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Some Observations on the Jurisdiction of the African Court of Justice and Human Rights over International Administrative Law

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The extension of the African Court's jurisdiction to disputes between the African Union and its staff members is an anomaly in the order of international and regional courts, as these courts rarely adjudicate internal disputes between international organizations and their staff members. The body of law which governs such disputes is known as international administrative law or international civil service law, and it has developed over the last eighty-plus years through the tribunals created by these organizations. Since organizations such as the United Nations and the African Union enjoy jurisdictional immunities, national courts are limited in their ability to protect the labour rights of international civil servants - employees of these organizations. The development of internal justice systems that include an independent judicial body therefore became a necessary balance to the immunities enjoyed by these organizations. In *The Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, the International Court of Justice (ICJ) held that it would 'hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.'[1]

In 1966 the Organization of African Unity (OAU), predecessor to the African Union, established an Administrative Tribunal noting that 'the service relations in the Organization must be regulated only by internal rules of the Organization, any competence of national courts being excluded.'[2] This

[1] *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion, International Court of Justice, 13 July 1954, ICJ Reports (1954) 47, at 57.

[2] Preamble, Statute of the Administrative Tribunal, Organization of African Unity, CM/99/Rev.2, at 1.

https://doi.org/10.1017/9781108525343.037 Published online by Cambridge University Press

Tribunal, which now operates as the African Union Administrative Tribunal (AUAT), is competent to receive applications from staff members of the African Union alleging non-observance of contracts of employment or violations of the provisions of the Staff Regulations and Rules by the organization. In a manner similar to a national court, the AUAT issues binding decisions which include remedies to compensate the aggrieved staff member. With the inclusion of Article 29(1)(c) in the Protocol on the Statute of the African Court of Justice and Human Rights (The Protocol), employees of the African Union and its organs now have the unprecedented right to appeal decisions of the AUAT to the region's highest court – the African Court of Justice and Human Rights.

This chapter offers initial observations on the inclusion of an appellate jurisdiction over international administrative law in the Statute of the African Court. It will first set out the legal framework and historical context for this provision, and further assess four main observations on the exercise of this jurisdiction.

1. LEGAL FRAMEWORK AND HISTORICAL CONTEXT

To understand the context in which the African Court exercises jurisdiction over administrative law matters, Article 29(1)(c) of the Protocol is best read in conjunction with Rule 62 of the 2010 African Union Staff Regulations and Rules. Pursuant to Rule 62.1, a staff member of the African Union may submit an application to the AUAT[3] contesting administrative and disciplinary decisions by the organization taken against him or her. The AUAT is competent to hear 'appeals submitted by staff members or their beneficiaries, alleging violations of the terms of appointment, including all applicable provisions of the Staff Regulations and Rules, or appeals against administrative and disciplinary measures.'[4] Recourse to the Tribunal forms an internal remedy, the exