor & Francis Group 2007).
[420] Kant I, *Kant: Groundwork of the Metaphysics of Morals* (JB Schneewind ed, Cambridge University Press 2020). Donaldson T, "KANT'S GLOBAL RATIONALISM" in Terry Nardin and David R Mapel (eds), *Traditions of International Ethics* (Cambridge University Press 1992).
[421] Hare RM, "Ethical Theory and Utilitarianism" in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (Cambridge University Press 1982).
[422] Mill JS, *On Liberty* (Gertrude Himmelfarb ed, Penguin Classics 2003)
[423] Aristotle, *Aristotle: Nicomachean Ethics* (Roger Crisp ed, Cambridge University Press 2014)
[424] Nussbaum M, "Virtue Ethics: The Misleading Category" (1999) 11 Areté 533

control of international organizations and global governors.[425] Virtue ethics has been operationalized in the work of the International Criminal Court, [426] and in analysing the failing of the law of the international civil service to protect the global bureaucracy -

> *"... in the absence of any international criminal law, the code of ethics governing the international civil service is based on these institutions' internal regulations and on the legal principles enshrined by the judicial authorities"*[427]

The UN Staff Rules and Regulations heavily rely on the aspirational virtue ethics principles of internationalism, integrity, independence, and efficiency; the tribunals apply those as legal norms, as pointed out in Chapter 2. The ICSC Code, the whistleblower protection policy, and the ethical infrastructure in general lie on a fault line between the push for democratic transparency and the pull of diplomatic secrecy; between informal dispute resolution and public renunciation of abuse of power, of sexual harassment, of retaliation. These conflicts have ethics in their core, and it is important to point out that the individual decisions to ignore sexual harassment or corruption are not based on the vague theoretical principles, or on the written policies and rules.

The writing of the codes can be a long process, but according to Barrington,

> *"writing the vision, mission and value statement for the civil service, although far from straight forward, was the easy bit. The next and most challenging stage is the leadership challenge, instilling these words into the very fabric of day-to-day transactions"*[428]

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[425] Klabbers J, "Autonomy, Constitutionalism and Virtue in International Institutional Law" in Richard Collins and Nigel D White (eds), *International Organizations and the Idea of Autonomy* (1st Edition, Routledge 2011)
[426] Gaskarth, (n. 414).
[427] Plantey in Loriot F, "Accountability at the United Nations — in Need of a Genuine External Enforcement Body" in Chris de Cooker (ed), *Accountability, Investigation and Due Process in International Organizations* (Brill | Nijhoff 2005) p. 67
[428] Barrington A, Carpenter B and Macfeely S, "Setting Out a Vision for the Civil Service in Ireland" (2014) 62 Administration 65

Putting values into action in the work of an organisation is a continuous process and it involves regular renewal and re-examination of those values, as well as the character of the leadership and the actions of the managers. Says MacCarthaigh on the public service in Ireland,

> *"While the identification and mode of expression of values is the first step for any value-driven organisation, acting on those values is essential to give them meaning. Having a list of values does not mean they exist in an organisation."*[429]

It has been established, in many studies across public and private companies, across countries and levels, the continuous and repeated actions of the leaders must embody the written values, or they will be neither followed by the bureaucrats, nor trusted by the public. A report by Transparency International in 2001 emphasises that,

> *"Civil servants will not abide by an organisation's published Ethics Code if they see major breaches of the Code routinely ignored by the management of the organization. ... Managers (including the political leadership of the organization) must set the example."* [430]

In an organisational setting, especially a pluralistic one, there are many elements that form the common ground for communicating and working together. Having a shared understanding of right and wrong, and expectations of acceptable behaviour is a process rather than implied knowledge in an international environment. The evidence of those shared principles and trust in the system is a way to measure the evolution of the ethos and culture of the international civil service, also through the actions of the whistleblowers who stand for those ideals.

3.2 Trust and values

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[429] MacCarthaigh M, "Public Service Values" [2008] Institute of Public Administration

[430] Whitton H, *Implementing Effective Ethics Standards In Government And The Civil Service* (Transparency International UK 2001)

The observations on the parameters of the UN organisational culture described in this chapter are based not only on personal observations and theory, but also on qualitative and quantitative studies - studies on integrity,[431] on the staff engagement and culture,[432] on sexual harassment,[433] as well as the JIU reports on the ethical infrastructure and the whistleblower retaliation policy.[434] These studies provide information on the attitudes of staff in specific focus points of the organisational ethos, and on the fact that those studies were considered important enough to conduct by external independent bodies and internally. The combined evidence points to a low, albeit growing, trust in some ethical principles; to pride in the work of the organisation; to a rift between the career diplomats and the management and leadership of the global institutions. The evidence is not definitive; and there are certain methodological questions that could affect the outcomes. However, the consistency is at least somewhat significant in the context of this thesis.

3.2.1 Integrity, engagement, sexual harassment

In 2014, Deloitte published the results of a survey on UN staff attitudes towards integrity; the study identified tone at the top, staff accountability, supervisory commitment, ethnocentrism, and resource allocation as high priority for reform. The staff perspective was summarised in the following way:

> *"Most of the infrastructure to support ethics and integrity is in place; accountability is not. There are perceived weaknesses, (e.g., protection from reprisal for identifying those who violate the guidelines on professional conduct) but such weaknesses may be…perceptions only. More importantly, staff seems to wonder: Who can (or should) be held accountable if leaders and supervisors are not? Who can care much about ethics and*

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[431] Deloitte Consulting LLP, "UNITED NATIONS ORGANIZATIONAL INTEGRITY SURVEY 2004" (2004)
[432] UNCEB, "United Nations Staff Engagement Survey", Feb 2018
[433] Welsh T, "UN Surveys Sexual Harassment, Union Says Problem Is Broader" (January 18, 2019) <https://www.devex.com/news/un-surveys-sexual-harassment-union-says-problem-is-broader-94163>
[434] JIU/REP/2018/4

organizational integrity if leaders, supervisors and staff appear to not care and not caring has little impact on career success?"[435]

From the point of international civil service ethos and culture, this paragraph highlights several key issues. Firstly, the infrastructure to support ethics and integrity is said to be in place, i.e. policies, procedures, and training programs that are designed to promote ethical behaviour, i.e. the rules are not the issue. It is the lack of accountability that is seen as a major problem, which points out that while there are rules in place, they are not enforced (or not enforced fairly), which undermines the effectiveness of and trust in the ethical infrastructure.

The perceived lack of protection from reprisal for identifying violations of internal regulations indicates that employees are hesitant to report unethical behaviour due to fear of retaliation. This directly contributes to creating a culture of silence and enables unethical conduct to continue unchecked. The study also raises questions about organisational accountability and leadership. If leaders and supervisors are not held accountable for their actions, it can create a sense of cynicism and disillusionment among employees. According to the study,

> *"UN staff, ... lack confidence that they can report misconduct without retaliation. ... are critical of UN' ability to adapt to and plan for change. ... doubt UN' support for skill development, and ability to provide career opportunities. ... exhibit less favorable perceptions towards senior leadership's communication, dissemination of information, support of best practices, and empowerment (trust) of staff. "*[436]

This environment can further erode the civil servants' trust in the organisation and enforce a belief that unethical behaviour is tolerated or even rewarded. Without a strong ethical culture rooted in trust, embodied by the leaders, and practised equally throughout the UN system, the risk of unethical behaviour and corruption increases. The tone at the top is problematic and creates an environment of mistrust, one where speaking up is not encouraged.

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[435] Deloitte (n. 431)
[436] Ibid.

According to an internal 2017[437] UN staff engagement survey,

> *"One third of staff do not feel comfortable challenging the status quo, and express a lack of performance and ethical accountability at UN."*

Considering that this is the first study of such attitudes, the magnitude of mistrust raises serious concerns about the organisational culture and accountability of the UN. The evidence strongly suggests that the existing ethical and legal infrastructure do not monitor and address violations appropriately, and that leads to mistrust and lack of initiative on the side of the staff. On the positive side, the 2017 study found that staff express very high pride in their jobs. UN Staff see ethical action as highly important, and also see a clear link between their work and the work of the organisation. This could be one of the core motivators for whistleblowers to take action, as demonstrated in the cases in the next chapter. There is an awareness of the ethical infrastructure and the connection between bureaucracy and "clerical" work, and the function of a global institution; but the civil servants do not trust the leadership, the implementation, and the protection that the system offers in writing.

Finally, the Deloitte[438] and Staff Union studies[439] investigating the UN staff's stance on sexual harassment yielded meager responses, which in an of itself is a strong indicator of issues with the organisational culture. SG Guteres pointed out that the limited participation reflects a genuine issue with discussing sexual harassment candidly. The lack of response is a clear signal that, despite condemning sexual harassment and abuse of power in policy and regulation, it is the culture of silence that keeps the victims hurt and the perpetrators in power. According to the Deloitte survey, employees with little job security were the most susceptible to sexual harassment. Junior professional officers and associate experts had a 49.3 percent likelihood of encountering sexual harassment, while U.N. volunteers and consultants reported experiencing such incidents at rates of 39

[437] According to the JUI 2021 report, the survey was repeated in 2019 and 2021, but the results have not been made public.
[438] Deloitte (n. 431)
[439] Welsh (n. 433)

percent and 38.7 percent, respectively. On the other hand, senior officials have been allowed to resign rather than be dismissed for such misconduct.[440]

All of the studies quoted indicate that speaking up is not looked upon favourably in the UN system and that staff do not trust the rules that are supposed to protect them because of the behaviour of the top officials. These studies provide valuable evidence of the organisational culture, but crucially, have not been done regularly or publicly. There is no information on how attitudes change with the change in leadership, with the change in policy (whistleblowing), or on transparency. The testimonials are supported by the JIU reports on the ethical infrastructure and the whistleblower protection policy.

3.2.2 JIU reports

The JIU has released several reports relevant to the issues of the civil service ethos and culture in recent years, with the 2006 report discussing oversight, 2010 report focusing on ethics, the 2018 report addressing the whistleblower policy, and the 2021 report revisiting the topic of the ethics function of the UN system. The reports provide not only an overview of the ethics and culture institutionalisation of the global organisations, but also an insight into the attitudes towards the ethos, the inter-organisational conflicts, and the evolution of the concepts and structures.

The 2006 JIU report on the "oversight lacunae" of the UN system concluded that there was a "lack of policies and procedures in respect to ethics"[441] and recommended that all UN system organisations create a dedicated ethics office following the example of the UN. The inspectors stressed that the United Nations system organizations have been criticised for their unethical and corrupt practices, which highlight the need for policies and practices that address integrity and ethics. The report concluded that

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[440] UN Office of Human Resources, Compendium of disciplinary measures : practice of the Secretary-General in disciplinary matters and cases of possible criminal behaviour from 1 July 2009-31 December 2019, 2020

[441] JIU/REP/2006/2. The 2006 report was followed by a 2019 report "Review Of Audit And Oversight Committees In The United Nations System". The 2019 report focused on the harmonisation of audit and oversight bodies across the UN system.

> *"it is critical that Member States exercise fully their oversight responsibilities. Their domestic publics deserve United Nations organizations that are efficient, cost-effective and transparent. They have entrusted the governing bodies with the oversight of the budgets and management of the organizations. If the domestic publics do not believe that adequate safeguards are in place, confidence and support for the organizations may be lost."*

The JIU inspectors clearly draws a line between the "domestic publics" and the Member States, and emphasises that the "publics'" relationship with the UN system is based on trust. The lack of trust in public institutions can lead to cynicism, apathy, and a sense of alienation among citizens, especially considering the distance between global institutions and domestic constituents. It can also undermine the legitimacy of public institutions, erode their credibility, and make it more difficult for them to achieve their objectives when working on the ground. It is also notable that ethics and trust was considered indispensable from oversight, financial disclosure, and accountability in the context of the 2006 report.

The UN system's focus on ethics did not diminish in the following years. The 2010 report, titled "Ethics in the United Nations System"[442] was conducted as a followup on the 2006 report. According to it, the overwhelming perception was that -

> *"Unethical behaviour and corrupt practices on the part of a few continue to mar the work and reputation of United Nations system organizations."*

The report proposed a set of standards for the establishment of an ethics function within the UN system organizations. However, it expressed a concern that in many agencies and funds ethical codes "[amount] to no more than a paper exercise", with zero funding allocated; also "there was little staff buy-in to the ethics function, which was viewed merely as a management device that did nothing to address the underlying problems".[443] The terms of reference of the ethics function should include developing and disseminating ethics standards, but also providing mandatory ethics training, and offering confidential ethics advice and guidance to all staff, regardless of their contractual status. According to the report, few UN

[442] JIU/REP/2010/3
[443] Ibid, para 44.

organisations had mandatory ethics training, and it was emphasised that consistency across the system was of key importance. Additionally, the ethics function should administer the organisation's policy for protecting staff against retaliation for reporting misconduct and cooperating with audits or investigations, and the organisation's financial disclosure program. The inspectors encouraged UN institutions to organise regular "town hall" style meetings to discuss ethics, and to harmonise standards across the system using the UN Ethics Office as a benchmark. They also reviewed issues with mistrust among staff surrounding the recruitment of the ethics officers, as well as transparency and independence of the post. The JIU report recommended that "ethics offices should undertake biennial staff surveys on ethics and integrity awareness in their organizations",[444] a recommendation that is followed through in the 2021 report.

From the perspective of the ethos of international organisations, it is clear that unethical behaviour and corrupt practices were still prevalent within many United Nations system organizations a decade ago. It may be easy to attribute such behaviour to just a few individual "bad apples", but the evidence points out that it is often a result of a wider culture of acceptance, turning a blind eye, and tolerating the abuse of whistleblowers. In 2010, only 12 out of 22 participating organizations had an ethics function, and even those that did were not meeting the necessary independence criteria. Furthermore, the JIU highlights that a self-reporting online system was used to track progress, making it difficult to independently verify the accuracy of the data. While it is encouraging that 71% of the 2010 recommendations were accepted and 97% were implemented, it is clear that there was still much work to be done in order to improve ethical standards across the board.

In 2018, the JIU published a report[445] reviewing the whistleblower practices across the UN system. It is important to note that this was not the first review of the whistleblower policies - the 2010 ethics report made several recommendations on the topic, including giving JUI review powers of retaliation prima facie findings, but those were never implemented or considered, especially after the establishment of the Ethics Panel. The 2018 report underlined the importance of independent

[444] Ibid, Recommendation 11.
[445] JIU/REP/2018/4

oversight, especially in the review of whistleblower protection policies, clear language and reporting channels. The policies even in the UN Secretariat were found to be "written by lawyers, for lawyers",[446] rather than in a language for the staff to understand, follow, and trust. The inspectors acknowledge that the policies were created in response to high-profile whistleblower cases, and also point out that the procedures wouldn't work if the workplace culture was not conducive thereof.

According to the results of the global staff survey referred to in the report, 45 percent of the respondents stated that they had observed misconduct or wrongdoing within the last five years. This figure is significantly higher than both private and public service employees internationally.[447] However, less than half of those who reported observing such behaviour claimed to have reported it. After breaking down the data by the size of the organisation, it was found that approximately 50 percent of the individuals who reported observing misconduct in large organizations had reported it, while only 39.3 percent and 41.2 percent had reported it in medium-sized and small organizations, respectively. In terms of employment status, personnel with continuing or permanent appointments reported misconduct at a higher rate (51.3 percent) than those with fixed-term contracts (47.4 percent) or temporary appointments (39.3 percent). It is clear that there is evidence that civil servants who have job security are likely to report misconduct, and some international civil servants even argue that only nationals of powerful member states, who have a backup career in their home country and who have had political influence, become whistleblowers. Out of all personnel who reported misconduct/wrongdoing or participated in an oversight activity within the past five years, 12.8 percent experienced retaliation as a result. However, of those who reported experiencing retaliation, only 40 percent actually reported it.

According to the report,

> *"Underreporting of misconduct, wrongdoing and retaliation, at current levels across the United Nations system organizations, is of considerable concern and points to weaknesses and deficiencies in: policies that are unclear or do not provide adequate protections; key functions that are*

[446] Ibid.
[447] Ibid, Page ix.

ineffective and/or lack independence; procedures that are vague or protracted; processes that take too long or are overly bureaucratic; and, especially, leadership that has not adequately developed and supported a culture of accountability, or "tone at the top"."[448]

The report considered that, between 2012 and 2016, 18 organizations recorded 278 cases of retaliation reports through designated channels, with accommodations being made for 34 complainants. Of those cases, 62 prima facie cases of retaliation were identified and referred for investigation, and only 20 cases were substantiated. These numbers were found to be concerning, especially when considering the United Nations system organizations as a whole, which employ over 150,000 personnel. While comparable data from other international organizations outside of JIU's purview is hard to obtain, it suggests possible deficiencies in policies, processes, and procedures for handling retaliation reports, as well as potential issues with the competency of staff functions that handle such reports. Staff expressed lack of confidence in the system for protecting whistleblowers and in the likelihood that the misconduct will be addressed, even though the report concluded that the mechanisms for protection are in place throughout the UN system. Slightly above half of the participants in the global staff survey conveyed trust in their organisation's methods and protocols for efficiently addressing cases of wrongdoing or misconduct. However, this percentage declined when it came to retaliation cases. The report recommended publishing the outcomes of cases publicly to correct the trust deficit.

The whistleblower study draws a clear connection between law, leadership, trust, and culture. Reporting on a superior is considered one of the most precarious situations for staff members. Out of the participants who took the global staff survey, 60.4% were either uncertain or believed that reporting on a superior could affect their career and performance evaluation. As per the JIU's interview with complainants, the vulnerability of the complainant increases with the seniority of the person linked with the purported activity.

There is clear evidence that the culture of the UN system organisations does not support speaking out in any form.

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[448] Ibid, page xi.

> *"Nearly one quarter of the personnel cases JIU studied were, in effect,* ***respectful dissent cases****, or had at least started out that way. These cases were rooted in policy or procedural disagreements with middle management or senior leaders that could have had, or did have, serious implications. All complainants experienced severe retaliation, and most cases included disclosures to external entities (Member States and/or the media), while half ended in resignations of the complainant and subsequent litigation. All cases created, and continue to create, serious discord within their respective organizations. [emphasis added]"*[449]

Respectful dissent is a critical aspect of any healthy and functional society, community, or organisation. It allows individuals to express their opinions, views, and ideas, even if they differ from the majority, without fear of retribution or marginalisation. Respectful dissent can lead to constructive and productive debates and discussions that can result in better decision-making, innovation, and progress. It also promotes open-mindedness, inclusivity, and diversity, which are essential ethical principles upheld by the United Nations. Ultimately, encouraging and valuing respectful dissent can create a culture of trust, collaboration, and positive changes for the global institutions both internally and externally.

Perhaps the most unique feature of the 2018 report is the discussion on the possibility of reporting the misconduct of the executive head of a UN organisation, or the head of investigations, to an external body. Only UNHCR, UNRWA, and WIPO have such explicit provisions for reporting to an independent actor - the UN OIOS. It does appear that the UN Secretariat does have a leading role in the system, as well as in the roots of the ethos. The publicly known cases of dismissal / resignation of an executive head of a global organisation will be discussed in the next section.

According to the 2021 report on the ethics function of the UN system, the overriding objective of the Ethics Offices is to foster a "culture of ethics", and to that end,

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[449] Ibid, page xii.

"Most organizations closely follow the lead of the United Nations Secretariat."

However, crucially several large organisations in the system - ILO,[450] IMO, UPU, UNWTO and UNWomen - still have no ethics function and the low budget allocations indicate that ethics is still a low priority for the leadership in many organisations. Despite that, the requests for ethics services increased by more than 100% between 2014 and 2019 for the UN Ethics Office, similarly to other UN organisations.

The inspector defines ethics as "performance consistent with the values of the United Nations and the highest standards of integrity required by the Charter of the United Nations and the standards of conduct for the international civil service."[451] However, it is pointed out that "ethical behaviour is much more than mere compliance with internal and external legal norms". The "tone at the top" is found to be vital, although the inspectors focused on the role of the executive head and their financial disclosure rather than on the entirety of the fragmented leadership and management of the organisations. The report urged organisations to evaluate their financial disclosure programmes; to conduct regular staff surveys[452] and mandatory courses[453]; and to establish link between anti-sexual harassment and ethics.

The report focused again on the role of the ethics officers and their independence, using external[454] and internal standards. The conclusion was that thirteen organisations, including the UN Ethics Office, do not live up to the standard of independence. The report pointed out that ethics heads are not always allowed to senior management meetings, and recommended that organisations should coordinate the ethics infrastructure through the CEB. It is also indicated strongly that low staff trust in the leadership is still cause for concern. Another issue was

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[450] ILO hired a full-time Ethics Officer for the first time in 2022.
[451] JIU/REP/2021/5 p8, para 44
[452] According to the 2021 report, two-thirds of the organisations have implemented the recommendation "at least partially", and the rest have not implemented it at all. It does not cite the specific surveys by document number or results. Ibid, paragraph 193.
[453] The attendance of courses was under 50 percent. Ibid, paragraph 207
[454] See IIA, "The IIA's Three Lines Model. An Update of the Three Lines of Defense" (*The Institute of Internal Auditors*, September 9, 2020)

the lack of transparency of the reports on the ethics activities in some organisations,[455] and the varied access of the heads of the Ethics Office to the governing bodies.

Finally, the 2021 report addressed the connection between ethics and whistleblower protection. It points out some progress made since the 2018 report, particularly the establishment of the ENMO, which was reviewed in section 3.1.3. Deficiencies with regard to protecting complainants still exist, particularly with regard to the lack of appeals of the Ethics Office decisions. Regarding the United Nations specialised agencies and IAEA, five organizations implemented new policies between 2019 and 2021 (FAO, ICAO, ILO, ITU, and UNESCO), while three organizations are currently revising their relevant policies (UNIDO, UNWTO, and WMO). The Inspector observes that while the majority of these policies focus on safeguarding whistleblowers, the IAEA's policy, revised in 2020, was not released as an ethics policy.

In conclusion, the reports by the JIU provide an insight into the UN system's ethical infrastructure - policies, offices, frames of reference, coordination, training, etc. - and some trends emerge that confirm the importance of the role of leadership, of trust, of transparency, of clear policy, and fair application. The reports both give specific information and ask broad questions on how to foster a culture of ethics in intergovernmental organisations, questions that have been examined throughout the scholarship of public administration.

3.2.3 The global duties of the international civil service

For the past century, scholarship on the civil service has always referred to the work of Max Weber, a prolific German philosopher and sociologist who wrote on various social aspects – political economy, religion, and politics.[456] His writings include, albeit not in a unified manner, a "yardstick" for measuring the social and political value of bureaucratic structures that has very often been summarised as a

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[455] UNHCR, IAEA, ILO, UNIDO, UPU and UNWTO. JIU/REP/2021/5 para 140
[456] Waters T and Waters D (eds), *Weber's Rationalism and Modern Society* (Palgrave Macmillan US 2015). See specifically Chapter 6 "Bureaucracy" pp73-128

"checklist" that includes the following criteria – a clear hierarchy, division of labour, meritocracy, technical training and competencies, written rules and communication, and impersonality of the rules. This "checklist" is supplemented by the emphasis that Weber puts on the "duty" and "sense of social esteem" of public officials.

Weber believed that modern public administration was "not only inevitable, but ultimately desirable as well",[457] while he also feared its influence.[458] One of the core beliefs of the Weberian bureaucracy model is the separation of public administration and politics in order to restrain the growing power of civil servants, who in his view have the capacity to overtake the elected officials they are supposed to serve. He feared that even though they are hierarchically subordinate and exist to carry out the edicts of politicians that are democratically representative and accountable, it is bureaucrats who can dominate through information asymmetry and professional longevity. This belief has permeated the relationship between civil servants and politicians in Western Europe, and also the intergovernmental institutions created by the Western European powers at the beginning of the 20th century. In the global context this fear has further contributed to an atmosphere of mistrust between diplomats and civil servants.

On the other side of that spectrum is Hegel,[459] who emphasised the necessity for moral education for bureaucrats that would put their priorities in the right order. According to him "the fact that a dispassionate, upright, and polite demeanor becomes customary … is … a result of direct education in thought and ethical conduct".[460] This contrast exemplifies the tug of war between punitive/control and aspirational ethics, and the difficulty to operationalize virtues in codes of ethics at international organizations.

Another important discussion from the US scholarship was the responsibility-accountability debate, also known as the Friedrich-Finer debate, of the 1940s. Carl

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[457] See Ringer F, *Max Weber: An Intellectual Biography* (University of Chicago Press 2010).
[458] Jackson MW, "Bureaucracy in Hegel's Political Theory" (1986) 18 Administration & society 139.
[459] See Sager F and Rosser C, "Reflecting on Seminal Administrative Theorists: Weber, Wilson, and Hegel: Theories of Modern Bureaucracy" [2009] Public Administration Review, 1136.
[460] Hegel GWF, "Philosophy of Right" in Sir Thomas Malcolm Knox (ed), *Hegel's Philosophy of Right* (Oxford University Press 1821)

Friedrich was a German-American political theorist who advocated for Weberian-inspired internal controls like professional standards and knowledge, in order to ensure accountability by peers; he also emphasised the need for discretion.[461] On the other side of the Atlantic, Herman Finer urged for external checks, since "the servants of public are not to decide their own course; they are to be responsible to the elected representative to the public".[462] The debate is ongoing, and some scholars even merge the two points, claiming that accountability equals following the rules, while responsibility is acting on personal judgement for the greater good.[463] Another way to frame the question is Dwight Waldo's work, who was one of the first who questioned the neutrality of terms such as "efficiency" by insisting that it must be based on democratic values.[464]

US administrative ethics scholarship became quite prolific in the 1970s, in the aftermath of the whistleblower-led Watergate scandal, which gave impetus to move from the scattered, efficiency-focused governance that allowed abuse of power. The European research is also quite fragmented - for instance the British public service ethos is based on a "historical institutional approach",[465] and in the Netherlands a compliance approach has overridden a value-based system.[466] The basic terminology can clash - in the US scholars refer to public administration ethics, while European continental studies refer to integrity - which is another reason why unqualified domestic parallels in the international sphere can be problematic. Recently comparative studies have been done that include rarely

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[461] Friedrich C, "Public Policy and the Nature of Administrative Responsibility" in Carl J Friedrich (ed), *Public Policy* (Harvard University Press 1940)

[462] Finer H, "Administrative Responsibility in Democratic Government" (1941) 1 Public administration review 335.

[463] Jackson M, "Responsibility versus Accountability in the Friedrich-Finer Debate" (2009) 15 Journal of management history 66.

[464] Waldo D, *The Administrative State* (2nd edn, Holmes & Meier 1984). See also Rosenbloom DH and McCurdy HE (eds), *Revisiting Waldo's Administrative State: Constancy and Change in Public Administration* (Georgetown University Press 2006).

[465] Vandenabeele W and Horton S, "The Evolution of the British Public Service Ethos: A Historical Institutional Approach to Explaining Continuity and Change" in L Huberts (ed), *Ethics and Integrity of Governance: Perspectives Across Frontiers* (Edward Elgar Publishing 2008). One of the conclusions of the chapter is that political power prevails over utilitarianist motives.

[466] Hoekstra A, "A Paradigmatic Shift in Ethics and Integrity Management Within the Dutch Public Sector?" in L Huberts (ed), *Ethics and Integrity of Governance: Perspectives Across Frontiers* (2008)

studied topics such as Indian, Daoist, Buddhist, Confucian, Judaic, Christian, Islamic, African and Russian traditions.[467] The 2011 study by Jordan & Gray of transnational public administration ethics stresses the dichotomy between universalism and contextual morality - arguing that there are no qualities universally deemed as "good", but also that not all moral values are equally good. However, since domestic bureaucrats sometimes have to relate to the ethical principles of a foreign administration, Jordan and Gray establish what they call "administrative orthodoxy" and the principles they believe underlie it - efficiency, economy, efficacy, expertise, equality. These qualities closely reflect the principles of the UN civil service as expressed in UN Charter Art 101, and even though this is a relatively new study, it might be that the scholarship is converging somewhat.

Even a very brief overview of public administration scholarship and public administration ethics scholarship reveals bureaucracy and morality married to power, social values, and the relationship between citizens, bureaucrats, and decision-makers. In traditional administrative theory, values are seen as a matter of politics, and the separation of administration and politics is a vital tenet of the neutrality of bureaucracy. One common thread, however, is the vital importance of the civil service in the formulation, application, and evaluation of law and policy, as well as the intrinsic link between the interests of the society and the actions of the public servants.

Wilson,[468] lamented that for a long time it was the constitutional principles at the forefront of the discourse, rather than the application of the law and policy by the administration.

> *"The question was always: Who shall make law, and what shall that law be? The other question, how law should be administered with enlightenment, with equity, with speed, and without friction, was put aside as " practical detail " which clerks could arrange after doctors had agreed upon principles."*

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[467] See the corresponding chapters in Jordan SR and Gray PW, *The Ethics of Public Administration: The Challenges of Global Governance* (Baylor University Press 2011)
[468] Wilson W, "The Study of Administration" (1887) 2 Political Science Q

"The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study. It is a part of political life only as the methods of the counting-house are a part of the life of society; only as machinery is part of the manufactured product. But it is, at the same time, raised very far above the dull level of mere technical detail by the fact that through its greater principles it is directly connected with the lasting maxims of political wisdom, the permanent truths of political progress."

The "business" of civil service ethics is thus not just applied ethics, but also a question of justice in close relation to the public. Legalising ethics in the public administration ethics is referred to as constitutionalism, in the context of separation of powers, but those principles represent more than a legal connection.[469] It is a question of the civil service espousing the values and interests of the society they serve. In that, domestically as well as internationally,[470] public interest from an ethical perspective on the law can be defined as both procedural and substantive due process. Administrative ethics is closely tied to ensuring the rights of citizens, but public management models from the 1990s treated citizens as customers and recipients, and there is a lot of scepticism in the field about the idealism of citizenship.[471]

Three points emerge from analysing the evidence from the studies in the previous subsections in light of the theory-

1) there are dichotomies between control and aspiration, between confidentiality and transparency, between accountability and legal consequences in the theoretical approaches;
2) the staff of international organizations can be considered both in the service of the representatives of nation states and having moral obligations beyond the aggregate of member states and thus they have conflicting duties to national governments and the collective of global citizenship;

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[469] Rosenbloom DH, "Public Administrative Theory and the Separation of Powers" (1983) 43 Public administration review 219.
[470] Stoyanova & Leppävirta, (n. 114)
[471] Deleon L and Deleon P, "The Democratic Ethos and Public Management" (2002) 34 Administration & society 229.

3) ethics is considered important in creating a culture and preventing corruption and abuse of power, but ethical codes and rules are not enough.

These divisions trace back to recurring terms concerning the purpose and responsibility of an international organisation; the duties of the international civil servants; and the nature of the "global public". They also reflect the treatment of whistleblowers, in that the individuals that speak up against wrongdoings expose the contradictions and expose the inconsistencies of the UN reputation and image. In the administrative context, law can be seen as adversarial - one side wins, another loses in a dispute, one is right, the other is wrong - all the while the underlying ethics are principles that guide decision-making in adjudication.[472] The internal culture of the UN is therefore based on value conflicts - a contradiction between the stated purpose / values of the UN and of its civil service, and of the practice and application thereof. The pillars of the UN culture - the relationship with the Member States; the ethics and aspirations of the Charter and the ethical infrastructure; and the perpetuation of a culture of silence - affect not only the individual legal cases of whistleblowers at the tribunals, but also the workings of the entire organisation.

3.3 Leadership and culture

The UN and other intergovernmental organisations are the actors that they are because of their mandates and capacities that they were given by nation states, but also because of the history of choices made by individuals, and especially because of the nature of the organisational leadership. The diplomatic representatives of governments make the legally binding decisions in the parliamentary organs, like the GA and SC, including decisions concerning the internal law of the organisation. The process of selection of the Secretary-General is an important part of the culture of silence of the UN, and illustrates how the "tone at the top" conflicts with the priority of transparency and accountability.

[472] Martinez JM, *Public Administration Ethics for the 21st Century* (Praeger 2009)

3.3.1 Secretary-General Selection

The selection of the UN Secretary-General demonstrates the dichotomy between written principle and practice in the history of the organisational culture of the institution. The UN has had one interim head and nine Secretary-Generals since its inception in 1946. All of them have been men; the 2016 selection featured 2 women candidates in the final straw poll, and the 2006 selection had 1 woman in the final poll for the first time. This trend conflicts with UN Charter Art 8 on gender equality, and could be considered a de facto restriction. This chapter has established that the leadership of the executive head of the UN in the UN system is more than just symbolic, but legal, ethical, and cultural. The implications of the ongoing limitations on women on the international civil service culture are concerning, although they are usually overshadowed by the lack of transparency of the selection process as a whole.

Article 97 of the UN Charter states, "The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council". Member States nominate candidates by letters to the President of the General Assembly and /or the President of the Security Council, the Council meets in a closed meeting to deliberate. Afterwards, the Security Council adopts a resolution to recommend the candidate which is transmitted to the Assembly, which meets in an open meeting to consider the recommendation and finally adopts a resolution to appoint the Secretary-General.

General Assembly Resolution A/RES/11(I) of 1946 states,

> *"Both nomination and appointment should be discussed at private meetings, and a vote in either the Security Council or the General Assembly, if taken, should be by secret ballot."*[473]

[473] The resolution also outlined the SG (a) Terms of appointment; (b) • Conditions of employment, including restraint as to future employment; (c) Length of term of office and possibility of reappointment; (d) Required voting majorities in the Council and General Assembly; (e) Procedures for appointment involving closed meetings in both the Council; (f) and Assembly and secret balloting. See Security Council Report, "Special Research Report: Appointment of a New Secretary-General : Research Report : Security Council Report" (*Securitycouncilreport.org*, February 16, 2006) <https://www.securitycouncilreport.org/research-reports/lookup-c-glkwlemtisg-b-1426023.php> accessed October 10, 2023

This resolution was never amended. Most importantly, Resolution 11(I) established that the Council presents a single name as a recommendation to the Council -

> *"[it is] desirable for the Security Council to proffer one candidate only for the consideration of the General Assembly, and for debate on the nomination in the General Assembly to be avoided."*

This practice has also persisted and was never formally reconsidered and amended. Resolution 51/241 from 1997 stated that:

> *"56. The process of selection of the Secretary-General shall be made more transparent."*

Some developments in an effort to open the process took place in the decades since, chiefly by providing more information to the media. However, a great deal of the selection takes place in informal meetings, which do not have to be recorded, summarised for the media, or communicated at all. Moreover, in 1981, the Security Council instituted "straw polls" - a preliminary ballot where the Member States would anonymously indicate whether they "encouraged" or "discouraged" a candidate. In 1996, colour coding for the first time indicated the origin of the vote, i.e. "red" for permanent members and "white" for non-permanent members.

The confidentiality provisions can be found in rule 141 of the Rules of Procedure of the General Assembly and rule 48 of the Provisional Rules of Procedure of the Security Council. The lack of information on the selection process not only undermines the global public trust in the office of the Secretary General, but also reinforces the culture of secrecy in the UN organisation and the UN system. There has been no challenge to the perception that the top levels of the organisation are not only chosen behind closed doors, but without any formal consideration of their moral character.

The Secretary-General in turn appoints all senior officials at the Assistant- and Under-Secretary-General levels, often based on political or regional power balance considerations, and also has the unique discretion to dismiss such appointees. The D-2 and above appointments are the prerogative of the SG and are not subject to

review by panels like other staff members.[474] In the history of the UN, the Secretary-General has never exercised the authority to dismiss bureaucrats on those levels, even in cases of public and egregious breaches of law and decency.[475] In 2018, the UN has claimed that certain high-ranking officials are under investigation for sexual harassment of subordinates, but no further information has been released up to date.[476] Dismissal at the managerial and leadership levels, including of the executive heads, has been so rare and so secretive that it only confirms the levels of impunity bestowed upon those individuals.

In April 2002, after two no-confidence votes at the Organisation for the Prohibition of Chemical Weapons Conference, the OPCW dismissed its Director-General, Jose Bustani. This case[477] is to date the only[478] instance of the head of an intergovernmental organisation being dismissed.[479] Bustani was a vocal advocate for expanding the OPCW's mandate to include the verification and destruction of chemical weapons held by non-state actors. However, his efforts were met with resistance from some states, particularly the United States, which threatened to cut funding to the OPCW unless Bustani was removed. The decision to dismiss Bustani raised ethical concerns about the undue influence of powerful states on international organizations, as well as the importance of protecting the independence and integrity of such organizations. It also highlighted the need for greater transparency and accountability in the decision-making processes of

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[474] See Langrod (n. 196) p160 on types of appointment and election.

[475] Former Ethics Office Director for one. Ratcliffe R, "Top UN Official Accused of Sexual Harassment Stands Down" *The guardian* (February 23, 2018) <https://www.theguardian.com/global-development/2018/feb/23/luiz-loures-un-official-accused-of-sexual-harassment-stands-down> accessed October 10, 2023. Loures was not dismissed.

[476] Ratcliffe R, "Sexual Harassment and Assault Rife at United Nations, Staff Claim" *The Guardian* (January 18, 2018) <https://www.theguardian.com/global-development/2018/jan/18/sexual-assault-and-harassment-rife-at-united-nations-staff-claim> accessed October 10, 2023

[477] Stanič A, "Bustani v. Organisation for the Prohibition of Chemical Weapons. Judgment No. 2232" (2004) 98 The American journal of international law 810

[478] Several prominent chief administrators have been investigated for sexual assault and abuse of power - prominently Dominique Strauss-Khan of the IMF and Luis-Moreno Ocampo of the ICC - but no others have so far been dismissed. Strauss-Khan resigned after being indicted, but the charges against him were dropped by a New York court. Ocampo fired his spokesperson for confronting him about the alleged misconduct and was censured by ILOAT Judgement 2757. See below for Wolfowitz's resignation.

[479] J.M. B. v. OPCW, ILOAT Judgement No. 2232

international organizations to prevent the influence of powerful states from overriding ethical considerations.

In the Bustani judgement, the ILOAT found that it had jurisdiction ratione materiale, since even though the decision to dismiss the Director-General was taken by the plenary organ of the organisation, it was an administrative decision that affected the employment condition of a staff member. This is an important, and unsubtle, inference that the decisions taken by the representatives of Member States have direct consequences for the members of the international civil service. The Tribunal condemned the political interference by the US and upheld the independence of the international civil service, and awarded damages, since Bustani had not sought reinstatement. It is worth pointing out again that the ILOAT has a more consistent record in siding with staff members than any other administrative tribunal; the dismissal of Bustani was a clear example of a conflict between the executive and parliamentary branches of an international organisation, rather than the usual back-room political resignations.

In 2007, Paul Wolfowitz, then-president of the World Bank, left his position following a controversy surrounding allegations of nepotism. Wolfowitz had been accused of arranging a promotion and significant pay raise for his girlfriend, Shaha Riza, who worked at the bank. The controversy erupted when news of the promotion and pay raise became public knowledge, leading to protests from bank staff and calls for Wolfowitz's resignation. Despite initially resisting calls for him to step down,[480] Wolfowitz eventually resigned, rather than being dismissed for misconduct, citing a loss of support from the bank's board of directors.

According to Schein, who will be discussed later in this section, the organisational leadership creates and changes cultures, while management and bureaucracy act within a culture. Within the UN, the leadership is divided between the diplomats, who make decisions in the UN Committees, including creating and changing the internal rules; and the administrative leadership that represents the organisation, but has very limited authority. This dichotomy is reflected in the external functions

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[480] CNN, “Wolfowitz Rejects World Bank Ethics Ruling” *CNN Money* (May 15, 2007) <https://web.archive.org/web/20070518235908/http://money.cnn.com/2007/05/15/news/newsmakers/wolfowitz.reut/?postversion=2007051507>

of the organisation as well, for instance Schein refers to an international refugee organisation where field workers measured the success by the number of refugees helped, while the managers referred to the feedback of the government representatives.[481] So, although the organisation's primary aim is international peace and stability, there exist certain discrepancies in its organisational culture, where values articulated may not entirely align with those practised. This will be further demonstrated in the application of the whistleblower policy in the cases in Chapter 4.

On the other hand, the work of the organisation is based on its image, its reputation, the perception of a bastion of peace and globalisation; any message that challenges that construct is not going to be received well. Because the UN internal culture is so conflicting, it is to be expected that a whistleblower's report would tend to be either ignored or perceived as a threat to the status quo. Two specific elements of the UN internality are the separation of the politically mandated leadership - the Secretary-General, Under Secretary-General (USG), Assistant Secretary-General (ASG) - and the "rank and file" bureaucracy in terms of legal consequences; and the national power monopolies over the staffing of the intergovernmental organisations.

According to Novosad and Werker,

> *"Statistically, democracy, investment in diplomacy, and economic/military power are predictors of senior positions—even after controlling for the U.N. staffing mandate of competence and integrity.*
>
> *... While the world population share of Western Europe and its offshoots fell from 18% in 1965 to 13% in 2005, their share of Secretariat positions remained largely constant, falling from 46% in 1965 only to 45% in 2005."*[482]

Despite the commitment of the UN Secretary General to prioritise "efficiency, competence, and integrity" in the hiring of international civil servants, the existing

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[481] Schein EH and Schein P, *Organizational Culture and Leadership* (5th edn, John Wiley & Sons 2016) P 86 / 102

[482] Novosad P and Werker E, "Who Runs the International System? Nationality and Leadership in the United Nations Secretariat" (2019) 14 The review of international organizations 1

power structures and interests play a significant role in determining senior positions. It undermines the credibility of the UN externally, and internally reinforces the culture of mistrust in the written rules and principles. The loyalty and morals of the senior managers that are politically appointed are not trusted -

> *"Political appointees are frequently not loyal to the United Nations, but to their respective governments, upon which they depend for further reward or punishment".*[483]

If the role of leadership is to create and change culture, the culture of the UN system is at odds with itself as a reflection of the leadership dichotomy and the conflict between principles and practice of staffing. These fault lines are also visible in the friction between the different organs that directly affect the application of the ethical mandates and the whistleblower protection policy.

3.3.2 Organs

Aside from the Office of Administration of Justice, which administers the tribunals, there are four relevant internal departments and offices that influence the application of ethics and law at the UN - the Office of Legal Affairs, the Department of Management, the Office of Internal Oversight Services and the Ethics Office itself. The first two are older and considered part of the traditional UN hierarchy, while the latter two are independent and relatively new; the heads of these organs have different statuses and term limits - from ASG to USG to D-2. The determination of whistleblower status is made by the Ethics Office, based on a report by the Office of Internal Oversight Services (OIOS). Misconduct investigations are also conducted by OIOS, with the help of the Office of Human Resource Management; and it is OHRM that represents the administration in first instance cases.

The Office of Legal Affairs was established by General Assembly resolution 13 (1) of 13 February 1946 as the "central legal service for the Secretary-General and the Secretariat and United Nations organ". The General Legal Division of the Office of Legal Affairs has an explicit mandate to (among others) interpret the internal rules; to provide legal advice on human resources matters and policies; to review

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[483] Ibid.

administrative issuances; to represent the Secretary-General before the United Nations Appeals Tribunal; and to provide advice to the offices representing the Secretary-General before the United Nations Dispute Tribunal[484]. There are no documents that reference guidelines for reviewing administrative issuances, or for interpretation of provisions.

The Department of Management[485] deals with "administrative, personnel, policy and reform" issues, including ICT, procurement, project management support, human resources, policy planning, treasury and financing, among others. In the context of the law of the UN civil service, the Office of Human Resources Management (OHRM), specifically the Administrative Law Section (ALS), deals with disciplinary matters and recommending measures in cases of established misconduct; advises managers on human resources questions; and also represents the Secretary-General in front of the Dispute Tribunal. There is no legal rationale as to why the Administrative Law Unit is not part of the OLA, and there is a clear duplication of functions. There are also questions of transparency, since the office that reviews possible misconduct and recommends measures also represents the administration and is supposed to submit all the available information to the Tribunal.

The Department of Management and the Office of Legal Affairs reflect the old, informal culture of resolving UN administrative legal disputes and disciplinary matters, where human resource policy was fused with administrative justice, especially in the informal secretive dispute resolution of the Joint Appeals Board and the Joint Disciplinary Committee. There should be a clear division of mandate between the two - legal and HR - but what happens in practice is that the OLA deals with more "official" issues coming from the Secretary-General and the GA, while ALS and OHRM deal with the management and individual staff issues. This culture reflects diplomatic practice and affects the investigative arm of the Administration that also carries elements of that behind-the-scenes practice that has reinforced the culture of silence.

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[484] "United Nations - Office of Legal Affairs" (*Legal.un.org*) <http://legal.un.org/ola/div_gld.aspx?section=gld> accessed October 10, 2023. See also ST/SGB/2008/13

[485] Which can also trace its roots back to resolution 13 (1), but has been renamed and restructured over the years.

The OIOS serves as the UN's internal watchdog, with the mandate to provide independent and objective assessments of the organisation's activities and programs. The OIOS plays a vital role in monitoring the use of UN resources, investigating allegations of fraud and misconduct, and providing recommendations to improve the organisation's operations. It also conducts evaluations of programs and projects to ensure that they are achieving their intended goals and making efficient use of resources. The Office was created in 1994 by A/RBS/48/218 B, and the mandate was elaborated in Article 16 and 17 of ST/SGB/273, with an "operational independence", and the mandate to report directly to the Secretary-General. The basic function of OIOS is to make a determination whether a misconduct has occurred, and to conduct audits of different programmes and internal bodies. In a 2007 report titled "A Culture Review of the Investigations Division of OIOS",[486] Dr. Michel Girodo concluded that the investigative body was governed by an overly legalistic, reactive, centralised and secretive environment. The Erling Grimstad Report in 2007[487] also confirmed that the organisational culture of investigation had serious issues - lack of effectiveness, investigative division recommendations are purely advisory, the supervisor of the staff member under investigation has the power to decide what measure to take. The report found lack of trust, lack of structure and bad communication, hostile environment and conflict between management, *" a volatile management style ... that is driven by an obsessive and excessive need for confidentiality on par with the style of intelligence organizations."* Between 2010-2015, OIOS was the focus of an internal conflict that included several cases brought to the tribunals and the press, allegations of fraud, favouritism, tampering with evidence, retaliatory investigations, among others.[488] The overwhelming conclusion from analysing the series of events is that the informal culture of silence and the low confidence in the integrity of the organisational leadership and the investigative arm can have many negative consequences, including on the ethos and culture formation.

As has already been mentioned, the UN led the creation of the ethical infrastructure in the UN system. In 2005 Kofi Annan created the UN Ethics Office and promulgated the first whistleblower protection policy, in the aftermath of the

[486] Girodo M, *A Culture Review of the Investigations Division of OIOS* (2007)
[487] Ibid, p101.
[488] See Nguyen-Kropp & Postica case in Chapter 4.

Oil-for-food scandal. The Office has the mandate to provide advice, training, administer the financial disclosure programme, as well as make recommendations on protection for whistleblowers from retaliation. During his term, Secretary-General Ban-Ki Moon put a strong emphasis on financial transparency and largely ignored the other elements of ethics. The Ethics Office came under public scrutiny in the context of several whistleblower retaliation scandals, and has been criticised by the Government Accountability Project for its slow process and failure to protect staff members. In 2017 the whistleblower policy was amended to exclude the recommendations of the Ethics Office from judicial review by the tribunals. This raises serious concerns about the rule of law in the UN internal justice system, including with the judges of the Dispute Tribunal.[489] The Ethics Office is a linchpin in the UN system ethical infrastructure, both in the application of the procedures, but also in the training, advice, coordination, etc. that form the organisational culture and ethos of the UN system organisations.

3.3.3 Organisational culture theory

Organisational culture is not simple to define, although one key phrase - "the way things are done around here" - seems to capture the gist of the concept with visceral accuracy. The atmosphere in a company or public institution, the history, the internal language, the written and unwritten rules, the authority dynamics, etc. have all been identified as an interconnected entity affecting the operation and character of a company or institution.[490] The study of organisational culture dates back to the 1980s in the context of efficiency and productivity in companies, of identifying "winning" elements of organisational culture. The assumption was that the company structure and the way of managing human assets can affect company performance, and it would be beneficial to identify those elements and replicate them.[491] It was posited that "strategic" human resource policies, i.e. intentional planning of the use of human resources, could affect not only performance and effectiveness, but also social/psychological issues like organisational infighting

[489] See the conclusion of chapter 2.

[490] O'Riordan J, "Organisational Culture And The Public Service" [2015] Institute of Public Administration

[491] Beer M et al, *Managing Human Assets* (Simon and Schuster 1984)

and inertia,[492] but the priority shift between the two has become a source of imbalance. Therein lies a contradiction evident in the UN internal law and ethics - the dichotomy between outcomes (consequentialism) and values - and the obvious conflict in pulling the personnel in two directions that might be in conflict.

Public administration scholarship also has studies on the internal culture and ethics because values and trust are very important in the context of the relationship between the public service and the public.[493] In the public sector, the focus has been on identifying issues, like corruption, ineffectiveness, etc. and identifying elements of organisational culture both as sources of problems and key points for potential reforms. Performance in the public sector is intrinsically tied to the relationship with the citizens rather than production, and therefore the organisational culture of the public organisations closely reflects the concept of public good and democratic values. In that sense, the importance of hierarchy differs between the private and the public spheres.[494] A 2014 Report on the Irish public service found that an "unnecessarily secretive" bureaucracy results in an institution with a "limited learning capacity and reduced openness to new ideas",[495] which creates a loop of ever-increasing mistrust. Of course, international organisations are yet another sphere, with its own peculiarities and with a complex relationship between member states and the international civil servants and the global public. There are common elements across private and public entities that are worth investigating, because it would be the general principles that would

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[492] Fombrun CJ, Tichy NM and Devanna MA, *Strategic Human Resource Management* (New York : Wiley 1984).

[493] Molina AD, "Values in Public Administration: The Role of Organizational Culture" (2009) 12 International journal of organization theory and behavior 266; Parker R and Bradley L, "Organisational Culture in the Public Sector: Evidence from Six Organisations" (2000) 13 International journal of public sector management 125; Schraeder M, Jordan M and Tears R, "Organizational Culture in Public Sector Organizations: Promoting Change through Training and Leading by Example" (2005) 26 Leadership & Organization Development Journal 492.

[494] Pollitt and Bouckaert distinguish between two models of administrative culture - Rechtsstaat and Public Interest models. See Pollitt C and Bouckaert G, *Public Management Reform: A Comparative Analysis* (Oxford University Press 2004)

[495] Raidió Teilifís Éireann, "Report of the Independent Review Group on the Department of Justice and Equality" (*Rte.ie*, 2014) <https://www.rte.ie/documents/news/justice-dept-review.pdf> accessed October 11, 2023

translate and provide a common ground for analysing the influence of the UN culture on the treatment of whistleblowers.

One of the reasons why organisational culture is difficult to identify and understand is because it encompasses the "taken for granted values, underlying assumptions, expectations, collective memories and definitions present in any organisation."[496] It is not a conscious understanding of "how things are done" that drives people's behaviour, but the unspoken and largely unnoticed by the employees themselves. It is a multilevel order that spreads across broad cultural principles, hierarchies, linguistic specificities, and micro-cultures specific to different departments.

The foremost scholar of organisational culture is Edgar Schein, formerly of the MIT Sloan School, who first published textbooks on organisational psychology in the 1960s and 70s, and then moved to human resource management research in the 80s. The first edition of "Organizational Culture and Leadership: A Dynamic View" came out in 1985, with a fifth edition published in 2016.[497] Schein's famous "triad" of organisational culture consists of three levels - artefacts, espoused beliefs, and underlying assumptions. The model emphasises that to truly understand and influence an organisation's culture, one must go beyond the observable and delve into the deeper levels of beliefs and assumptions. On the surface level are the artefacts that include visible elements of culture such as dress code, office layout, and symbols. Those are easy to observe but may not provide a complete understanding of an organisation's culture. In an international organisation there would be symbols, flags, the headquarters, etc. Beneath the surface are the espoused beliefs and values. These are the stated principles, mission statements, and ideologies that organizations express. They represent what an organisation claims to believe in and stand for. In the UN it could be said that the espoused beliefs of the civil service are encoded foremost in the Charter, and in the ICSC Code of Conduct. The deepest level of culture consists of underlying assumptions, which are often unconscious and taken for granted, like trust. These

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[496] Cameron KS and Quinn RE, *Diagnosing and Changing Organizational Culture: Based on the Competing Values Framework* (2nd edn, Jossey-Bass 2011)

[497] He has also posited the importance of "humble" inquiry, consulting, and leadership in his latest publications. Edgar H and Schein PA, *Humble Leadership: The Power of Relationships, Openness, and Trust* (Berrett-Koehler Publishers 2018)

assumptions guide behaviour and decision-making within the organisation. They are deeply ingrained and can be challenging to uncover and change. Those deepest beliefs are what drives the treatment of whistleblowers and what emerges as a red thread running through the subsections of this chapter - from the conflicts in the UN system coordination, to the mistrust in the policies, to the role of the leadership.

Other scholars - like Johnson and Scholes in 1990 - describe a complex structure which is a more detailed form of Schein's triad, including symbols, power relations, structure, control systems, rituals, stories, the paradigm, etc.[498] The shared history of a group and the behaviour of the leadership establish the core values that guide the evolution of a culture, and there is strong evidence in research that failure of change processes in organisations are often due to lack of consideration of the organisational culture.[499] This conclusion can be applied to the UN as well, as the efforts to reform the international institutions and their internal regulations, including the whistleblower protection, have not taken into account the existing values, conventions, and practice.

Finally, the organisational culture as a whole does not exist in isolation, as, according to Schein, “whether or not a culture is “good” or “bad,” “functionally effective” or not, depends not on the culture alone, but on the relationship of the culture to the environment in which it exists.”[500] Companies and public bodies are heavily dependent on their clients and constituents, so it is not surprising that the external context affects their internal values. This thesis claims that the external framework of international institutions, including the global constituents, affects the organisational culture and the rules, and vice versa - that the internality of the UN and other organisations affects the global society.

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[498] Johnson G and Scholes K, *Exploring Corporate Strategy* (6th edn, Financial Times Prentice Hall 2002)

[499] In Cameron and Quinn, (n. 496); Also in Katzenbach JR, Steffen I and Kronley C, “Cultural Change That Sticks” (2012) 90 Harvard business review 110.

[500] Schein (n. 481)

3.3.4 Culture formation

Similarly to the discussions on the common law and the common ethos of the international civil service, the common global organisational culture appears to be found in different artefacts and institutions, as well as in behaviours, organisational language, etc. Aside from the written sources, according to Cameron and Quinn, '

> *"An organisation's culture is reflected in what is valued, the dominant leadership styles, the language and symbols, the procedures and routines, and the definitions of success that make an organisation unique'."*[501]

Broadly speaking, the UN culture is focused on internationality, both ethically and legally; on creating an impartial, stable forum for negotiations that is served by the bureaucracy; on the rituals and performance of diplomacy; on strict hierarchy and differentiation of duties to the point of segregation between departments; on leadership that is separate from the regular civil service, and is mandated by the representatives of the nation states.

Both domestic and international civil servants perform a great deal and variety of clerical and other duties - record keeping, technical support, translation, archiving, information collection, meeting organisation, etc. - in support of public officials. The national and international civil service carries the organisational memory of political institutions. Public administration and global governance scholarship - most notably since Max Weber, but also earlier - has recognized the importance of these duties for domestic and global governance.[502] The job parallels have also been expressed in similarly worded internal rules and policies that establish the rights and responsibilities of the global bureaucrats. Because of the similarities in their duties,[503] it appears convenient to claim that an international civil servant *ought* to be loyal to the national governments that create and run the organisation, and that formally represent the constituent global public. It is worth noting that, since the inception of the bureaucracy of the League of Nations, national civil servants have gone on to work at international organisations, especially in the legal

[501] In Cameron and Quinn, (n. 496, 22)
[502] Avant DD, Finnemore M and Sell SK, "Who Governs the Globe?" in Deborah D Avant, Martha Finnemore and Susan K Sell (eds), *Who Governs the Globe?* (Cambridge University Press 2010)
[503] See de Cooker (n. 398)

and HR fields, and have brought their habits, unspoken rules, and work culture with them.

However, the nature of their professional responsibilities does not describe the entirety of the context dichotomies between domestic and international bureaucrats. Domestic civil servants have a loyalty to the government and domestic duties, are (often[504]) citizens of that country and subject to its laws, and have access to a domestic court; and there is no doubt that they are agents of the state and the domestic constituents. At the global level a civil servant still (often) has a citizenship, lives in a country, and has private legal obligations - such as rent, etc. - but they are not protected by domestic courts in the same way. An international civil servant cannot initiate a labour dispute in a domestic court; they cannot file a discrimination or harassment complaint against a diplomat; if they are arrested by police in the pursuit of their professional duties, they do not always have the same procedural rights as citizens and aliens. The contract of the international civil service is with the organisation; their duties put them at the service of the representatives of national governments; and because of the issues with autonomy and the enmeshment of the two it is not that clear if the bureaucrats are agents of the organisation, or of the collective of the states. Chapter 1 of this thesis addressed similar issues of the independent will of the organisation and responsibility, the issues with the access to a fair and balanced system of justice were addressed in Chapter 2, and will be further demonstrated in Chapter 4. What is important to point out is the environment that this legal system creates, and how it affects the application of the rules that are supposed to foster a culture of ethics, including protecting whistleblowers.

The roots of the international civil service ethos and culture can be traced to the League of Nations.[505] Thanassis Aghnides, who worked in the League from 1919 and was director of the Disarmament Section, was instrumental in the ICSAB's

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[504] There are some exceptions, especially prevalent among the EU countries where nationals enjoy the same rights and privileges; also experts can be foreign nationals.

[505] Gram-Skjoldager K and Ikonomou HA, *Organizing the 20th-Century World: International Organizations and the Emergence of International Public Administration, 1920-1960s* (Karen Gram-Skjoldager, Haakon Andreas Ikonomou and Torsten Kahlert eds, Bloomsbury Academic 2020)

drafting of the first Standards of Conduct in 1954.[506] The organisational culture of the UN could not be isolated from national administrations from its inception because of the hiring practicalities. Ikonomou has described the “amphibious employees” who represented both national and international interests in the League. According to Langrod, more than half of the original UN staff were US nationals because the recruitment drive was so improvised, and the imbalance was not corrected easily.[507] On the other hand, there was considerable “continuity” between international bureaucracy, and even the EU civil servants.[508]

Dirk Salomons[509] highlights the challenges faced by the United Nations bureaucracy in dealing with modern-day global issues such as poverty. He points out that the British administrative traditions and colonial structures, along with the "Empire" British civil service principles, have become barriers to the organisation's work. These principles, which include "command-and-control, seniority, independence, and merit," have been distorted and are hindering progress. Salomons questions how the HRM policy and strategy contribute to or inhibit the work of the bureaucracy. He notes the similarities between the League and UN oath and international characteristics, including promotion from within based on seniority. However, there is no limit on the renewal of higher posts in the UN, unlike in the League. The geographical distribution is politicised, and "equitable geographic distribution" means whoever pays the most gets the most posts, as was pointed out in the previous subsection. There is not much hiring from the private sector, and there are no resources for early career development.

Salomons emphasises that the international civil servants should be autonomous to achieve the organisational goals, despite the lack of independence from nation-states. He claims that patronage vs. merit culture clashes are prevalent, and patronage is limited in areas where public accountability and visibility are high, but rampant in the opposite. Salomons also highlights that the standards of conduct promulgated in 1954 by the ICSAB stipulate obedience rather than autonomy,

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[506] See more in Thanassis AHE, “Standards of Conduct of the International Civil Servant” (1953) 19 Progress in public administration 179

[507] Langrod (n. 196)

[508] See Gram-Skjoldager and Ikonomou (n. 505, p 95)

[509] Salomons D, “Managing People at the United Nations: Squaring the Circle of Merit and Patronage” in Dirk Salomons and Dennis Dijkzeul (eds), *International Organizations Revisited: Agency and Pathology in a Multipolar World* (Berghahn Books 2021), pp. 153–90.

independent thought, flexibility, and growth. The lack of managerial authority to act quickly because of internal controls remains a challenge, despite external criticism. The 1980s political HR bartering of posts and growing nepotism demoralised the Secretariat and increased mistrust between bureaucrats and management. The period of decolonisation increased the number of states, but the big powers were reluctant to change the geographical distribution quotas away from contributions. The Soviet civil servants were tightly controlled by the USSR government, but after 1989 many found regular appointments. Salomons does acknowledge that the 2012 reform resulted in an amalgamation of the "patronage" system with strategic management. However, the system is still paralyzed at the top, and the 2019-2021 global human resources strategy was seen as a defeat as it only acknowledged the problem rather than implementing significant reforms.

The early 2000s were a crucial period in the formation of the UN system culture and ethos. In his 2005 publication "Accountability, Investigation, and Due Process in International Organisations", Chris de Cooker puts together essays by academics and practitioners on different aspects of the application of administrative law and ethics in international organisations. The authors described the environment of introducing the new ethics codes, clarifying expectations, and formulating what had been until then the unspoken elements of the organisational culture. De Cooker finds that

> *"The codification of norms and standards, as well as the introduction of guidelines may have been helpful ... Many staff remain largely lost and frustrated, however. It is one of the prime duties of senior management to show the way ... Managers should set the example. In too many organisations one can notice, however, that the real guardians of the rules, norms and values of that organisation have been seen to apply the norms - or have been accused by their staff of applying them - differently when it concerns senior staff"*[510]

Organisational leadership has the responsibility not only to write and change the ethical standard, but also to apply it fairly and to embody it. As has already been proven and emphasised several times, the codes are not enough; it is the human

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[510] De Cooker (n. 398, p 51)

being that lives the principles and uses their power to apply them equally over time in an organisation that institutionalises those morals. In the UN, scandals were brought to light, which tarnished the public image of the organisation and created a trust deficit; as a reaction, procedures were written and passed, but the system did not take enough stock of the culture of silence and what it takes to unmake it. The JIU reports gathered data and made recommendations, but did little to name and acknowledge that leaders were not held accountable for their actions.

De Cooker concludes that,

> *"An administration is only credible when it is committed, at its highest level, to the highest standards of ethics and accountability, and when priority is given to the rule of law. Also here, International Administration is no exception."*[511]

Shirley Hazzard and Romeo Dallaire

Defining organisational culture can be challenging, yet it is relatively easy to grasp its impact on the functioning of large organizations and the experiences of individuals within them. When it comes to the international civil service, this culture is fluid, shaped by numerous intersecting entities and interests. The UN's organisational culture is more clearly defined at its headquarters, but variations exist due to the diverse missions and branches across different continents especially after the 1990s.

This thesis traces the roots of the law and ethics of the international civil service to the League of Nations and the public international legal sphere; likewise, the culture did not spring into existence, but can be traced in the writings of insiders and in the actions of UN staff in the defining conflicts of the 20th century.

Shirley Hazzard is an award-winning novelist, less famous for two books that she wrote about her 10 year career at the UN - Defeat of an Ideal (1973) and

[511] Ibid.

Countenance of Truth (1990). She described the UN organisational culture of the 1950s,

> *"The United Nations emerged as a temple of official good intentions, a place where governments might – without abating their transgressions – go to church; a place made remote – by agreed untruth and procedural complexity, and by tedium itself – from the risk of intense public involvement."*[512]

She also described in detail the lack of accountability of the leadership, specifically the Nazi associations of Secretary-General Kurt Waldheim, in the context of the relationship with powerful Member States,

> *"Since the moment of the United Nations' inception, untold energies have been expended by governments not only toward the exclusion of persons of principle and distinction from the organization's leading positions, but toward the installation of men whose character and affiliations would as far as possible preclude any serious challenge to governmental sovereignty."*[513]

The importance of public image and trust was not lost on Ms Hazzard,

> *"the latent power of the U.N. concept has always resided in the public confidence it might generate by high performance and demonstrated integrity."*[514]

Such were the outlines of the UN organisational culture in the 1950s - secrecy, power struggles, leadership that did not live up to the ideals. One needs to be in touch with the culture to evaluate it, not only because it is secretive, but because it is the human stories and perspectives that cut through the tribunal judgements, staff regulations, and codes of conduct. Those were not resolved and in 1994 the Rwandan genocide brought the shortcomings of this culture, and its effect on the global public and politics, to the public eye once more.

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[512] Hazzard S, *Countenance of Truth: United Nations and the Waldheim Case* (Chatto & Windus 1991) p. 5
[513] Ibid.
[514] Ibid.

"Still, at its heart the Rwandan story is the story of the failure of humanity to heed a call for help from an endangered people. The international community, of which the UN is only a symbol, failed to move beyond self-interest for the sake of Rwanda. While most nations agreed that something should be done they all had excuses why they should not be the ones to do it. As a result, the UN was denied the political will and material means to prevent the tragedy."[515]

In 1994, General Romeo Dallaire, commander of United Nations peacekeeping forces in Rwanda (UNAMIR) sent what has come to be known as the "Genocide Fax," a communication that has become a notorious symbol of the failure to prevent the mass killing of Rwanda's Tutsi minority. Dated January 11 but received in New York on January 10, the urgent message cited information from a high-ranking trainer of the pro-regime Interahamwe militia group, warning of an imminent "anti-Tutsi extermination" plot. UNAMIR and the UN were not allowed to have independent information-gathering, depending on the voluntary intelligence communicated by national governments. Despite Dallaire's warning, within three months Interahamwe members played a leading role in the 100-day genocide that resulted in the deaths of at least half a million Tutsi people, along with tens of thousands of "moderate" Hutus. This occurred during a time of war in which the Hutu-dominated regime was fighting against Tutsi-led insurgents from neighbouring Uganda.

The failure of the international community, particularly the United Nations and the United States, to take action at key turning points such as the "genocide fax" has become an illustration of their inability to prevent the tragedy that unfolded in Rwanda because of the apathy of the bureaucracy.[516] Despite General Dallaire's request for authority to raid suspected arms caches, U.N. officials rejected it and instead instructed him to consult with government leaders associated with the Interahamwe. This failure to act reflects the wide-spread culture of silence that also informed the decision of several UN civil servants to act on the report on the sexual abuse of children in CAR, and the attitude towards whistleblowers and

[515] Dallaire R, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Random House 2003)

[516] Barnett M, *Eyewitness to a Genocide: The United Nations and Rwanda* (Cornell University Press 2018)

people who “sound the alarm” on crimes and misconduct. A UN spokesman, Fred Eckhard, clarified later on that UN diplomats and officials insisted that Dallaire was to be kept "on a leash" as he was "champing at the bit."[517]

Dallaire was well aware that the leadership of the organisation had a big part to play in the failure of the UN in Rwanda.

> *“Member nations do not want a large, reputable, strong and independent United Nations, no matter their hypocritical pronouncements otherwise. What they want is a weak, beholden, indebted scapegoat of an organization, which they can blame for their failures or steal victories from.”*

As pessimistic and jaded as his conclusion was, it was not without merit, and it expressed mistrust. The perspective of the UN and other international organisations as threats to national sovereignty has persisted in the 21st century, with world leaders blaming the WHO for their own failures in the Covid crisis.

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[517] United States Holocaust Memorial Museum, “Genocide Fax: Part III” (*ushmm.org*) <https://www.ushmm.org/genocide-prevention/countries/rwanda/turning-points/genocide-fax-part-iii> accessed October 11, 2023

Chapter 4 Cases

"He must work in the common interest, rising above all particularism, but respecting the values which each people contributes to humanity. Neither a diplomat nor a soldier, but the personification of world solidarity, the international civil servant, if he is indeed impartial, occupies a strategic position of the highest importance in a pluralist world whose mentality is governed by, and tends towards, force. He symbolises the breach with the methods of the past, and by his very existence opposes anarchy between nations, since his function is to introduce elements of order and stability among them."

"It is hardly surprising that ... seems in conflict with reality."

(Langrod, 1963)

Introduction

The 1976 movie "All the President's Men," directed by Alan J. Pakula follows the investigative journalism of Bob Woodward and Carl Bernstein, portrayed by Robert Redford and Dustin Hoffman. The two reporters delve into the mysterious break-in at the US Democratic National Committee headquarters, encountering a number of anonymous sources and informants who divulge classified information. These whistleblowers provided the crucial evidence and leads that ultimately lead to the exposure of the Watergate scandal and its connections to the highest levels of power in the Nixon administration. In the movie, Bob Woodward calls the evasive equivocations of the US administration "non-denial denials", a phrase that has a special importance in the discussion of whistleblowing in public bodies, in their culture of silence and secrecy where whistleblowers are the contrast to the rest. Studies show that there are no cultural, religious, or even family circumstances that are common among whistleblowers.[518] However, studies of the

[518] Alford CF, *Whistleblowers: Broken Lives and Organizational Power* (Cornell University Press 2017)

organisational circumstances reveal that the key commonality is the moral muteness on the topic of ethical failings -

> *"The best way to disrupt moral behavior is not to discuss it, and not to discuss not discussing it. ... Talking about what we are doing means talking about how what we do affects others. Talking about what we are doing puts our actions in the larger context of their influence on the world of others. ... For the organisations where these whistleblowers worked, it was too much."*[519] (Alford)

To recall the legal background presented in Chapters 1 and 2, in the context of international administrative law, international civil servants have a quasi contractual relationship with an organisation that is immune from prosecution in domestic courts and exists to fulfil a specific function agreed upon among nation states; their obligations to that goal and the ideals espoused therein are simultaneously concrete and self-contradictory. This thesis so far has established both the broader and the more specific elements of those duties, the tribunals, and their institutional context, with the help of human stories to highlight the significance of individuals therein. The hypothesis is that the lack of protection against retaliation for reporting on misconduct is not a simple reflection of a lacking legal system, but a symptom of broader ethical and cultural fault lines that are visible in the conglomeration of the organs that bring the international bureaucracy together. This institutional framework underlying the international civil service ethos presented in Chapter 3 is based on intraorganisational hierarchical power struggles, value conflicts, and a "tone at the top " that emphasises a culture of silence over transparency and accountability. In other words, it is not all about the whistleblowers themselves, but about every person who chooses not to become a whistleblower, the people who think that it is acceptable to turn on the one who speaks up, and those that put priority on the status quo over enforcing policies and being open about what goes on in the organisation.

[519] Ibid.

Whistleblower cases are the perfect embodiment and illustration of the enmeshment between the legal, ethical, and cultural aspects of the international civil service and public international law. The cases provide examples of how the practice does not reflect the written aspirational language of the regulations, and how individuals get caught within the cultural fault lines and the secrecy of international politics. According to the UN Staff Regulations, civil servants have the obligation to speak up when they become aware of misconduct; however, fulfilling that duty goes against the practice of keeping up appearances and comes at personal and professional costs - harassment, loss of employment, etc. And when staff members do bring cases to the responsible officials for investigation or adjudication, they do not receive adequate protection. Each case described in this chapter has its own peculiarities, but there are common elements that make it possible to group cases and draw wider conclusions about the cultural and legal claims of the thesis, rather than simply listing them in a chronological order. This chapter will look at both cases that were adjudicated before the tribunal and those that haven't had a judicial resolution; those that dealt with corruption and those that addressed sexual harassment, abuse of power, and sexual abuse of civilians; as well as cases where individuals have "leaked" information to the media and those that only reported it internally. The one element that brings them all together is that almost none of the whistleblowers work for the United Nations any longer; and once they left the organisation they criticised the status quo in ways that counter the institutional silence.

The chapter begins with an overview of the most relevant legal instruments - the whistleblower protection policy and the framework on sexual exploitation and harassment protection - then moves to the three cultural linchpin cases (ie cases that didn't go to a tribunal) that provide the ethical and organisational context for the five cases containing (sometimes multiple) tribunal decisions in the last subsection. The eight cases were chosen because they represent turning points in the administrative legal and cultural evolution, and have also generated international media attention and social involvement.

4.1 Instruments

The history of the regulations for protecting whistleblowers is tied very closely to the cultural linchpin cases that will be discussed in subsection 2 and the judicial decisions in subsection 3. According to the 2018 JIU report,

> *"These protection against retaliation policies, more often than not, have emerged as ad hoc responses to high-profile whistle-blower cases and/or have been developed in response to requests by Member States. "*[520]

As has been already pointed out in Chapter 3, the UN has not been proactive in protecting its staff and promoting a culture of safe dissent, even though the organisation has urged nation states to adopt the same policies nationally.[521] In 2003 the UN adopted the Convention against Corruption, which has 140 signatory nation states, wherein Art 32 and 33 endorse providing protection of witnesses and "reporting persons" against retaliation. The official preparations of the Convention began in 2001, but protection of whistleblowers was only instituted in the UN system since 2005, after it came to light that UN staff members have documented and reported on widespread corruption that went ignored for years, only to get ostracised, demoted, lose promotion possibilities, or even get fired.

The public scrutiny and the broader context of the anti-globalisation movements of the early 2000s put pressure[522] on the global institutions to institute internal changes related to transparency, accountability, and whistleblower protection. Similarly, in the mid-2010s, cases of widespread sexual abuse of minors by UN peace-keepers in war zones were widely reported in the media and the international organisations scrambled to improve their tarnished image by strengthening existing

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520 JIU/REP/2018/4

521 UNODC, "Focus Areas - Whistleblower Protection" (*United Nations : Office on Drugs and Crime*) <https://www.unodc.org/unodc/en/ft-uncac/focus-areas/whistleblower.html> accessed October 12, 2023; See also A/70/361.

522 It has been claimed that the US threatened to withhold contributions to the UN and its agencies if no whistleblower protection policies were put in place. See Samantha Feinstein's (GAP) intervention in the panel discussion "The United Nations is Failing Whistleblowers: What Needs To Change", in the during the 20th International Anti-Corruption Conference (IACC) held in Washington, D.C. from 6-10 December 2022 - International Anti-Corruption Conference (IACC), "The United Nations Is Failing Whistleblowers: What Needs to Change" <http://www.youtube.com/watch?v=NW1iuskSfko> accessed October 4, 2023

policies. It does go to show that the issues exist, but are not talked about; and as soon as they are made public, the organisations create policies to crack down on a problem that they do not acknowledge sufficiently.

4.1.1 Whistleblower Policy

In Secretary-General's Bulletin[523] ST/SGB/2005/21 of December 19th, 2005, "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations," (the 2005 policy) Secretary-General Kofi Annan instituted the first whistleblower protection policy in the UN system, which was updated in 2017 by Secretary-General Antonio Guterres with ST/SGB/2017/2 (the 2017 policy).[524] According to the Values and Behaviours Framework[525] of the United Nations Secretariat by the OHRM, integrity is defined as "[acting] ethically, demonstrating the standards of conduct of the United Nations and taking prompt action in case of witnessing unprofessional or unethical behaviour, or any other breach of UN standards." It also calls on managers to "Create an enabling working environment in which everyone may speak openly, honestly and without fear of retribution." By 2018 the entire UN system was covered by whistleblower protection policies, modelled after the UN rules.

In 2015, the UN Special Rapporteur on freedom of expression, David Kaye, published a report calling on both governments and international institutions to protect their whistleblowers better because "silence is too often the only safe option left".[526] This thesis has already reviewed the attitudes of the international civil servants towards the UN system policies as evidenced in the JIU reports - the lack of trust and the "tone at the top" among others. The content of the rules is in

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523 For the legal status of SGB within the hierarchy of sources see Section 3.5.4

524 It is interesting that the whistleblower policy was the second Bulletin issued by SG Guterres, after the update of the Staff Rules and Regulations. There is no evidence that there was pressure to do so or a process that was already started, so the initiative was most likely solely from Guerres' team.

525 United Nations, "Values and Behaviours Framework", 2017 - "The 'UN Values and Behaviours Framework' forms the basis of an organisational culture that is both current and aspirational. Its nine elements, the result of a co-creation process involving nearly 4500 staff, should guide how we build relationships, how we perform our jobs, and how we experience the organisation on a daily basis." "UN Values and Behaviours Framework" (*Hr.un.org*) <https://hr.un.org/page/un-values-and-behaviours-framework-0> accessed October 12, 2023

526 A/70/361

part to blame for the scepticism - the technical language, complex system, the involvement of different independent bodies, and especially the time periods. According to the 2018 JIU report, across the UN system whistleblower policies for the recommendation on timeliness,

> *"Only one [UN] organization fully met all the indicators, with most falling short in systematically recording reports, having explicit timelines for the preliminary review and investigation of misconduct reports and having provisions for external referral of misconduct investigations."*[527]

In the cases that the JIU investigated in detail, "it was noted that the actual time taken to complete prima facie reviews and investigations was unduly long — in some cases it took several hundred days."[528] Additionally, investigation reports can take "30 calendar days (ICAO), 45 days (UNRWA), two months (UNESCO), 85 days (UNIDO), 90 days (IMO, UNICEF and UPU) and 120 days in the remaining 11 organizations".[529] In practice this would mean that staff members who reported misconduct would be in limbo for months, even if adequate interim measures were recommended by the Ethics Office and implemented by the management.

The UN whistleblower policies state that "reports of misconduct should be made through the established **internal** mechanisms: to the Office of Internal Oversight Services (OIOS), the Assistant Secretary-General for Human Resources Management, the head of department or office concerned or the focal point appointed to receive reports of sexual exploitation and abuse" (Section 3, emphasis added) or to **external** mechanisms provided that reporting internally would constitute a danger to the individual reporter or whenever there is a serious danger to the public. The cases of Elbasri and Kompass analysed below raise questions of whether the external reporting provisions are well-balanced against the obligation for confidentiality and the internal organisational culture of silence.

If an individual who has made such a report experiences retaliation as a consequence, they have the right to make a report to the UN Ethics Office to request a preliminary investigation and interim protection. If the Ethics Office

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[527] JIU/2018/4
[528] Ibid JIU/2018/4
[529] FAO, ITU, the United Nations Secretariat, UNAIDS, UNDP, UNFPA, UN-Women, UPU, WFP, WHO, WIPO and WMO

finds that there is evidence of retaliation - ie a prima facie case - then they would refer the case to OIOS for a full investigation. Then, based on the OIOS report, the Ethics Office makes the final decision of whether the staff member is indeed a whistleblower under the policy, and can make recommendations to the manager in charge, or refer the case to ASG for Management and the Secretary-General for disciplinary measures. The decisions of the Ethics Office can be appealed to the Chair or alternate Chair of the Ethics Panel.

Article 1.4 of the 2005 policy defines retaliation as "any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy. When established, retaliation is by itself misconduct." The last sentence was removed from the 2017 policy, which raises questions about the intent in the administration to focus on branding retaliation as a morally wrong action in the organisational context. The scope of the protection covers a staff member reporting the "failure of one or more staff members to comply with his or her obligations" and adding in 2017 "wrongdoing by any person that, if established, would be manifestly harmful to the interests, operations, or governance of the Organization."[530] The latter scope is thus wider and gives staff members discretion to determine what actions would be harmful to the interests of the UN as a whole; however, that obligation was not added to the Staff Rules and Regulations, where the duty to report is limited to a breach of a staff member's obligations to the organisation.

There are several other significant differences between the 2005 and 2017 policies. The latter version added preventative action by OIOS, i.e. the duty to report to the Ethics Office concerning any cases where retaliation might happen. Those are not included in the Ethics Office annual reports, so it is impossible to draw conclusions thereof. The staff member applying for whistleblower status was obligated to report as soon as possible after the retaliation action in the 2005 policy and 2017 it was within 6 months of retaliation action. The projected length for the preliminary review was decreased from 45 days to 30 days and the 2017 policy expanded the definitions of prima facie case and preliminary investigation.

[530] Art 2.1

These most significant changes were introduced in the wake of the case of Wasserstrom described in section 4.3.1. Section 6.3, which emphasises that the protocols outlined in the 2005 bulletin do not undermine the rights of an individual who has experienced retaliation to pursue remedies through internal recourse channels, was removed from the 2017 policy. The biggest difference between the two versions is the addition of Section 10 of the 2017 policy - "Recommendations of the Ethics Office and the alternate Chair of the Ethics Panel under the present bulletin do not constitute administrative decisions and are not subject to challenge under chapter XI of the Staff Rules." This is probably the most problematic section of this Bulletin. The UNDT/UNAT were established by the UN General Assembly Resolution 63/253 on 24 December 2008, and their statutes have been amended by the General Assembly several times.[531] According to UNDT Statute Article 13 and UNAT Statute Article 12,

> *"The present statute may be amended by decision of the General Assembly."*

While the Secretary-General has the mandate to act as the "chief administrative officer" of the UN, assuming powers to amend the mandate of the administrative tribunals with a Bulletin goes against the spirit and the letter of the internal justice system of the United Nations. It could be argued that such powers are implied from the function of the post, although there are contradictions within the purpose of the tribunals themselves. The administrative tribunals of the United Nations are not part of the UN Charter, but were created by the General Assembly as "independent and truly judicial bod[ies]" to render judgements that have "binding force upon the United Nations Organization as the juridical person responsible for the proper observance of the contract of service"; thus, these tribunals are "essential, in order to ensure the efficient working of the Secretariat and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity."[532] An amendment to the mandate of the tribunals can

[531] The UNDT mandate was amended by resolution 69/203 adopted on 18 December 2014, by resolution A/70/112 adopted on 14 December 2015, and by resolution 71/266 on 23 December 2016. The UNAT mandate was amended by resolution 69/203 adopted on 18 December 2014, by resolution 70/112 adopted on 14 December 2015, and by resolution 71/266 adopted on 23 December 2016.

[532] See Effects of Awards Advisory Opinion, ICJ, 13 July 1954

affect the very legal and moral core of the "organic-institutional element"[533] of the UN constitutive treaties.

The Ethics Office compiles an annual report[534] including a statistic of the activities - chiefly financial disclosure, advice and education, and whistleblower protection activities. There is a significant shift after 2016 that can be identified in the numbers. Between 2006 and 2016, the Ethics Office conducted preliminary reviews on 153 claims concerning protection against retaliation. Out of these, 21 claims were identified as prima facie cases, where the protected activity was established to be a contributing factor in the alleged retaliation or threat of retaliation. This subset of cases accounts for approximately 13% of all the claims reviewed during that period. Out of the 21 prima facie cases, 5 were found to involve retaliation after the investigation by the OIOS, which means 3% of all claims made during the 10 year period were found to involve retaliation. The Ethics Office attests that the statistics "correspond with those of comparable organizations",[535] including the World Bank, and the Swiss and Canadian national offices, although it does not provide the basis for comparison, especially considering two are national public bodies. According to the 2108 JIU report,

> *"Between 2012 and 2016, a total of 278 retaliation cases were formally reported to the designated channels in 18 organizations, with accommodations being made for complainants in 34 cases. A total of 62 prima facie cases of retaliation were determined and forwarded for investigation. Retaliation was substantiated in only 20 cases. While it cannot be validated with comparable data from other international organizations that fall outside the remit of JIU, the numbers are concerning to the Inspectors when viewed in the context of the United Nations system organizations, which together employ more than 150,000 personnel. The data may point to possible deficiencies in the clarity of policies, the adequacy of processes and procedures in handling retaliation reports*

[533] See Zacklin R, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (Martinus Nijhoff 2005)
[534] The 2022 report has not been published as of July 2023
[535] Footnote 5 A/71/334

and/or the competency of staff functions that deal with retaliation reports."[536]

It is worth pointing out that only about 10% of the cases across the UN system referred included interim measures to protect the potential whistleblower; 22% were prima facie cases and less than 1% were affirmed retaliation complaints. These numbers do not correspond to the UN statistics - higher percentage of prima facie cases but lower whistleblower status - so it is difficult to make conclusions about the comparisons, even as the concern of the JIU inspectors about the procedures rings true.

Between 2017 and 2021, the UN Ethics Office completed 161 preliminary determinations, which is nearly the same number as the previous period in half the time, and made a prima facie determination in 35 cases, which were subsequently referred for investigation. This accounts for almost 22% of claims. Following investigation by the OIOS, the Office made 15 final determinations of retaliation, or 9% of all claims, during this period. Compared to the previous period, this means that almost double the number of cases found to be prima facie, and there is a three times increase in the proportion of cases determined to involve retaliation. It is unclear whether the bar for whistleblowing was lowered due to the large number of tribunal cases or for a different reason.[537]

The UN system whistleblower protection infrastructure is now almost two decades old. The policies have brought a measure of protection as well as criticism, but also an awareness to the existence of whistleblowers, and the existence of retaliation. The UN civil service inherited its mandate from the League of Nations and its culture from the centuries of backroom political negotiations and diplomacy; the 21st century is bringing to light the contradictions between the values of society now and the values that have been passed down. A similar claim can be made about another relevant policy - the sexual exploitation and sexual abuse protection - and the entrenched male-dominated culture and freedom from consequences for sexual predators in humanitarian and international organisational settings.

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[536] JIU/2018/4

[537] In 2015 the Head of the UN Ethics Office Joan Dubinsky was replaced with Elia Armstrong, possibly in connection to the Kompass case.

4.1.2 Reporting sexual exploitation and harassment

This thesis is not focused directly on sexual harassment and abuse in the UN system, but rather on the consequences for reporting "serious" misconduct such as sexual abuse and exploitation and the evidence it provides for the larger trends in the international administrative legal and cultural framework. Efforts to address sexual harassment and discrimination have been a formal part of the UN internal regulations for a little longer than whistleblowing, even though arguments have been made that it has existed since the inception of the organisation. In 1992 Secretary-General Boutros-Ghali promulgated a series of administrative issuances prohibiting harassment in general;[538] Secretary-General Annan introduced a bulletin on "Special measures for protection from sexual exploitation and sexual abuse"[539] based on General Assembly resolution 57/306 of 15 April 2003, "Investigation into sexual exploitation of refugees by aid workers in West Africa", as well as the 2005 programme on "Prevention of workplace harassment, sexual harassment and abuse of authority".[540] Since 2003 the Secretary-General issues a yearly report on Special measures for protection from sexual exploitation and sexual abuse.[541] Secretary-General Ban Ki-Moon issued "Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority"[542] in 2008, which abolished the 1992 programme in favour of a more robust legalistic framework for investigating and censuring. However, it wasn't until 2014, with the revelations from Anders Kompass and the media attention, that the UN made serious structural effort.

The timeline of events related to the most detailed and controversial sexual abuse by peacekeepers, primarily in the context of the Central African Republic (CAR), begins in 2014. The abuse allegations involve minors and vulnerable individuals, and they reveal systemic failures within the UN's response and accountability mechanisms. In July 2014 Anders Kompass received the report and passed it onto

[538] ST/AI/379 and ST/SGB/253
[539] ST/SGB/2003/13
[540] ST/SGB/2005/20
[541] First report A/58/777. In 2014 the report included a supplement on "substantiated allegations" and since 2015 a supplement on all allegations. Between 2010-2020 there have been nearly 400 allegations in total.
[542] ST/SGB/2008/5. The policy was updated in 2019 by ST/SGB/2019/8, which has been applied in cases in 2022 and 2023.

the French embassy and the head of OHCHR. Instead of investigating the abuses, the UN focuses on an investigation of Kompass for leaking the information, and puts him on administrative leave.[543] In December 2014, during a session of the UN General Assembly, the Secretary General presented a conclusive report from the International Commission of Inquiry on the Central African Republic. However, this report omitted any mention of the specific reports from MINUSCA, OHCHR, and UNICEF detailing instances of abuse committed by international peacekeepers. In February 2015, the annual report by the Secretary General regarding the UN's actions against sexual exploitation and abuse in 2014 did not include any reference to the documented instances of abuse that occurred in the Central African Republic. In June 2015, Secretary-General Ban Ki-Moon announces investigations into sexual abuse of minors in the CAR "by foreign troops not under the authority of the United Nations".[544] In June 2016, the report of the independent review into the allegations is published,[545] concluding that

> *"The manner in which United Nations agencies responded to the allegations was seriously flawed.*
>
> *… information about the allegations was passed from desk to desk, inbox to inbox, across multiple United Nations offices, with no one willing to take responsibility to address the serious human rights violations. Indeed, even when the Government of France became aware of the allegations and requested the cooperation of United Nations staff in its investigation, these requests were met with resistance and became bogged down in formalities. Staff became overly concerned with whether the allegations had been improperly "leaked" to the French authorities, and focused on protocols rather than action. The welfare of the victims and the accountability of the perpetrators appeared to be an afterthought, if considered at all. Overall, the response of the United Nations was fragmented and bureaucratic, and failed to satisfy the core mandate of the United Nations"*

The situation depicted reveals a deeply concerning lack of urgency and responsibility within the United Nations system. The allegations of sexual abuse

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543 See below the analysis of the Kompass affair

544 United Nations Secretary-General, "Statement Attributable to the Secretary-General on Allegations of Sexual Abuse in the Central African Republic" (*un.org*, June 3, 2015) <https://www.un.org/sg/en/content/sg/statement/2015-06-03/statement-attributable-secretary-general-allegations-sexual-abuse> accessed October 4, 2023

545 A/71/99

were seemingly treated with a callous disregard, as they were shuffled from "desk to desk" and across various UN offices. The focus on protocols and concerns about leaks to French authorities demonstrate a misplaced set of priorities within the UN. Instead of prioritising the welfare of the victims and holding perpetrators accountable, the organisation appeared more concerned about maintaining its image and adhering to procedural formalities. This approach not only reflects a failure to put justice and the protection of vulnerable individuals first, but it also erodes the credibility and integrity of the United Nations as a whole. The response ultimately undermines the fundamental mission of the United Nations.

The UNCEB task force on addressing sexual harassment,[546] was established in 2017 and works under the auspices of UN Women. The task force compiles reports on, among others, available resources,[547] peer-to-peer learning to eliminate harassment,[548] practices to effect culture change in humanitarian contexts,[549] within the effort to bring the UN's new "zero-tolerance"[550] policy on sexual harassment and exploitation to reality. In the latest Staff Regulations and Rules, Regulation 10.1 defines

"Sexual exploitation and sexual abuse constitute serious misconduct."

It is noteworthy that the current approach brings together the misconduct committed inside the organisation against staff members, together with infractions against civilians. It is indeed in that clash between the international organisations'

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546 UN System Chief Executives Board for Coordination (CEB), "Addressing Sexual Harassment" (*Unsceb.org*) <https://unsceb.org/topics/addressing-sexual-harassment> accessed October 4, 2023

547 UNRWA, "UNRWA Resources Available to Individuals Affected by Sexual Harassment" (*CEB Task Force*, June 2023) <https://shknowledgehub.unwomen.org/en/resources/unrwa-resources-available-individuals-affected-sexual-harassment> accessed October 4, 2023

548 UNWomen, "Enhancing Cooperation: Peer-to-Peer Learning to Prevent and Eliminate Sexual Harassment in the UN System and Beyond" (*CEB Task Force*, April 2023) <https://shknowledgehub.unwomen.org/en/resources/enhancing-cooperation-peer-peer-learning-prevent-and-eliminate-sexual-harassment-un> accessed October 4, 2023

549 UNHCR/IASC, "A Selection of Promising Practices on Organizational Culture Change" (*CEB Task Force*, May 2021) <https://shknowledgehub.unwomen.org/en/resources/selection-promising-practices-organizational-culture-change> accessed October 4, 2023

550 UN System Chief Executives Board for Coordination (CEB), "CEB Statement on Addressing Sexual Harassment within the Organizations of the UN System" (*Unsceb.org*, (3 May 2018) <https://unsceb.org/ceb-statement-addressing-sexual-harassment-within-organizations-un-system> accessed October 4, 2023

culture and the major humanitarian conflicts that the first whistleblower cases came to light.

4.2 Cultural linchpin cases

The three cases discussed in this subsection were not adjudicated at an international administrative tribunal, although they do involve some legal or quasi-legal proceedings. They represent turning points in the perception and treatment of whistleblowers in the setting of international organisations, the awareness of the issues outside of the organisational context, and the involvement of the global society therein. The sequence is chronological to demonstrate the influence of the practice on internal regulations, or lack thereof, as it occurs. The cases are all from outside the UN proper and the UN secretariat, but involve the UN Secretariat organs - OIOS especially. Because of the humanitarian context the breaches were especially egregious and thus gathered more media attention.

4.2.1 Bolkovac

Kathryn Bolkovac is a former American police officer who uncovered and publicised the UN involvement in human sex trafficking in post-war Bosnia and Herzegovina between 1999-2001. She was not an international civil servant, strictly speaking, but her actions uncovered serious misconduct among UN peacekeepers and the organisational culture that kept those actions secret. This is also the oldest case that clearly falls within the parameters of whistleblowing and retaliation in the UN context.

Bolkovac was contracted by DynCorp, a private military contractor hired by the US government, and worked in positions both in the International Police Task Force, and the UN Mission in Bosnia and Herzegovina. She discovered that both independent contractors and UN peacekeepers were involved in sexually abusing and trafficking young women and underage girls. After numerous reports to the UN leadership including Jacques Paul Klein, the UN Special Representative, and to the International Police Task Force (IPTF), she was demoted and fired; the reason for her dismissal was stated to be falsification of her time-cards.

Bolkovac did not have access to the UN Administrative Tribunal, and was active years before the whistleblower protection was even considered. A domestic labour tribunal in the UK awarded Bolkovac damages for unlawful dismissal in 2002,[551] but she was unable to find further work in the field of international human rights.

According to IPTF officer David Lamb in an interview with Human Rights Watch, investigators in UNMIBH stalled and even halted investigations on sexual abuse and trafficking.[552] A UN official stated to HRW that

> *"The attitude is that the dirty laundry should be washed inside the family, and I don't agree with that. The people [fighting trafficking] are very good, but they meet resistance inside the IPTF."*[553]

According to a 2002 OIOS report there was "no evidence of widespread or systematic involvement of U.N. police monitors in trafficking activities",[554] a determination based on an investigation that took place between 26th June - 6th of July, 2001. Independent investigators disagree with that conclusion, insisting that reliable witnesses and detailed confessions were obtained.[555]

There were no consequences for DynCorp, aside from the damages paid to Bolkovac. It was awarded further US government contracts for 1,3 billion dollars for training police officers in Iraq, which according to the US stated department "was so badly managed that auditors do not know how the money was spent".[556] DynCorp is a part of the PMC (private military contractors) infamy in international law, joining Academi - formerly Blackwater - which was convicted of killing Iraqi

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[551] Bolkovac v. DynCorp Aerospace Operations (UK) Ltd, "Unanimous Decision," Case no. 3102729/01

[552] Human Rights Watch, "Hopes Betrayed, Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution, X. IPTF AND TRAFFICKING" (2002) <https://archive.hrw.org/reports/2002/bosnia/Bosnia1102-10.htm> accessed October 4, 2023

[553] Ibid.

[554] U.N. News service, "U.N. OIOS Found No Evidence of IPTF Involvement in Trafficking," February 4, 2002

[555] Lynch C, "U.N. Halted Probe of Officers' Alleged Role in Sex Trafficking" *Washington Post* (December 27, 2001) <https://www.washingtonpost.com/archive/politics/2001/12/27/un-halted-probe-of-officers-alleged-role-in-sex-trafficking/2e2465f3-32b4-42ff-a8df-7a8108e4b9ee/> accessed October 4, 2023

[556] BBC News, "US-Iraqi Contract 'in Disarray'" *BBC* (October 23, 2007) <http://news.bbc.co.uk/2/hi/americas/7057629.stm> accessed October 4, 2023

civilians in the Nisour square. From a human rights perspective, PMCs have raised significant concerns about their impact on civilians and the rule of law. PMCs operate in environments where state authority is often weak, and their actions can have serious implications for human rights. For example, there have been numerous reports of PMCs engaging in excessive use of force, torture, and other forms of abuse, often with impunity. Additionally, the lack of accountability mechanisms and regulatory frameworks creates a situation where PMCs can operate with little to no oversight or accountability for their actions. This lack of accountability can contribute to a culture of impunity and undermine efforts to hold perpetrators of human rights abuses accountable. According to Bolkovac,

> *"I think the most appalling aspect that people miss is that virtually zero repercussions have happened to the individuals involved."*[557]

The UN never acknowledged the trafficking and the sexual exploitation, or the retaliation against Bolkovac and others who pleaded her case. According to her, it was not a one-time failure, but an ongoing culture that turned worse and worse, culminating in the CAR catastrophe a decade later -

> *"What used to be complicity by the UN by turning a blind eye has grown into a one-eyed monster, blatantly impeding proper investigations and prosecution of crimes committed by peacekeepers."*[558]

In her own words, the systemic problems can be traced to the legal and ethical dynamics between the UN and member states, and the organisational culture that arises from it -

> *"I do not think you can just start making changes without changing high-level management officials, without changing the way the UN functions. There is no accountability at any level in the UN. The accountability is in the hands of the member states. As long as the member states are not going to*

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[557] Liebelson D, "Interview: Kathryn Bolkovac of 'The Whistleblower' on Human Trafficking Scandal, New Film" (*Typepad.com*, October 12, 2011) <https://pogoblog.typepad.com/pogo/2011/10/interview-kathryn-bolkovac-of-the-whistleblower-discusses-trafficking-scandal-new-film.html> accessed October 4, 2023

[558] Slanjankic A, "UN Covers up Sex Scandal" (*Deutsche Welle*, February 29, 2016) <https://www.dw.com/en/bolkovac-un-tries-to-cover-up-peacekeeper-sex-abuse-scandal/a-19082815> accessed October 4, 2023

discipline and prosecute the individuals who they send in the missions, then the UN is not going to do that either. The UN has written off that part of discipline and accountability. They rely on the member states to do that. It is time for the member states to take control of the United Nations and stop the blame game."[559]

A movie was made based on Bolkovac's story in 2010, with Rachel Weisz in the role of Bolkovac and Vanessa Redgrave as Madeleine Rees. Rees is a British lawyer and was the Head of Office in Bosnia and a gender expert in the OHCHR; she is currently serving as Secretary-General of the Women's International League for Peace and Freedom. Rees received an OBE for her role in promoting human rights and was instrumental in Bolkovac's case. Perhaps the most iconic dialogue in the movie is between Rees and Blakely, an HR officer with UNMHQ -

"Blakely: Madeleine, I have to protect this organisation, and so should you. The U.N. is too fragile, too important. And that's what immunity is for.

Madeleine Rees: Immunity, not impunity. The United Nations was formed from the ashes of Auschwitz. The United States led the way, and it's a point of honor with me that the U.N. is not remembered for raping the very people we must protect.

Blakely: Those girls are whores of war. It happens. I will not dictate for morality.

Madeleine Rees: So what **are** *we dictating for?"*[560]

4.2.2 Mullick

Between 2000 and 2002, Dr. Rehan Mullick was employed as a research officer at the United Nations Office on Humanitarian Coordination in Iraq (UNOHCI) in Baghdad, and a part of his duties included measuring the impact of the Oil-for-food program (OIP). The OIP, which was established by UN Security Council Resolution 986, allowed the Iraqi government to trade oil for humanitarian

[559] Ibid.
[560] Kondracki L, *The Whistleblower* (Voltage Pictures 2010)

supplies to compensate for the effects of the post-Gulf War embargo. In official estimates the program facilitated the trade of more than US$60 billion in oil over eight years. Benon Sevan was appointed as Assistant Secretary-General of the UN Department of Political Affairs in July 1992, and became the head of the Oil-for-Food Programme in 1996. The OIP was discontinued in 2003 after the US invasion of Iraq and an independent inquiry was launched in 2004.

According to his own testimony before the Committee on International Relations of the US House of Representatives, in the course of his work Dr. Mullick noticed significant discrepancies in the distribution of humanitarian supplies through the OIP. He repeatedly attempted to alert his supervisors to the problems, but was subsequently demoted and duties were limited. In his own words,

> *"Each suggestion resulted in my supervisors reducing my job responsibilities," Mullick said. "This continued to occur until my only job was to run the slide projector at staff meetings."*[561]

Dr. Mullick then travelled to the UN headquarters in New York and submitted his report on his observations to the Department of Peacekeeping Operations and the Internal Oversight departments of the United Nations Secretariat. He was never contacted by any UN officials to discuss his report and was later notified that his contract would not be renewed. The press later referred to his experience with the so-called "culture of cover-ups".[562] Allegations surfaced that Sevan had accepted bribes from Saddam Hussein in the form of oil vouchers, enabling Saddam to obtain $11 billion for military and other unauthorised purposes, in clear violation of UN sanctions against his regime.

On 7 February 2005, United Nations Secretary-General Kofi Annan suspended Sevan and another UN official, both placed on paid leave with a salary of $1 per year, with benefits, including immunity from prosecution. On 8 August 2005, a UN-appointed panel, led by Paul Volcker, conducted a comprehensive investigation into the scandal and published its report. The inquiry committee discovered that billions of dollars were misappropriated through the program and

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[561] Hirschkorn P, "Whistle-Blower: 'Gaping Holes' in Oil-for-Food" *CNN* (March 18, 2005) <http://edition.cnn.com/2005/ALLPOLITICS/03/17/oil.for.food/index.html> accessed October 4, 2023

[562] Ibid

there was also evidence that Mr. S. Iqbal Riza, the Secretary-General's Chef de Cabinet, had destroyed documents pointing to illegal activities.[563] In its Second Interim Report, the Committee concluded that Mr. Riza acted "imprudently and in contravention of his own April 12, 2004 directives regarding the preservation of all documents relating to the Programme." On April 22, 2004, he authorised the shredding of three years of his records shortly after the beginning of the Committee's investigation.[564] The panel unequivocally concluded that Sevan had indeed accepted bribes from the former Iraqi regime and recommended that his UN immunity be lifted, allowing for a criminal investigation to take place. Sevan preemptively resigned from his position at the UN on 7 August 2005, a day before the report was scheduled to be made public.

Dr. Mullick testified both before the US House of Representatives and before the independent inquiry committee, but the UN has never officially recognized his role as a whistleblower and has never issued an apology or reparations for his treatment. Also, neither Sevan nor other top level officials responsible for the OIP have received any formal punishment for their involvement in one of the largest corruption scandals in the history of the United Nations. Sevan was indicted in a US court but fled to Cyprus.

The case of Dr. Mullick and the OIP has a special role in the context of whistleblowers at the UN. The magnitude of the corruption gathered a lot of media attention, and the scandal coincided with a historical move towards transparency and anti-corruption policies across Western countries. The Volcker report was released in February 2005 and reform followed quickly in the same year; in December 2005 Secretary-General Kofi Annan created the United Nations Ethics Office[565] and the first whistleblower protection policy.

Dr. Mullick's actions demonstrate both the negative consequences of speaking up in a culture of silence, even in the face of wide-spread corruption; and the positive outcomes of an individual civil servant standing up for the values of the

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563 Hoge W, "Oil Report to Say Aide to Annan Shed Files" *The New York Times* (March 29, 2005) <https://www.nytimes.com/2005/03/29/us/oil-report-to-say-aide-to-annan-shed-files.html> accessed October 12, 2023
564 Independent Inquiry Committee, "Second Interim Report" (Mar. 29, 2005) (hereinafter "Second Interim Report"), pp. 81-84.
565 ST/SGB/2005/22

organisation - a change in policy across the UN system. It is a tragedy that his actions were never recognised and that his international career ended in such a way.

4.2.3 Elbasri

Dr. Aicha Elbasri was employed as the United Nations peacekeeping mission in Sudan (UNAMID) spokesperson in Darfur between 2012-2013; in total she had worked for 8 years across UNAMID, the UN Assistance Mission for Iraq (UNAMI), and the UN Development Programme in Sudan (UNDP-Sudan). In her own words, she was "proud of being paid to help make the world a better place … Despite its failures, I still had faith in the organisation's willingness to make a difference in people's lives."[566]

Dr. Elbasri resigned from her position and subsequently leaked thousands of official documents to Foreign Policy magazine, as well as several original pieces detailing her allegations that the UN and peacekeepers had covered up information on attacks by the Sudanese army and militias on civilians. She pointed out the farce of the Security Council resolutions that pretended to give teeth to the international outrage at the crimes committed by President Omar al-Bashir, but instead empowered him to buy weapons and further arm his death squads. Al-Bashir was indicted by the ICC for crimes against humanity, genocide, and war crimes and there is a warrant for his arrest; he is still at large.

In her testimony in front of the U.S. House of Representatives Committee on Foreign Affairs in 2016, Elbasri describes in detail the interference of the Russian Mission Chief of Staff in censoring and even falsifying information on the atrocities committed by the government. The UN staff were told not to report on bomb attacks, even when they witnessed them in person -

> *"[Even] when defenseless civilians peacefully travelling in a truck were stopped and shot in cold blood on 5 September 2012 in front of UNAMID peacekeepers by the government Border Guards, the peacekeepers looked*

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[566] Elbasri A, "The United Orwellian Nations" (*The Elephant*, October 2, 2020) <https://www.theelephant.info/op-eds/2020/10/02/the-united-orwellian-nations/> accessed October 4, 2023

on and took photos of the assault. The Mission press release described the incident in these misleading terms: "On 5 September, armed men allegedly fired at local civilians, resulting in additional casualties." Even more disturbing is the Secretary General's report attributing this attack on civilians to "the crossfire of a firefight between armed Arab militia and Government regular forces."[567]

When she pressed the new head of UNAMID to correct the lies told about murders, abductions, rape, etc.

Mr. Tchalian, Mr. Yonis and the Director of Political Department, Ahmed Abubakar Rufai, ... told me that I shouldn't worry much about what the media says about UNAMID as stories die out in a few days and the Mission had better things to do than dealing with media queries, and that "transparency" had its limits.

Dr. Elbasri resigned on the date of that meeting, out of fear and disillusionment. She reported her observation in her resignation letter and in a report to OIOS, wrote letters to the prosecutor at the International Criminal Court,[568] and gave testimony at the US House of Representatives Committee on Foreign Affairs.[569] In an open letter from June 23 2014,[570] the ICC spokesperson called for Secretary-General Ban Ki Moon to conduct an independent and public inquiry of UNAMID and its handling of the conflict. Instead, Secretary-General Ban Ki Moon created an internal committee, which completed its review without setting foot in Darfur, since "visas were received late and it was judged that all relevant information

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[567] From Elbasri's testimony - Elbasri, A. "'Peacekeepers: Allegations of Abuse and Absence of Accountability at the United Nations' Testimony of Aicha Elbasri" (*U.S. House of Representatives Committee on Foreign Affairs*, April 13, 2016) <https://docs.house.gov/meetings/FA/FA16/20160413/104766/HHRG-114-FA16-Wstate-ElbasriA-20160413.pdf> accessed October 4, 2023

[568] Elbasri A,, "Stop the Conspiracy of Silence over Darfur" *The Guardian* (March 5, 2015) <https://www.theguardian.com/world/2015/mar/05/stop-the-conspiracy-of-silence-over-darfur> accessed October 4, 2023

[569] Elbasri A, (n. 546)

[570] Elbasri A, "We Can't Say All That We See in Darfur" (*Foreign Policy*, April 9, 2014) <https://foreignpolicy.com/2014/04/09/we-cant-say-all-that-we-see-in-darfur/> accessed October 4, 2023

could be collected by video- and teleconference or by e-mail."[571] The report concluded that

> *"The review team did not find any evidence to support the allegation that UNAMID had intentionally sought to cover up crimes against civilians and peacekeepers. The review did reveal, however, that, in 5 of the 16 incidents examined, the Mission did not provide United Nations Headquarters with full reports on the circumstances surrounding those incidents. The review team also found that the Mission had taken an unduly conservative approach to the media, maintaining silence when it could have developed a press line, even in the absence of all the facts."*

This is an excellent example of a "non-denial denial" mentioned in the introduction. "Maintaining silence" is not seen as an absence of transparency or hiding the truth, but as an alternative approach to dealing with the media.

In December 2021, the Security Council published "Summary report on lessons learned from the experience of the African Union-United Nations Hybrid Operation in Darfur"[572] which noted in passing that

> *"UNAMID was confronted with obstruction by the host Government at various times, which adversely affected the mission's room for manoeuvre to address the conflict dynamics."*[573]

However, UNAMID was determined to be a success in protecting civilians. Elbasri has accused the committee of bias and that the investigation was corrupt.

Much like Shirley Hazzard in the 1950s, referenced in the conclusion of Chapter 3, Elbasri's story reflects the idealism of an international civil servant lost in the face of the reality of the involvement of the international community in wars. Similar to Emma Reilly, whose case will be discussed later in subsection 5.3.5, Elbasri's situation illustrates the potential for conflict of priorities between Member States' governments and their citizens regarding transparency and confidentiality. In such scenarios, international organisations officials who advocate for secrecy often align

[571] S/2014/771
[572] S/2021/1099
[573] Ibid.

themselves with the governments, even when those governments are involved in severe actions like genocide. On the contrary, whistleblowers align with the fundamental values of the organisation and the global society, prioritising openness and accountability. In 2015, Dr. Elbasri was awarded the Ridenhour prize for truth-telling, an honour also given to Edward Snowden in 2014.

The cases of Bolkovac, Mullick, and Elbasri reveal that the UN, acting on behalf of the global society in conflict zones in Bosnia, Iraq, and Sudan, broke key tenets of its promises and principles; even as the whistleblowers kept to those principles. The rules and statements on misconduct, investigating misconduct, measures to remedy harm, transparency, anti-corruption, anti-harassment, anti-retaliation, etc. were not applied because of an organisational culture of silence, because top management believed “transparency has its limits", and because an entire organisation worked to maintain the fragile balance with and between member states. The cases illustrate an environment of fear, passivity, and helplessness in the face of genocide, murder, sexual exploitation, corruption; as well as the willingness of individuals to point those out, to raise the alarm both inside the organisation and outside, and the importance of media attention. The external accountability and pressure - from the Volcker Commission and the ICC - emphasise the interconnectedness between the international bureaucracy and the global society, regardless of the perception of isolation. The cases from the next subsection illustrate how the administrative legal system of the UN deals with the whistleblower retaliation framework, the dynamics between member states and the organisation, and reiterate the importance of the individual in international law.

4.3 Tribunal Cases

The five cases in this subsection are arranged chronologically because it reflects the development of the jurisprudence, but the cases often stretched for years before a resolution and the dates of the decisions are often years after the initial infraction and the whistleblower’s report. From 2012 to 2016,[574] a total of 41 cases involving

[574] JIU/REP/2018/4 page 50

retaliation were brought before three distinct tribunals: the ILO Administrative Tribunal, the United Nations Dispute Tribunal, and the UNRWA Dispute Tribunal. These cases were filed by complainants representing 12 different organizations. Among these cases, 56% resulted in decisions favouring the complainants. The success rates of appeals varied among the tribunals. Specifically, the ILO Administrative Tribunal saw a success rate of 66% (14 out of 21 cases), the United Nations Dispute Tribunal had a 47% success rate, and the UNRWA Dispute Tribunal had the lowest success rate at 33% (only 1 out of 3 cases). Additionally, during the same period, 31 retaliation-related cases were appealed by complainants from three organizations (IMO, the United Nations Secretariat, and UNRWA) to the second-instance United Nations Administrative Tribunal. However, only 16% of these appeals (5 cases) were decided in favour of the complainants.

The key question that comes up in most of these cases concerns the legal rights of staff members and the limits that the administration can put on them, embodied in the question of whether the decisions of the Ethics Office fall within the jurisdiction of the Tribunal. This is also an example of the intra-organisational dynamics and power struggles that were discussed in Chapter 4. Another important element is the dynamics between the UNDT and the UNAT in cases concerning whistleblowers - UNDT more often deciding for the staff members, and UNAT overturning those decisions on technicalities. The long delays, the procedural obstructions, and the low success rates serve to further discourage staff members from lodging claims against the administration, and from speaking up in the first place.

4.3.1 Wasserstrom

This first significant whistleblower case arguably and unfortunately established the parameters for each of the other ones following after, both in the sense of the organisational dynamics affecting the whistleblower individually, and the attitudes of the tribunals to the new policy and the new Ethics Office. James Wasserstrom was Head of the Office for the Coordination of Oversight of Publicly Owned Enterprises ("(O)POEs") within the United Nations Interim Administration Mission in Kosovo ("UNMIK"). In December 2005, days after the promulgation of the 2005 whistleblower policy, he lodged a complaint with the UN Ethics office asserting that, after exposing instances of corruption, he had faced retaliatory

measures - the shutdown of his office, termination of his UNMIK assignment, a dubious investigation, a border arrest, an unjustified search of his residence, and the placement of posters bearing his image around the headquarters to impede his access and damage his reputation.

In July 2007, nearly 18 months after the initial complaint and way beyond the customary timeline, the UN Ethics Office issued its assessment of the situation, determining that there was a preliminary case of retaliation against him. The matter was forwarded to the OIOS for further investigation, but more delays followed. In April 2008, the ID/OIOS report concluded that while the actions cited in the complaint were "deemed disproportionate in relation to the conflict of interest matter," they did not qualify as retaliation. The Ethics Office communicated the final decision to close the case to the complainant. In response, Wasserstrom contested this correspondence and formally requested an administrative review of the Ethics Office's ruling. However, he was informed that no additional steps would be taken in relation to the matter, as the Administration asserted that the Ethics Office's recommendation did not constitute an administrative decision.[575] He filed an application with the UNDT to contest that conclusion.

In a preliminary order issued in February 2010,[576] the UNDT affirmed that the determination made by the Director of the Ethics Office qualified as an "administrative decision", which rendered the application admissible for consideration by the court. In the counterargument, the Respondent attempted to compare the Ethics Office to the Office of the Ombudsman,

> *"which is not part of the hierarchical structure of the Administration and is an intermediary rather than a decision-maker, its lack of decision-making power demonstrated by its inability to impose a binding solution".*

It is interesting that the administration pushed so early on to move away from the definition of "administrative decision" promulgated in the *Andronov*[577] case -

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[575] See Case No. UNDT/NY/2009/044/JAB/2008/087, Order No.19 (NY/2010)

[576] Order No.19 (NY/2010)

[577] In the *Andronov* case (AT/DEC/1157), which was decided by the old UN Administrative Tribunal in 2004, the Appellant contested a decision by the Joint Appeals Board (which served as a non-judicial lower tribunal) that an interference by the Senior Legal Counsel in the

"Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences."

There is nothing in this definition, or in the tribunal statute, that would limit an "administrative decision" as "binding", or as the result of "decision-making power"; it is determined by its source and its consequences. The Ethics Office has the power to take intermediary measures to protect whistleblowers, and has the independent mandate to implement the whistleblower protection policy, which undoubtedly have "direct legal consequences". The UNDT decision rejected the comparison between the Ethics Office and the Office of the Ombudsman and analysed the employment conditions of international civil servants in the larger public international and administrative legal contexts -

" ... governed entirely by the contract of employment which incorporates the various legal instruments concerning the Organization's operations in so far as they impinge upon the staff member's position as employee, together with such rights and obligations which are implied by virtue of the contract and by virtue of the contract alone ... "

Fundamentally, the Order tried to shift the focus from the "independent" position of the Ethics Office to the tangible impact of its actions on the contractual rights of the specific staff member involved. This shift emphasises a strict interpretation of the terms "administrative" and "decision." Consequently, if the decision in question was influenced by irrelevant factors, it would amount to a legal violation and could be subjected to review by the Tribunal. As per the Order, the sole pertinent "direct legal consequence," following the Andronov principle, pertains to a breach of an explicit or implicit provision within the staff member's employment agreement.

The Order also looked at other larger issues pertaining to influence of policy on the mandate of the Tribunal through the lens of the contractual nature of the relationships. The Judgement was especially critical of the procedural and judicial

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Appellant's private affairs (a divorce proceeding) did not amount to an "administrative decision". The Tribunal decided in favour of Mr. Andronov and awarded damages.

difficulties presented by Section 3.4 of the Secretary General's Bulletin establishing the Ethics Office[578] -

> *"... the Ethics Office shall not be compelled by any United Nations official or body to testify about concerns brought to its attention."*

This provision not only prevents the Ethics Office from being summoned to testify before the Tribunal but also raises concerns about the obligations and answerability of individual members of the Office, regardless of whether they are from the past or current roster. The Order strongly critiques this indirect approach -

> *"Undertaking intellectual acrobatics is fun for solving cryptic crosswords but resolving the questions of legal rights and obligations should not require them. ... This is one of a number of unfortunate examples of bad drafting."*[579]

The importance of the Order within the broader framework of the Wasserstrom case and the realm of international civil service law cannot be downplayed. Judge Adams not only highlights the UN administration's inclination to render decisions with legal implications rooted in policy factors but also openly critiques the deficiency in clear and predictable formulation and interpretation of obligations. As part of this ruling, the Respondent was instructed to provide the Ethics Office's reports, a directive that the administration declined to comply with on multiple occasions. The Secretary-General appealed, but the appeal was ultimately dismissed.[580]

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[578] ST/SGB/2005/22 (n. 544)

[579] Judge Michael Adams has been very critical of the attitude of the Secretary-General towards the internal justice system in other cases. In the Bertucci case he stated that "His lawyers can claim that the Secretary-General should be considered as a head of state as much as they like, but he leaves his crown outside the courtroom." (UNDT/2010/080) Judge Adams was not selected for further terms as a UNDT judge.

[580] Judgement No. 2010-UNAT-060 Appeals Tribunal found that "the question of whether the Director's decision constituted an appealable administrative decision went directly to the merits of the case, which could not be decided before the Dispute Tribunal rendered a judgement on the merits." This decision contradicts the Judgement in 2014-UNAT-457 that finds that the application is not receivable ratione materiae.

In the subsequent verdict on the substantive matter,[581] the UNDT determined that the Ethics Office had not conducted a suitable review of the OIOS report, constituting a legal error. However, the UNDT rejected claims for compensation concerning income losses stemming from Mr. Wasserstrom's termination from UNMIK, because the contract termination itself was not the subject of the proceedings and the employer, UNDP, was not party to the proceedings.[582] This is problematic because, evidently, in order to be eligible for reasonable compensation, Wasserstrom was seemingly required to establish that the termination of his assignment was an act of retaliation. The recommended standards in whistleblower protection, as well as the UN whistleblower protection policy itself,[583] explicitly stipulate that the onus of proving retaliation does not lie with the Applicant. Instead, the burden rests upon the Administration to "prove by clear and convincing evidence that it would have taken the same action absent the protected [whistleblowing] activity…" It should not have been incumbent upon Wasserstrom to demonstrate that he encountered retaliation; rather, it should have been the responsibility of the Secretary-General to demonstrate that he did not.

However, the tribunal granted compensation for "severe distress and public humiliation," along with a contribution to legal expenses. This was due to the Secretary-General's "deliberately and persistently refus[ed], without good cause, to abide by the Orders of the Tribunal", and engaged in "a manifest abuse of proceedings".[584] The judgement ruled that the Secretary-General is liable for the Ethics Office's "failures and/or omissions". Judge Meeran criticised the institutional failings as well - "as an institution charged with the responsibility of uncovering acts of retaliation the effectiveness of the Ethics Office leaves much to be desired."

The Secretary-General contested these rulings, and in a decision reached in 2014 UNAT sided with the Secretary-General's appeal, with Judge Mary Faherty dissenting.[585] The UNAT determined that the recommendations issued by the Ethics Office do not carry the weight of administrative decisions because of its

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581 UNDT/2013/053
582 UNDT/2013/053 Para 26
583 Section 2.2 of 2005 whistleblower policy
584 Wasserstrom UNDT/2013/053
585 Wasserstrom 2014-UNAT-457

“operational independence”.[586] However, the decision to contribute to legal costs remained in force. This part of the ruling was maintained because the Secretary-General's deliberate and prolonged refusal to comply with the UNDT's orders needlessly prolonged the legal process, thus being labelled as “frivolous and vexatious” by the UNAT.

The considerations of the UNAT tribunal are truly puzzling and remarkably short - only two and a half pages compared to nine pages in UNDT/2012/092 on liability and eight pages in UNDT/2013/053 on relief. Unlike the UNDT, UNAT does not examine the role of the Ethics Office in general, the activities of the Ethics Office in the particular case, the documented evidence of retaliation, or the burden of proof on the Administration to establish by “clear and convincing evidence” that there was no retaliation pursuant to the 2005 Whistleblower policy.

The Appeals Tribunal's argument stems from the premise that, given the Director of the Ethics Office's appointment by and accountability to the Secretary-General, the Secretary-General becomes "a party to this appeal on behalf of the Ethics Office." It remains unclear why the UNAT places significant emphasis on this aspect, as the entire UN Secretariat is appointed by and accountable to the Secretary-General, and that fact does not affect the effect of “administrative decisions” in the legal sense. Consequently, actions that yield immediate legal implications and are undertaken in fulfilment of delegated responsibilities are subject to judicial scrutiny.

The Tribunal highlighted that Mr. Wasserstrom signed an employment contract with an outside entity a month before his UNMIK employment concluded, which supposedly counters the fact that his contract was terminated as an act of retaliation. This approach fails to address all instances of unfair treatment in the factual account. It remains puzzling why the Tribunal concentrates solely on this segment of evidence, particularly since the legal matter pertains to jurisdiction, retaliation, and the factual elements remain undisputed.

The judgement then opines that the presence of alternative legal avenues to contest the non-renewal of his appointment is significant but fails to establish how this pertains to the determination of what qualifies as an administrative decision.

[586] See *Koda* 2011-UNAT-130.

Notably, neither the Tribunal's mandate nor the Policy restricts jurisdiction in whistleblower cases based on the utilisation of alternative remedies.

A more extensive legal examination can be located within Judge Faherty's eleven-page dissenting opinion, the existence of which in and of itself a rarity in the jurisprudence of the UN tribunals. In her rationale, she grounds her argument in the UNDT statute, the interconnection between the Secretary-General and the Ethics Office, and the precise mandates of the Office, as outlined in the 2005 Whistleblower Protection Policy.

Regarding the issue of receivability, Judge Faherty argues that the interpretation of the *Koda*[587] judgement adopted by the Secretary-General and the Tribunal are not accurate because even if an entity like the Ethics Office were to be considered independent in the larger structure of the UN, that does not remove their actions from the purview of judicial review. The opinion reads,

> *"The principle underlying our ruling in Koda is that notwithstanding an entity's operational independence, once it is part of the Secretariat, any decision capable of affecting an employee's terms of employment and conditions of service "may be impugned"."*

The respondent contends that in the Koda case, the Appeals Tribunal made a distinction between actions and inactions of autonomous entities and administrative determinations made by the Secretary-General in response to those actions and inactions. This is a very narrow interpretation that takes one phrase [in emphasis below] completely out of context. According to the *Koda* judgement,

> *" ... OIOS operates under the "authority" of the Secretary-General, but has "operational independence". ... It seems that the drafters of this legislation sought to both establish the "operational independence" of OIOS and keep it in an administrative framework. We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS.* ***Thus the UNDT also has no jurisdiction to do so, as it can only review the Secretary-General's***

[587] See *Koda* 2011-UNAT-130. The Koda case dealt with the question of constructive dismissal, and in this context analyzed whether a report by the OIOS constituted an "administrative decision".

administrative decisions. *But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System."*

Judge Faherty also tackles the discourse concerning alternative legal remedies referred to in Section 6.3 of the 2005 policy by emphasising that there exists no obligation for the staff member who reports retaliation to necessitate an administrative review of the retaliatory measure before pursuing judicial review within the internal justice system.

> *"The procedures set out in the present bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms."*

This provision goes directly against the basis of the majority decision of the UNAT in the Wasserstrom decision and has been removed from the 2017 policy.

While the dissenting opinion doesn't explicitly pose the question, it prompts consideration as to why the UNAT directs attention towards depleting internal remedies, rather than prioritising whistleblower safeguarding. Reporting misconduct and the potential subsequent retaliation differ significantly from internal disagreements, where attempting amicable resolution before Tribunal involvement could be sensible. The policy's objective is to offer whistleblowers protection, not to create a mechanism for amicably resolving conflicts between whistleblowers and those retaliating against them. The Wasserstrom decision and the subsequent Hunt-Matthes judgements adopted a narrow interpretation of the content and the procedure of the whistleblower protection that limited the rights and protections of the staff members.

4.3.2 Hunt-Matthes

Caroline Hunt-Matthes joined the United Nations in 1994, when she conducted preliminary investigations for the International Criminal Tribunal for Rwanda. She went on to work for the UN in Vienna, Yugoslavia, Rome, Geneva as investigator, human rights officer, and ethics advisor, among others. For nearly 10 years her work performance was consistently rated as exceeding expectations. From September 2003 Ms. Hunt-Matthes was employed as a senior investigation officer in the Inspector-General's Office at UNHCR. In October 2003 she conducted an

investigation into a rape of a refugee by a UN staff member in Sri Lanka and encountered numerous interferences with this and her other investigations, including one where the IGO (Inspector General's Office) refused to register a complaint of sexual harassment against the High Commissioner. Ms. Hunt-Matthes' contract was not renewed on grounds of "unsatisfactory performance"; the OIOS investigation into the non-renewal as a retaliatory action for her reporting on sexual harassment was never concluded.[588]

The facts of Ms. Hunt-Matthes' case took place before the implementation of the 2005 whistleblower policy and the establishment of the Ethics Office, and it demonstrates how reluctant the organisation and the Appeals Tribunal were to implement the policy in letter and in spirit. The judicial history is long and complicated, involving several decisions, orders, and appeals. Some of those orders[589] reveal the lack of transparency and obstruction on the side of the administration similar to the Wasserstrom compensation above. It is noteworthy that it took 9 years of litigation to reach the first judgement in the case, and 15 years to reach a final resolution between the parties in 2018. The major tribunal decisions directly assess the role of the Ethics Office and its decisions on the employment conditions of staff members, and the dynamics between the two tiers of the tribunals.

In UNDT/2011/063, the Dispute Tribunal determined that the Ethics Office's choice had a direct impact on the Applicant's rights, thereby classifying it as an administrative decision. This is the first decision of its kind that began the series of back and forth between the Dispute and Appeals Tribunal that culminated with the Wasserstrom Appeal and the 2017 policy update.[590] The Dispute Tribunal stated that claims pertaining to matters outlined in the 2005 policy grant staff members specific administrative rights even if the facts of the case precede the establishment of the office and the promulgation of the policy, which encompass the option for judicial review of said administrative determination. The Tribunal determined the admissibility of the application, affirming that the Ethics Office's ruling fell under

[588] Paragraph 71 UNDT/2013/084
[589] Order No.030 (NBI/2013) released internal Ethics Office notes on the preliminary investigation to the Applicant that were refused by the administration. The tribunal made a decision based on weighing confidentiality against public interest, and openness.
[590] See above in Wasserstrom.

the scope of an administrative decision as defined in Article 2(1)(a) of the UNDT Statute. In paragraph 49 the Tribunal rejects a comparison between the Ombudsman and the Ethics Office because of the insistence of the Respondent that like the Ombudsman, the Ethics Office does not make "administrative decisions",[591] a judicial reasoning and comparison that is found in other decisions later on -

> *"Unlike the Ombudsman, the Ethics Office is not a passive observer once a report of misconduct has been submitted to it. The Ethics Office is tasked with conducting a preliminary review of the complaint and based on this review, it determines if the complainant engaged in a protected activity and whether the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation."*

The tribunal views the role played by the Ethics Office goes beyond providing advice to staff members and the Secretary General. The decision goes on to highlight the substantial impact that the Ethics Office's conclusions have on the rights and protections of staff members, and argues that the Ethics Office's decisions are not immune to judicial scrutiny. The analysis of the active role of the Ethics Office in evaluating complaints of misconduct, determining connections between protected activities and alleged retaliation, and making decisions that directly impact the rights of staff members concludes that -

> *"[the] determinations from the Ethics Office have direct consequences for the rights of staff members. If the decision of the Ethics Office is that there is a prima facie case of retaliation, the staff member is accorded protection under ST/SGB/2005/21. If the decision is that there is no prima facie case of retaliation, the staff member is left without protection even if he or she was found to have engaged in a protected activity. The Tribunal considers that this unique role played by the Ethics Office cannot be deemed as merely an advisory one that is not subject to judicial scrutiny."*

The conclusion was that the role of the Office was substantive and its decisions hold legal weight and are subject to judicial oversight. This first judgement was

[591] As per the Andronov definition. See 2.5.5 on the significance of administrative decisions and the jurisdiction of the tribunals.

overturned on appeal by judgement No. 2014-UNAT-444; the appeal was joined with case UNDT/2013/085.

Judgment No. UNDT/2013/085 dealt with the challenge by Ms. Hunt-Matthes of the decision of the UN Ethics Office on its merits. In April 2006 she submitted a request for protection as a whistleblower. The Ethics Office found "there is no connection between [the Applicant's] reporting of misconduct and the decision not to renew her contract. The Ethics Office does not therefore find a prima facie case of retaliation." It is noteworthy that the Office did not argue that it had no jurisdiction because of retroactive application of the 2005 policy. The administration argued that the application of the 2005 policy should be limited procedurally and substantively -

> *"On the question of the retroactive effect of ST/SGB/2005/21, the Respondent submitted that the general substantive right of staff to a workplace free from retaliation that existed before 1 January 2006 remained unchanged by the implementation of ST/SGB/2005/21 except that ST/SGB/2005/21 created an additional procedural right to request the Ethics Office to review complaints concerning limited categories of acts of retaliation."*

The tribunal disagreed with such an interpretation -

> *"ST/SGB/2005/21 should not be applied in a manner that restricts the right of a United Nations staff member to bring a claim. The Tribunal strongly doubts and cannot infer that the Secretary-General intended that those staff members who had reported misconduct in line with their duty to those persons contemplated by IOM/FOM/65/2003 before ST/SGB/2005/21 came into force should be deprived of protection by virtue of its enactment. Such an intention would contradict the fundamental right of staff members to be protected against retaliation."*

The Tribunal found that the Ethics Office failed to properly conduct a preliminary investigation in Ms. Hunt-Matthes' case and awarded damages based on the stress she experienced. The decision was quoted in Gehr,[592] among others, which was also reversed on appeal.

[592] Hunt-Matthes UNDT/2013/127

In judgement No. 2014-UNAT-444 (appealing both UNDT/2013/085 and UNDT/2011/06) the Appeals Tribunal found that the UNDT made a legal mistake in determining that Ms. Hunt-Matthes' allegations of retaliation fell under the scope of ST/SGB/2005/21. This determination was supposedly flawed because her claims were based on events that took place in 2004, prior to the implementation of the 2005 policy. Consequently, due to this legal error, the UNDT also erred in law by considering Ms. Hunt-Matthes' application under ratione materiae; it should not have accepted the application in the first place. This decision adopts a very narrow interpretation of the rules that ignores two important facts - there is nothing in the Ethics Office mandate that precludes it from extending protection to staff members who were active whistleblowers before its establishment; and the Office did in fact make that determination, which means that the policy was applied retroactively by the Administration. Additionally, this argument was not raised in the case of Wasserstrom, which also took place before the promulgation of the 2005 policy. The subsequent whistleblower cases unfortunately perpetuate the approach of the Appeals Tribunal to take a very conservative attitude that restricts the rights of the staff members and the protection provided by the policy.[593] This approach was extended further in the UNAT decisions in Wasserstrom and the 2017 policy, as well as in the other legal cases involving Ms. Hunt Matthes.

Other tribunal decisions and appeals focus on actual witnesses' testimonies of retaliation and reveal details about the organisational culture of silence, narrow interpretation of regulations, and covering up unfavourable situations. Judgment No. UNDT/2013/084 delivered a decision on Ms Hunt-Matthes' challenge of the non-renewal decision at the UNDT. The Dispute Tribunal found that the performance evaluation was not completed according to internal regulations and thus was not a lawful reason for dismissal. At the time, the UNHCR regulation against retaliation was IOM/FOM/65/2003,[594] but the decision also referenced

[593] The publication of the UNAT judgement delayed the publication of other decisions, like Postica UNDT/2015/110

[594] "5.2.8 No action may be taken against staff or others as a reprisal for reporting allegations of misconduct or disclosing information to, or otherwise co-operating with, the IGO. An investigation will be initiated against any staff member who is credibly alleged to have retaliated against another staff member or other person who submitted a complaint to the IGO or otherwise co-operated with the IGO."

Wasserstrom and the 2005 whistleblower policy. In her application, Ms. Hunt-Matthes insisted that

> *"the organisational culture of UNHCR is conducive to incidents of harassment and retaliation, behaviour patterns many of its senior staff fail to recognize or acknowledge"*[595]

The deadline for submitting witness lists in the process of UNDT/2013/084 was 31 January 2013; the Applicant called one witness and the Respondent submitted that they did not intend to call any witnesses. On 26 February 2013, Mr. Anthon Verwey, former Chief of the EPAU testified on behalf of Ms. Hunt-Matthes. Considering Mr. Verwey's testimony, the judgement laid blame for the retaliation squarely in the organisational culture and tone at the top -

> *"There can be no doubt that the Applicant's uncompromising stance on the application of ethical and procedural standards to investigations caused discomfort at the highest levels."*

From the testimony and the work history, there is ample evidence that Ms. Hunt-Matthes prioritised fairness, transparency, and integrity in her investigative work. The Applicant's actions exposed not only misconduct, but also unethical behaviour and questionable practices that were previously perpetuated, overlooked, or tolerated. Her commitment to ethical standards set her apart from others in the immediate hierarchy and the organisation in general, and her treatment by the administration could very likely have a chilling effect on further whistleblowing - sending a message to other employees that speaking out against ethical violations or procedural misconduct might lead to similar retaliation.

The witness also expanded on a wider context and organisational cultural fault lines that led to the retaliation against Ms. Hunt-Matthes -

> *"Mr. Verwey gave evidence from his own experience working in IGO. He recalled instances of overt interference from senior officials in the conduct and outcome of investigations designed, in his view, to manipulate the whole process to get certain outcomes. He gave a specific example of an investigation ordered into a division of UNHCR which he was aware was*

[595] Hunt-Matthes Order No. 081 (NBI/2013)

designed to "clip the wings" of the Head of that division. In his opinion, the concern was not with the facts but to "knock someone down.""[596]

The testimony of Mr. Verwey underscores the complex dynamics surrounding whistleblowing and the challenges they face in such contexts. The mention of "overt interference" from senior officials implies that these individuals were not only passively encouraging and overlooking, but also actively involved in the investigation process and sought to exert influence over it. The interference seems to extend not only to the procedural conduct of investigations but also to their eventual outcomes. This included a targeted effort to undermine or limit the authority and influence of a department head - a person of managerial rank involved in international human rights issues. If Mr. Verwey's observations and testimonies are accurate, it is plausible and even likely that individuals who attempt to expose such interference and manipulation within the organisation's investigative processes could face retaliation. The described behaviour would contribute to a culture of suppressing dissent and discouraging employees from speaking out against unethical practices or interference by senior officials. This would further entrench a climate of fear and hinder transparency within the organisation, even as it engages with breaches of human rights on the global scale and in practice.

In the evening of February 26, the representative of the Respondent submitted a request to call the applicant's former supervisor to the stand because Mr. Verwey's testimony contained information on retaliation that was not included in the summary provided beforehand. The request was denied by the tribunal on the ground that the Respondent did not question the witness, and because retaliation was the crux of the trial from the start.[597]

The judgement presents another excellent example of "non-denial denial" -

"The negative mid-term assessment which was apparently unilaterally prepared by the supervisor in April 2004 followed closely after the Applicant's allegations of misconduct by UNHCR officials and her criticism of IGO internal procedures. The Tribunal concludes that the Administration

[596] Hunt-Matthes UNDT/2013/084 Paragraph 33
[597] Hunt-Matthes Order No. 081(NBI/2013)

chose to mischaracterise these allegations as poor performance rather than to properly investigate them or refer one of them to OIOS as the Applicant requested."[598]

The Dispute Tribunal found in favour of the staff member and awarded the Applicant one year's salary and benefits, plus USD 50, 000 for moral damages and costs "for manifest abuse of proceedings by Counsel for the Secretary-General". The Tribunal also referred UNHCR offices for accountability to the Secretary-General for their involvement in the case. The decision was reversed by the Appeals Tribunal.

In Judgement No. 2014-UNAT-443 the Appeals Tribunal overturned the UNDT judgement and ordered a new hearing, overseen by a different judge. UNAT acknowledged that there was no dispute regarding the fact that parts of Mr. Verwey's testimony, wherein he spoke about the alleged falsification of confidentiality breach allegations involving the staff member's former supervisor and the ex-Deputy Inspector-General, were not included in the summary provided. UNAT deemed it an error on the part of the UNDT to disregard the significance of this omission.

Despite the fact that the Respondent did not challenge the Applicant or Mr. Verwey during the hearing on the matter of retaliation, UNAT found that the Secretary-General should have done so. Additionally, the Appeals Tribunal found that the Secretary-General should have protested Mr. Verwey's testimony when it became evident that he was straying from the provided summary. In the interest of justice, UNAT believed it imperative to grant the Secretary-General the opportunity to counter Mr. Verwey's previously undisclosed accusations by presenting a rebuttal witness. The Tribunal found that the Secretary-General should have had the right to call another witness based on the fact that the summary of testimony was incomplete, which would have meant that two procedural wrongs would cancel each other out. The conclusion was that,

"In our view, the UNDT improperly exercised its discretion by giving the timetable of the case priority over the fair trial rights of the Secretary-General."

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[598] Hunt-Matthes UNDT/2013/084 para 108

In essence, the Appeals Tribunal overturned the entire verdict in Ms. Hunt-Matthes' case - including the damages, legal costs, and moral costs for 9 years of legal battles - based on the supposed procedural error regarding one witness testimony. It did not recognise any of the conclusions of the Dispute Tribunal regarding retaliation or harassment, or the "abuse of proceedings" that was recorded and penalised by the lower tribunal; but focused on one narrow, questionable mistake as a reason to retry the whole case. It also arguably went against its own decision in *Sanwidi*, where UNAT warned the UNDT -

> *"Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General."*

In 2015 Ms. Hunt-Matthes' case was sent for a retrial; it was postponed several times over the course of 3 years to allow for informal settlement procedures.[599] Subsequently, on June 1, 2018, the Applicant submitted a "Motion to discontinue and withdraw proceedings." Within the motion, the parties also requested that the settlement agreement be incorporated in a confidential manner into the order or judgement related to the withdrawal of the case. The two parties issues a joint statement -

> *"UNHCR accepts that there were matters which in hindsight could have been better managed in relation to the separation. It is a matter of regret that these issues and the lengthy delays have impacted upon Ms. Hunt-Matthes' employment and personal life. In the interests of both parties in seeing this matter resolved, a mutually satisfactory settlement has been reached today."*[600]

Ms. Hunt-Matthes herself stated independently

[599] Order No. 408 (NBI/2016) - set date for case management discussion; Order No. 436 (NBI/2016) - set October 27 deadline for outcome of mediation; Order No. 476 (NBI/2016) - suspension of proceedings for informal settlement proceedings. Order No. 503 (NBI/2016) on 19 December 2016 - suspension until January. Order No. 012 (NBI/ 2017) - suspension until Feb 2017. Order No. 096 (NBI/2018) - motion to discontinue.

[600] Government Accountability Project, "Longest-Running UN Whistleblower Case Ends with Settlement and UNHCR Statement of Regret" (*Government Accountability Project*, June 5, 2018) <https://whistleblower.org/press/longest-running-un-whistleblower-case-ends-settlement-and-unhcr-statement-regret/> accessed October 4, 2023

> *"For UN whistleblower protection to be effective – the UN Ethics Office must be truly independent. Culture change within all UN organizations will only move forward when accountability of its senior staff is enforced which it was not in this case."*

The UNAT decisions in Wasserstrom and Hunt-Matthes, which were delivered on the same day, have been decisive in the jurisprudence of the tribunals concerning whistleblower protection. In *Nadeau*, the Applicant attested that "The jurisprudence of the Appeals Tribunal in Wasserstrom 2014-UNAT-457 renders **illusory** the protection provided for by ST/SGB/2005/21" [emphasis added].[601] The decisions have also affected the confidence of staff members in the protection provided by the policy, and therefore in the conflict between culture of silence and the culture of respectful dissent and speaking up. According to a report[602] by the Working Group on Investigations, Disciplinary Matters and Administration of Justice in 2014,

> *"Fundamental weaknesses and flaws of the Ethics Office were highlighted by the above cases [Hunt-Matthes and Wasserstrom]. First, the question is whether, as an office directly reporting to the Secretary-General, it can perform its functions in a truly independent and impartial manner. Secondly, the Office has a poor record of substantiating retaliation."*

4.3.3 Nguyen-Kropp and Postica

In 2009, Florin Postica and Ai Loan Nguyen-Kropp, then investigators in ID/OIOS, jointly submitted an internal complaint against their supervisor, Michael Dudley, who was serving as the Officer-in-Charge of the Investigations Division within the Office of Internal Oversight Services (ID/OIOS), to Ms. Inga-Britt Ahlenius, then Under-Secretary-General (USG) for OIOS. The allegation was centred around potential evidence tampering in a criminal case. The two investigators claimed that Dudley had suppressed crucial evidence and

[601] Nadeau Order No. 102 (NY/2016)
[602] Staff Paper, 2014

manipulated photographs. These actions were believed to be an attempt to wrongly implicate certain members of the UN staff in the illicit distribution of controlled substances through the UN Medical Services Division (MSD). As a result of their actions, both Postica and Nguyen-Kropp were the subjects of workplace harassment, lowered performance evaluations, and a retaliatory investigation that eventually concluded without any charges being brought against them. A supervisor later acknowledged that this investigation was unnecessary and resulted in a wasteful consumption of resources.[603] Mr. Dudley later admitted to altering and withholding evidence, but was exonerated from misconduct by the OIOS without any investigation.

Postica and Nguyen-Kropp reported the retaliatory inquiry to the Ethics Office and requested intervention. The Ethics Office determined that the investigation, which eventually exonerated them, wasn't conducted out of retaliation, leading to the closure of the case. Both Nguyen-Kropp and Postica emphasised that the experience of being under scrutiny had detrimental effects. OIOS had made the investigation of the two public across different international audit agencies - OLAF, the World Bank, IADB, ICTY, UNDP, and the EBRD - subsequently causing them to be regarded with scepticism within professional circles. They filed separate applications with the UNDT, which were later joined in a decision on the merits by UNDT and a joint appeal case by UNAT.

In UNDT/2013/028 Ms. Nguyen-Kropp and in UNDT/2013/029 Mr. Postica argued that they requested management evaluation of the secret investigation, only to be told that there was no investigation; the Respondent argued that her application was time-barred because they did not request management evaluation in time after receiving official notification. The Tribunal found the application receivable since otherwise

> *the Tribunal would in effect be condoning any practice whereby the Administration conducts investigations in secret and denies the staff member the right of challenging such due process violations by sheltering behind the argument that, in the absence of receipt of notification and a request for management evaluation and irrespective of the harm inflicted on the staff member, the claim was not receivable.*

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[603] Nquyen-Kropp & Postica UNDT/2013/176 Para 16

The Tribunal found that it had the authority to consider an " administrative decision to launch a disciplinary investigation into her affairs, which, in addition to being procedurally flawed, may also be tainted by bad faith and/or ulterior motives." It referred to *Nwuke* in wherein "a possible disciplinary procedure" could directly affect "the accused staff member".[604]

In UNDT/2013/176 the Dispute Tribunal found that the secret investigation was retaliatory and "tainted by procedural irregularity and manifest unfairness" and awarded economic and moral damages. The Tribunal examined whether the "procedural irregularities" submitted by the Respondent amounted to "reason to believe" that a misconduct had taken place. The respondent had argued that "any statements made by the Applicants during the hearings as well as any documentary evidence not agreed upon by the Respondent should not be used by the Tribunal." The judgement rejected the argument and found that the Respondent had approved reports containing the same irregularities previously, and that the statement of the new USG/OIOS underlined that the investigation "should never have taken place", violating the due process rights of the staff members.

The Tribunal found that there was ample evidence that the administration hurt the professional reputation of the staff members -

> *"the way in which the preliminary investigation wa s solicited (with the involvement of OLAF, Inter-American Development Bank, the United Nations Development Fund, ERBD, and ICTY) among the very same professional circles in which these Applicants work resulted in a wide dissemination among several international offices of harmful and prejudicial material concerning the Applicants. The Applicants were presented in a very negative light throughout their professional community"*

The judgement quoted the importance of staff reporting misconduct in the ICSC Standards of Conduct; it also underlined the importance of section 6.3, which was removed from the 2017 policy -

> *"This provision in the Bulletin is essential. Indeed, retaliation does not occur in a vacuum but in relation to acts which may constitute administrative decisions that can be separately challenged before internal*

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[604] Nwuke 2010-UNAT-099 Para 29. See Chapter 2.

> *recourse systems, such as decisions concerning non-renewal, non-promotion, performance evaluation, etc. Should staff not be in a position to take parallel courses of action, both before the Ethics Office and before internal recourse systems, they would be prevented from accessing the full protection of the law that allows them to seek judicial redress in regard to administrative decisions alleged to be in violation of the terms of their contract of employment."*

The decision puts protection of whistleblowers in the larger context of the internal administrative law of international organisations, as well as in the context of the work of the organisation globally -

> *"The prohibition against improper motives, in particular retaliation, is not just a matter of law. It is to make certain that employees feel empowered to voice their concerns. An organisation cannot function effectively when its employees are afraid to raise a concern or report an issue. The aim of the system of internal justice is to ensure that the United Nations continues to make every effort to ensure that improper motive does not taint its operational decisions and that its staff members are treated fairly, transparently and in a way that promotes justice, efficiency and human rights."*

The judgement also denied the argument by the administration that a direct link must exist between the subject of a report and the retaliatory action. Any alternative interpretation that might allow the organisation to avoid granting employees protection by asserting that the link between the report and the person responsible for the adverse decision is not straightforward would severely weaken the effectiveness of the anti-retaliation directive and would seldom, if ever, be substantiated. Although the decision-maker holds the capacity for retaliation, it is more likely than not that the report or safeguarded activity will not be aimed directly at the decision-maker. Instead, it often targets an individual whose interests the decision-maker aims to defend. This tendency arises from the fact that the decision-maker frequently possesses a vested interest, whether direct or indirect, in the situation.

In 2015-UNAT-509 the UNAT delivered a decision in the appeal against UNDT/2013/176, UNDT/2013/028, and UNDT/2013/029. The Appeals Tribunal found that the applications should not have been receivable because

> *"Generally speaking, appeals against a decision to initiate an investigation are not receivable as such a decision is preliminary in nature and does not, at that stage, affect the legal rights of a staff member".*

The decision compares a misconduct investigation to a selection process, as a "preparatory" and "intermediate" in nature. The judgement states that

> *"tribunals should not interfere with matters that fall within the Administration's prerogatives, including its lawful internal processes"*

Again, the Appeals Tribunal adopts a narrow interpretation of very specific provisions that ignores extensive judicial reasoning by the Dispute Tribunal about the role of the Ethics Office and the function of the Whistleblower policy, as well as facts that provide ample evidence of real effects on legal rights, the professional, and personal life of staff members who engaged in whistleblowing.

In 2015 a decision was reached after over 4 years of litigation, marking a high point of contention between the Dispute and Appeals Tribunal on the powers of judicial review over the Ethics Office and its decisions. Judgement UNDT/2015/110/Corr.2 included significant criticism of the drafting of the mandate of the Ethics Office and the influence of its decisions on the rights of staff members. The Tribunal ordered a stay of proceedings until UNAT delivered its judgements in *Hunt-Matthes* and *Wasserstrom*, wherein the judgements of the UNDT were voided and found not receivable. There was another stay in proceedings in anticipation of the decision on the applicants' cases in *Nguyen-Kropp & Postica* 2015-UNAT-509. The conclusion was that the UNDT is bound by the precedent of the higher tier tribunal, and even though it disagreed with the conclusion, rejected the applications.

The Dispute Tribunal examined in detail the nature and role of the Ethics Office in the organisation; this is in contrast with the decisions of the Appeals Tribunal that simply cite the phrase "independent". Judge Meeran criticised the fact that the Appeals Tribunal in Wasserstrom did not address the detailed reasoning in Order No. 19 (NY/2010) or point out any flaws therein. The Respondent again argued

that the Ethics Office is comparable to the Ombudsman and refers to the *Koda* judgement referenced in Wasserstrom previously. The judgement found that neither apply, since the Ethics Office is accountable to the Secretary-General and *Koda* refers to interference in the investigations by OIOS. The judgement found that

> *"If independence and impartiality are of vital importance in the functioning of the Ethics Office, as stated in the Secretary-General's report, it is curious that neither word is used in ST/SGB/2005/22, which established the Ethics Office and its terms of reference. In any case, the Tribunal considers that it is more important to consider the nature of the work of the Ethics Office, its relationship with the Administration, and its responsibilities"*[605]

Judge Goolam Meeran concurred with Judge Faherty's dissenting opinion in *Wasserstrom*, analysed above, and found that the decisions of the Ethics Office are attributable to the organisation and have impact on the staff members, and as such, are subject to judicial review.

The judgement expresses the strong opinion that

> *"The current state of the jurisprudence establishes the total lack of accountability of the Ethics Office and this, in and of itself, seriously undermines the purpose underpinning ST/SGB/2005/21, which is to expose misconduct at all levels within the Organization and to protect those reporting misconduct in good faith."*[606]

It is pointed out that

> *"the most damaging decision for those seeking protection under ST/SGB/2005/21 is a determination that retaliation did not occur and that they are not entitled to protection. According to the Respondent and the Appeals Tribunal, no reviewable administrative decision results as a consequence of that determination."*[607]

The decision concluded that

[605] Nquyen-Kropp & Postica UNDT/2015/110/Corr.2
[606] Ibid.
[607] Ibid.

"The stated purpose of the Organization's policy on retaliation is to ensure that the Organization functions in an open, transparent and fair manner, and to protect individuals who report misconduct. The Tribunal considers that this policy is too important to the integrity of the Organization to have the important issues raised in this judgement remain unclear. … If staff members do not feel comfortable submitting reports of misconduct, the integrity of the Organization will inevitably suffer."[608]

Judge Meeran urged the administration and the Member States to clarify the policy

"If final decisions by the Ethics Office determining that retaliation has not occurred in a particular case are to remain immune from judicial review and scrutiny, the United Nations' policy on retaliation should clearly state this. The Tribunal invites Member States and the Secretary-General to make their intentions clear in this regard in any amendments to ST/SGB/2005/21."[609]

Mr. Postica and Ms. Nguyen-Kropp appealed the UNDT decision urging the Appeals Tribunal to overturn its decisions in Wasserstrom and Hunt-Matthes; in 2016 the full bench of the Appeals Tribunal rendered its judgement, reiterating that the decisions of the Ethics Office are not subject to review because

"The Bulletins bestow on the Ethics Office only the power to recommend, advise and refer."[610]

The decision takes the stance that the fact that the Ethics Office "finds" from the investigation report whether retaliation has occurred does not mean that it makes a final determination. This is another example of a very limited view of the role of the Office, the impact of its decisions, and the reasons for the existence of the policy, which were analysed in detail in the Dispute Tribunal's decisions.

The Appeals Tribunal insists that the alternative recourse available to staff members is enough to justify excluding the inactions of the Office, effectively

[608] Ibid.
[609] Ibid.
[610] Nquyen-Kropp & Postica, 2016-UNAT-673

stripping the rationale for the existence of the whistleblower protection policy and the Office itself -

> *"Although the Bulletin does not specifically provide for an instance where the Ethics Office does not find a credible case of retaliation, such a decision would not be a final decision carrying legal consequences. A complainant can always come back with better evidence or, under section 6.3 of the Bulletin, can raise retaliatory motives in a challenge to an action taken by the Administration."*[611]

The decision acknowledges that the Office did not meet its mandate, but does not acknowledge the need for judicial review of those inactions, and puts the responsibility on the General Assembly to correct those failings -

> *"We acknowledge that in the case of Mr. Wasserstrom, as in the case of the Appellants, the Ethics Office failed in its duty to make a recommendation pursuant to Section 5.7 of ST/SGB/2005/21. Under the law as it presently stands, the Tribunals do not have the power to order the Ethics Office to comply with Section 5.7, nor to order the Secretary-General to take action when the Ethics Office fails to do so. The remedy for such a situation rests with the General Assembly."*[612]

In a sense, the Appeals Tribunal washes its hands of the responsibility to review actions of the administration that affect the rights of the staff members; and its duty to uphold principles of justice and fair due process, as well as the spirit of the policies that aim to promote transparency and accountability.

The case of Nguyen-Kropp and Postica demonstrate not only the culture of secrecy of the UN secretariat, with reports of compromised investigations, harassment, smear campaigns, and impunity of high-ranking officials; but also the determination of the Appeals Tribunal to limit the judicial recourse of staff members against the actions and inactions of the administration. Future cases reinforced those unfortunate trends.

[611] Ibid.
[612] Ibid.

4.3.3 Kompass

Anders Kompass worked as Director, Field Operations and Technical Cooperation Division (D-2) between 2009 and 2016. Before that he had a long career as a country representative of Sweden to Guatemala and Mexico, and a 4 year work experience at the UNDP in El Salvador and New York. In July 2014 he was informed of the existence of a report of allegations of sexual abuse against minors by the French military serving as peacekeepers in the Central African Republic. He passed the information to the French embassy and his superior - the Deputy High Commissioner. He was placed on administrative leave pending a misconduct investigation for allegedly "leaking" the report in violation of confidentiality rules, a decision which he appealed at the UNDT. In March 2015 he was asked to resign, which he refused. The case gathered considerable media attention and involved external official scrutiny by an indepenedent panel, which cleared Mr. Kompass of all charges and concluded that his suspension was unlawful.

On 5 May 2015 by Order No. 99 (GVA/2015) the UNDT delivered its decision regarding the administrative leave. The Applicant challenged whether the Director-General of UNOG had the delegated authority to put him on administrative leave because OHCHR is not part of the UN organisational structure. The second relevant element was whether the decision was made based on "legally sound ground". The decision to place Kompass was supposedly to prevent him from concealing or destroying evidence, or interfering with the investigation.[613]

> *"The Tribunal notes that the contested decision does not refer to "a danger to other staff members or to the Organization", but to "the interest of the Organization ... in order to preserve all evidence and to avoid any interference with the investigation". The Tribunal finds that neither the interest of the Organization, nor the avoidance of any interference with the investigation are reasons in the exhaustive list of para. 4 of the respective administrative instruction. Therefore, as such, they cannot be accepted as valid reasons for placing the Applicant on administrative leave."*[614]

[613] From Order 99 "it is considered to be in the interest of the Organization to place you on administrative leave in order to preserve all evidence and to avoid any interference with the investigation."
[614] Kompass, Order No. 99 (GVA/2015)

Mr. Kompass was also the subject of retaliatory internal investigations by the OIOS, which allegedly were directed by the chief of staff of Secretary-General Ban Ki Moon,[615] but no one was convicted of retaliatory action. Mr. Kompass contested the endorsement from the USG/OIOS for an investigation into potential misconduct allegations against him; and the inferred refusal to halt this investigation while the evaluation by an independent panel appointed by the Secretary-General, regarding the Organization's response to allegations of sexual abuse and exploitation of minors by foreign military forces deployed in the CAR, is pending. Further, the Secretary-General assigned the responsibility of evaluating whether senior officials of the Organization misused their authority or engaged in retaliation against the Applicant, to the Panel rather than to OIOS. By Order No. 139 (GVA/2015), the UNDT rejected the application because the initiation of an investigation is not an appealable decision.[616] It does raise the question of whether the Tribunal might interfere with "unlawful" internal processes -

> *"By using the phrase "generally speaking", the Appeals Tribunal seems to suggest that there may be exceptions to the principle it enunciates. Moreover, the Judgment pursues:*
>
> > *This accords with another general principle that tribunals should not interfere with the matters that fall within the Administration's prerogatives, including its lawful internal processes, and that the Administration must be left to conduct this processes in full and to finality.*
>
> *Indeed, this passage may be read as implying, a contrario, that tribunals might be entitled to interfere with internal processes of the Administration which are not lawful."*[617]

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[615] Lynch C, "The UN Official Who Blew the Lid off Central African Republic Sex Scandal Vindicated" (*Foreign Policy*, December 17, 2015) <https://foreignpolicy.com/2015/12/17/the-u-n-official-who-blew-the-lid-on-central-african-republic-sex-scandal-vindicated/> accessed October 4, 2023 ;
Lynch C, "UN Tightens Noose on UN Rights Official Who Exposed Abuses" (*Foreign Policy*, June 12, 2015) <https://foreignpolicy.com/2015/06/12/prince-zeid-u-n-high-commissioner-human-rights-africa-sexual-misconduct-france-u-n-whistle-blower/> accessed October 4, 2023
[616] See Nguyen-Kropp and Postica above
[617] Kompass, Order No. 139 (GVA/2015)

However, the Tribunal takes care to limit the possible instances to cases where the processes were “tainted by a flaw of an obvious and fundamental nature”. The judgement also contains interesting insights into the organisational culture, the efforts to discredit the whistleblower, and the instrumentalisation of the confidentiality policies. According to the applicant,

> *“He had to observe in silence top officials of the Organization making defamatory statements about him to various interlocutors, while the Staff Rules and Regulations forbid him to make public statements in his defence”*

This double standard underlines the same policy of smear campaigns that perpetuated the case of Nguyen-Kropp and Postica above.

Mr. Kompass resigned in 2016, and in a press release criticised "the complete impunity for those who have been found to have, in various degrees, abused their authority, together with the unwillingness of the hierarchy to express any regrets for the way they acted towards me".[618] In 2017, a panel of French judges decided not to bring charges against the French peacekeepers involved.[619] Mr. Kompass worked as Sweden’s ambassador to Guatemala between 2017 - 2020 and was then the Acting Director of the Swedish Institute for Human Rights (NHRI) in 2022. He was awarded the Stig Dagerman Prize for free speech in 2017.

4.3.5 Reilly

Emma Reilly is a UN human rights officer who exposed the leaking of the names of Chinese dissidents to the Chinese government. Reilly has worked in OHCHR since 2012. On February 11, 2013, Ms. Reilly and fellow OHCHR personnel involved in facilitating NGO participation in the Human Rights Council received directions to furnish information to the Permanent Mission of China. The request pertained to whether 13 specified human rights advocates had sought accreditation

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[618] BBC News, “UN Whistleblower Resigns over French Peacekeeper ‘Child Abuse’” *BBC* (June 8, 2016) <https://www.bbc.com/news/world-africa-36481372> accessed October 4, 2023

[619] Morenne B, “No Charges in Sexual Abuse Case Involving French Peacekeepers” *The New York times* (January 6, 2017) <https://www.nytimes.com/2017/01/06/world/africa/french-peacekeepers-un-sexual-abuse-case-central-african-republic.html> accessed October 4, 2023

for the 22nd regular session of the Human Rights Council. Confirming these activists' applications prior to their travel posed a noticeable risk of subjecting them to detention and other potential forms of retaliation, thereby dampening their freedom of expression. Ms. Reilly communicated this directive to higher-ranking OHCHR staff members, including the then High Commissioner. Despite her reporting, the practice of sharing the identities of human rights defenders before their international trips, which could involve criticism of their government, was instituted and persisted until at least 2015.

On 20 July 2016, Reilly filed a complaint of harassment and abuse of authority under ST/SGB/2008/5 against her reporting officers requesting management evaluation of a recruitment process. In 2015 and 2016, she also made requests for protection from retaliation to the Ethics Office under the 2005 policy for reporting misconduct relating to the practices of OHCHR. In a memorandum dated October 7, 2016, the Ethics Office concluded that the Applicant had been involved in certain protected activities, but found no prima facie case of retaliation. However, on October 13, 2016, the Director of the Ethics Office consented to reconsider Reilly's request for protection, prompting a reopening of the case. Reilly was then contacted by a journalist about her retaliation complaint; she reached out to the Ethics Office for advice, but it appeared that the documents were leaked from the Office and were published online.

On February 2, 2017, after the unauthorised release of documents from the Ethics Office, OHCHR released a press statement detailing the procedure purportedly utilised for requests from China pertaining to the identification of human rights advocates. This statement included an assertion that Ms. Reilly's grievances had been investigated twice independently, resulting in the determination that her complaints lacked sufficient evidence and she had "never faced reprisals". Reilly requested that the press release be corrected, and requested a managerial evaluation of the press release, citing harm to her reputation and career. In March 2017 the High Commissioner refused to retract or correct the press release, and in May the USG for Management closed the request for evaluation.

In April 2017, the Alternate Chair of the Ethics Panel confirmed the previous decision of the Ethics Office; she also stated that "the information sharing with a Member State" did not constitute reports of misconduct as the conduct "was within

the authority of the staff member, well-known to senior leaders in OHCHR" and did not result in an investigation.[620] In August 2017, David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, interfered with the OHCHR on Reilly's behalf.[621] In 2017 and 2018 Reilly and the Ethics Panel engaged in various forms of communication regarding her reports and the retaliation; she also sought management evaluation of the decision not to protect her from retaliation, which was deemed not receivable by the MEU.

In 2019, Judge Downing granted the challenge by Ms. Reilly of undue delay by OHRM regarding her complaint of abuse of authority by the High Commissioner for Human Rights regarding the press release. The Tribunal found that the 9 months delay by the OHRM on dealing with the Applicant's complaint amounted "to an implicit decision not to take action on her complaint" and a clear violation of ST/SGB/2008/5. Section 5.17 of ST/SGB/2008/5 sets out a 3 month limit for an investigation to take place, and the Appeals Tribunal has held that

> *"a period of six months to communicate the decision not to open a formal fact-finding investigation is far from prompt".*[622]

Judge Downing held that the Secretary-General

> *"was making a unilateral decision to deviate from the applicable rules, which is not permitted".*[623]

The judgement ordered the administration to make a finding under the Applicant's complaint, but did not order damages. It is noteworthy that Judge Downing was removed before he could make a judgement in Ms. Reilly's case regarding the substance of the ongoing harassment, see below.

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620 Reilly, UNDT/2020/097

621 Kaye D, "Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression" (*Ohchr.org*, 2017) <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23269> accessed October 4, 2023

622 Benfield-Laporte, 2015-UNAT-505

623 Reilly, UNDT/2019/094

In 2020 filing, in an effort to distance the case from the UNAT judgements diminishing the rights of whistleblowers, the Applicant contested that,

> *"The application must be distinguished from the cases Wasserstrom 2014-UNAT-457 and Nguyen-Kropp & Postica 2016-UNAT-673 and is receivable. Unlike in these cases, numerous retaliatory acts the Applicant has referred to the Ethics Office cannot be contested in the formal justice system and the finding of the Ethics Office was that no prima facie case of retaliation existed, so no investigation took place. This decision deals with the Applicant's request for protection in a final manner and does not constitute a mere recommendation. It thus affects the Applicant's terms and conditions of employment."*[624]

The contested decision is the decision of the Second Alternate Chair of the Ethics Panel (after the chair recused herself) of 2 March 2018, which

> *"found that there was no prima facie case of retaliation under the old or the new policy and thus declined to refer the matter to OIOS for further investigation. However, acting under sec. 9.2 of the new policy* [2017 whistleblower policy]*, she recommended a number of measures to be taken, including for OHCHR and the Applicant to engage in mediation, and for the Applicant to be temporarily reassigned pending completion of such mediation."* [625]

It is noteworthy that neither the Ethics Office nor the Tribunal had arguments against applying the 2017 policy retroactively in Reilly's case, unlike the case of Hunt-Matthes above. The conclusion was that, under section 10.82 of the 2017 policy

> *"the UNEO recommendations are not reviewable administrative decisions and, as such, they fall outside the scope of the UNDT's jurisdiction."*[626]

The Tribunal found that the review mechanism by the Ethics Panel was intended to offer complainants an additional pathway through which they can have their

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[624] Reilly, UNDT/2020/097

[625] Ibid.

[626] Ibid.

grievances evaluated, particularly when they present additional evidence. The decision acknowledges that there is no legal provision permitting it to conclude that determinations of no prima facie retaliation are eligible for judicial review. Furthermore, such a provision would directly conflict with the language and rationale of section 10.82. The Tribunal also underscores the fact that even if it deems the old policy (ST/SGB/2005/21) to be the applicable framework, the prevailing legal interpretation within the Appeals Tribunal's jurisprudence, by majority, is that the actions and and inactions of the Ethics Office do not constitute administrative decisions.

It is very clear that the limits on judicial recourse are problematic. According to the decision,

> *"Access to justice, as an essential part of the rule of law in the Organization, is clearly ensured by the fact that complainants can always contest decisions or omissions by the administration they deem retaliatory even after a finding of no prima facie retaliation has been made by the UNEO."*[627]

However, if it is the mandate of the Ethics Office to provide protection against retaliation, and protection is not provided, then it is unclear who would be the object of a judicial challenge. This is exacerbated by the removal of provision 6.3 of the 2005 policy from the 2017 policy.

The Tribunal puts the onus on the General Assembly to provide another solution, echoing the decision by Judge Meeran in Nguyen-Kropp and Postica -

> *"The Tribunal underlines that only the General Assembly, as the legislative body of the Organization, can establish and define conditions under which access to the internal justice system is granted to staff members. Providing direct access to the Tribunal in relation to UNEO findings of no prima facie retaliation remains a policy issue that should be resolved through a legislative act."*[628]

[627] Ibid.
[628] Ibid.

As pointed out in section 5.1, the 2017 policy, which limited the access to justice on the decisions of the Ethics Office, was promulgated by the Secretary-General, not the General Assembly.

In Judgement No. 2021-UNAT-1079 the Appeals Tribunal upheld the decision of the UNDT with regard to its inability to review the decision of the Alternate Chair of the Ethics Panel. In Judgement No. 2022-UNAT-1190 the Appeals Tribunal dismissed Ms. Reilly's request for correcting the facts in the previous decision, calling her complaints "quibbles" and "an inconsequential exercise in pedantry."[629]

In 2021 the UN Dispute Tribunal partially granted Reilly's contesting "'[o]ngoing workplace harassment based on protected activity for reporting and objecting to wrongdoing by management', including the decision to conclude an investigation of harassment only with managerial actions; and ... '[v]iolation of staff member privacy rights and defamation of character', including the related decision to state that her claims were found unsubstantiated in a press release".[630] The case was remanded to a fact-finding panel for the purpose of interviewing Reilly's superior, and the Appellant was granted moral damages.

Ms. Reilly filed an appeal, which was granted in part in Judgement No. 2022-UNAT-1309 from 28 October 2022, where in the UNAT reversed the UNDT's rejection of Ms. Reilly's claims on harassment and abuse of authority and ordered a reconsideration.

The next judgement is still pending. In 2023, during a hearing, Ms. Reilly claims

> *"The judge essentially tried to stop my lawyer from even presenting the defense that is laid out in all of the legal documents. Frankly, she acted as counsel for the UN, not an independent arbiter of the compliance of their actions with their own rules and those set by member states. I knew the UNDT is biased, but that was extreme even by their low standards."*[631]

[629] Reilly, 2022-UNAT-1190
[630] Reilly, UNDT/2021/093, para. 1
[631] UNWatch, "Whistleblower on Trial" (*UN Watch*, June 8, 2023) <https://unwatch.org/whistleblower-on-trial/> accessed October 4, 2023

The judge from UNDT, Rowan Downing, who was taken off Reilly's case just before delivering the judgement, has likened this action to a "coup d'état." Downing further commented that this was, in essence, an assault on the autonomy of the judiciary, as no nation-state could reasonably endorse such behaviour.[632] Judge Downing claims that Reilly's case is "the only [whistleblower] case … where the Secretary-General had personally intervened".[633]

Reilly insists that she has a moral and legal duty as a human rights lawyer to reveal the actions of the OHCHR, which go against the core principles of the organisation -

> *"My entire defense is that because there is no dispute in court that the UN has an ongoing policy of handing names of activists to China on request, and the UN has repeatedly lied about that policy in public and to member states, I had a legal obligation to report the ongoing danger to people who come to the UN to testify about China's human rights abuses,".*

Ms. Reilly still works in the UN.

Summary

Each chapter so far has concluded with human stories and perspectives, in order to illustrate the complex, often abstract, legal and ethical issues summarised therein. It is important to make a point about the role of individuals in international organisations in the public international legal context that often only includes states. On the other hand, Chapter 4 focuses almost exclusively on cases, or human stories, so it makes sense to reverse the deductive approach to an inductive one - i.e. to make observations on the legal and cultural questions that they raise as a whole - before proceeding to the overall conclusion of the thesis itself.

The judgements in the cases of *Wasserstrom*, *Hunt-Matthes*, *Nguyen-Kropp and Postica*, *Kompass*, and *Reilly* raised a number of specific questions - most importantly the status of the Ethics Office, but also the vexing dynamic of the UN

632 Feldman, (n. 366)
633 Ibid.

Appeals Tribunal repeatedly adopting a very narrow interpretation of regulations that limits the ability of staff members to contest decisions by the administration. An administrative tribunal that overly emphasises legal technicalities at the expense of the core rights of individuals risks the potential erosion of justice and fairness, and losing sight of the broader principles and values such as protecting individual staff members, ensuring due process, and promoting equity. This approach leads to outcomes where whistleblowers find themselves discouraged, disadvantaged, or denied justice simply due to procedural or technical errors, even when they have legitimate claims or grievances. It undermines the tribunal's fundamental purpose, which is to provide accessible, efficient, and just resolution of disputes.

The importance of judicial review of the actions of international public bodies and their decisions on the legal rights of international civil servants cannot be overstated. The Ethics Office has the sole jurisdiction over determining whistleblower status, and by excluding it from the competence of administrative tribunals, the UN is not only limiting the protection of its own staff, but also setting a dangerous precedent for the entire UN system. Judicial review is a crucial safeguard, ensuring that organs and officials act within the bounds of the law and adhere to the core UN principles of fairness, transparency, and accountability. The UN administrative legal system allows individual civil servants to challenge administrative decisions when they believe these decisions are unlawful, arbitrary, or unreasonable.

In the Effect of Awards Advisory Opinion, the ICJ emphasised that lack of judicial recourse would be inconsistent *"with the expressed aim of the Charter to promote freedom and justice for individuals"* and that the power to establish an independent judicial body *"was essential to ensure the efficient working of the Secretariat and ... the highest standards of efficiency, competence and integrity."*[634]

The tribunals and their power and responsibility to review administrative decisions of the UN regarding the staff, are a key pillar of achieving the organisational purpose. By subjecting UN bodies to judicial scrutiny, the tribunals are supposed to help correct errors, prevent abuses of power, and maintain the rule of law.

[634] ICJ Reports 1954 p. 57

Moreover, by protecting staff members that speak up against misconduct, they would promote confidence in the system. In essence, judicial review upholds the balance between effective governance and individual rights, ensuring that UN organs act in accordance with the law. By excluding the Ethics Office from that purview, the Secretary-General and the UN Appeals Tribunal are invalidating the purpose of the policy and the Office itself - to promote a culture of respectful dissent, to protect staff members, and to embody the ethos of the international civil service.

Chapter 2 discussed the issues with the assumption of *res judicata* and *stare decisis* powers by the UN Appeals Tribunal. In line with Article 6 of the UNAT Statute, the Appeals Tribunal possesses the authority to formulate its own procedural rules, contingent upon the General Assembly's endorsement. The UN General Assembly did not confer upon the Appeals Tribunal the doctrines of stare decisis or res judicata; rather, the tribunal extended its own jurisdiction by adjudicating a dispute between two parties. Similarly, the UNAT overturned numerous UNDT judgements, based on extensive legal reasoning, on the basis of the “independent” status of the Ethics Office - an argument that has a number of weaknesses that have been pointed out - and further decided that its own decision was enough to exclude the whole office from judicial review based on disputes between staff members and the Secretary General.

The tribunal decisions referred to in this chapter thus raise also important general legal issues - access to justice for staff who were not granted whistleblower status, right to a fair trial, and standing. Those are critical components of whistleblower protection, playing a pivotal role in ensuring the effectiveness of the UN whistleblower policies and upholding the guiding principles of transparency, accountability, and the rule of law that the UN stands for. Staff members are more likely to come forward if they believe they will have a fair opportunity to address their concerns through legal channels. Confidence in the justice system encourages individuals to expose misconduct without fear of reprisals. Organisational accountability through judicial review that embodies the organisational values is essential for deterring misconduct and corruption, and the cases do not provide evidence thereto.

What is more, the administration has repeatedly engaged with the whistleblowers in bad faith - see the Tribunal's insistence that the Secretary-General's "deliberately and persistently refus[ed], without good cause, to abide by the Orders of the Tribunal", and committed "a manifest abuse of proceedings", and the damages awarded to that end.[635] The right to a fair trial guarantees that whistleblowers are treated justly and impartially when their cases are adjudicated; conversely, the abuse of the judicial system indicates serious underlying issues with the independence and faculty of the tribunals.

The cases in this subsection - both the cultural linchip cases and the judicial decisions - also reveal a culture of silence and impunity for powerful individuals, and the reluctance to admit fault. In the early-2000s, Bolkovac and Mullick exposed not only deep-seated corruption and abuse of vulnerable people, but also the tacit acceptance of the actions of powerful individuals; Elbasri and Reilly faced similar issues a decade later. The case of Wasserstrom was overturned by UNAT in 2014, and the case of Reilly is facing a likely similar scenario in the 2020s. The updated whistleblower policy has not increased the protection of whistleblowers, and the culture of silence has not been "fixed", as the UN spokesperson has insisted.

Ultimately, the protection of whistleblowers against retaliation is weakened by the organisational culture; and yet, knowing that this culture exists, knowing that they might get punished for it, whistleblowers still come forward because it is the right thing to do.

[635] Wasserstrom, UNDT/2013/053

Conclusion

The word whistleblower brings to mind powerful shadowy corporations and government intelligence services, and a David-Goliath style faceoff with a brave champion of truth. While not every case involves this quality of drama, whistleblowers do represent defining moments for the relationship between the people and institutions, both public and private, in the 21st century. Individuals like Deeptroath, Chelsea Manning, Julian Assange, and Edward Snowden have redefined the image of governments and international corporations, and the trust the public has in the focal points of power. Movies such as "All the President's Men", "The Insider", "Erin Brockovich", "Official Secrets" have showcased these real-life events and situations, highlighting the personal cost and ethical dilemmas, the corporate greed and freedom of the press, as well as explore themes of corruption, justice, morality, and accountability.

It is important, albeit controversial, to point out that not every individual that speaks up against the UN is a whistleblower according to the whistleblower policy - i.e. a person who reports an internal wrongdoing to the authorities and has the right to protection from retaliation. Shirley Hazzard, Rowan Downing, Romeo Dallaire, and Michael Adams, are not whistleblowers, even though they wrote public statements about their experiences inside the UN. Being a critic is not the same as being a whistleblower. UN Staff union members are not whistleblowers, although they do experience retaliation for their duties. The staff members dismissed by Trygve Lie at the request of the US State Department for invoking their Fifth Amendment Rights - and thus leading to the Effect of Awards ICJ Opinion - were retaliated against in the organisation and some wrote about their experiences later, but are not whistleblowers. Aisha Elbasri, whose case is included as a cultural linchpin case because no tribunal decisions were reached and no public OIOS report were available, is a whistleblower because she made a report to OIOS and the ICC, which led to an internal investigation and a report. Bolkovac and Mullick also made reports to OIOS, and arguably were one of the driving reasons for the creation of the whistleblower policy. Some insiders have pointed out that there is a need to expand the definition to provide protection to a wider range of individuals, while others insist that doing so would weaken the policy

further; it is hard to argue that Staff Union members do need stronger official protection though.

Those distinctions and discussions are important because of the role of the organisational culture and the dynamic between the law of the international civil service and the ethos. Whistleblowers are individual insiders reporting on a breach of rules to the authority in charge; in an ideal situation the first person to notice an infraction would be the first person to speak up about it. In many groups and institutions, dissent is not encouraged; there is a strong negative connotation attached to “betraying” the group’s secrets - snitching, rat, etc. Whistleblowers are often people who break with the culture of silence in an organisation, with the practice of ignoring or even burying a problem, in order to try and rectify a wrong.

It is notable that the prominent whistleblower cases appeared after the 2000s. It is possible to speculate that certain elements contributed - the expansion of the UN bureaucracy; the missions in warzones far away from the tight-knit headquarters; the online presence of both the organisations and the media outlets that report on them. When confronted with evidence of the culture of silence and fear, whether by whistleblowers internally or by media externally, the UN representatives like UN Spokesperson Stephane Dujarric (referred to in the introduction) act defensive and deny, or lament how the “bad apples” have spoiled the reputation of the entire UN civil service that works for the betterment of humanity. It is counterintuitive to deny that there is a problem and then to discuss all the measures that have been taken to solve it, while denying the experiences of the staff members who spoke up against it and refusing them protection against retaliation.

In this framework, this thesis has provided evidence that several vital components contribute to a healthy organisational culture. Trust forms the foundation, fostering an environment where individuals have confidence in one another and in the organization as a whole. The JIU reports have reported a lack of trust in the protection of whistleblowers, but a strong belief in the work of the organisation. Respectful dissent is equally crucial, as it encourages open dialogue, the sharing of diverse perspectives, and the ability to question decisions constructively. Clear policies would provide a framework for consistent and fair operations, as would a consistent and fair application of those rules. Equally significant is the role of leadership, as their behaviour sets the tone for the entire organization. However, if

leadership adopts a stance of "non-denial denials," refusing to acknowledge issues or concerns, it can erode trust and hinder the development of a transparent and inclusive culture.

Leaders set the tone, values, and behavioural expectations within an organization through their actions, decisions, and communication. This is true about the Secretary-General, but also about the managers, the judges of the tribunals, and the Ethics Office. All of the oversight mechanisms serve as safeguards against potential abuses of power, corruption, and procedural irregularities; and excluding them from oversight diminishes the trust in the organisation and the protection against retaliation. The cultural linchpin cases also underscore the importance of external accountability - the Government Accountability Project[636] and Transparency International[637] - as well as the role of external bodies - the Volcker Commission, the ICC, etc. - because they form an important part of the global social context.

Given that international organizations are established to address global imperatives, it is important to construe their purpose within the broader context of external and internal societal dynamics. This thesis has demonstrated that the challenges associated with a public international law framework rooted in the sovereignty of individual nation-states both shape and impede the autonomy of these institutions. Context is a critical factor in understanding the dynamics of international organizations. Chapters 1 and 2 delved into the legal and social background that underpin these entities. Within the realm of public international law, the context includes the historical roles of states and the evolution of international institutions. Internally, organizations are shaped by their legal frameworks, cultural norms, ethical considerations, the tone set by leadership, and the functioning of tribunals. Externally, the broader context encompasses media coverage, academic discourse, humanitarian crises, political instability, and the perspectives and actions of individual citizens. Recognizing the multifaceted

[636] Government Accountability Project, "Representative Cases in Which the United Nations or Its Funds, Programmes or Agencies Have Not Complied with Best Practices in Whistleblower Protection" (*Government Accountability Project*) <https://whistleblower.org/wp-content/uploads/2018/12/Representative-UN-Cases.pdf> accessed October 4, 2023
[637] Maslen C, "Whistleblower Protection at the United Nations" (*Transparency.org*, December 15, 2021) <https://knowledgehub.transparency.org/assets/uploads/kproducts/whistleblower-protection-at-the-UN_PR_v3.pdf> accessed October 4, 2023

nature of these contexts is essential for comprehending the complexities and influences at play within international organizations and in global governance.

Historically, individuals have only become subject of public international law in the middle of the 20th century with the development of international human rights law and international criminal law. With the institutionalisation of instruments such as the ECHR and the bodies such as the ICC, the rights of individuals and their ability to litigate those have slowly expanded the scope of international law away from the exclusive focus on state sovereignty. As was pointed out in the introduction of Chapter 1, civil servants are not considered significant in the context of international law; as individuals, and bureaucrats, their role is rather technical, clerical, and lacking direct governmental nomination. What distinguishes them is their role in global governance; their knowledge of global issues; and their duties to the international organisations and their goals.

Academics have asked whether whistleblowing is a duty in general, as citizens and political actors.[638] International civil servants have the singular duty to be whistleblowers in the international legal and ethical framework, by virtue of the Staff Regulations and Rules. More than any other evidence, this obligation gives the individual a responsibility in public international law. This thesis has demonstrated that the UN civil service law is not well-drafted, convoluted, characterised by bewildering and intricate procedures and entities, stringent deadlines selectively applied to civil servants, and an extensive body of legal precedents. Consequently, the procedural rights of staff members are sometimes breached, especially considering the judgements by the UNAT in the whistleblower cases.

This thesis has examined not only how the UN and other intergovernmental organizations deal with whistleblowers and misconduct, but also how the actions of individual civil servants affect and reflect on the international civil service ethos and law. Whenever whistleblower cases gather media attention, political pressures spurn efforts to resolve the obvious structural issue, often through ad hoc policies and independent investigations. However, these temporary fixes do not constitute real reform because they do not address the core issues, and neither the judicial

[638] Ceva E and Bocchiola M, *Is Whistleblowing a Duty?* (Polity Press 2019)

system of the UN nor the organisational culture as it is can challenge the status quo. The UN civil servants are caught in the structure of conflicting layers and loyalties of the UN, chiefly the contradiction between the loyalty to the culture of secrecy perpetuated by the member states and the loyalty to the purpose of the UN in the framework of global society stretching beyond national governments. The broader conclusion of this thesis is that the global society needs the UN to be transparent and also the UN needs to encourage a culture of polite dissent in order to embody its goals. It is the whistleblowers that most closely embody the guiding principles of the UN, and it is their actions that give hope for the future.

Communities of UN whistleblowers like the panels at the International Anti-Corruption Conference (IACC) have also been vocally critical of the lack of protection of UN whistleblowers.[639] It could be that in the future, such a group would play a crucial role in advising the UN on reform, but also in fostering a supportive environment for individual civil servants contemplating speaking out against wrongdoing. These communities offer solidarity, understanding, and validation to potential and past whistleblowers, who may otherwise feel isolated or apprehensive about coming forward. By sharing their experiences, these communities provide insights into the challenges and risks involved in whistleblowing and offer practical advice on how to navigate them. Additionally, they serve as advocacy networks, raising awareness about the importance of whistleblowing and advocating for legal protections. Through these collective efforts, communities of whistleblowers not only encourage individuals to speak out but also contribute to a broader cultural shift towards transparency, accountability, and ethical behaviour in organizations and society at large. The existence of whistleblowers, who embody the fundamental values of global institutions, offers assurance that these principles are more than just a superficial public relations display.

[639] IACC (n. 523)

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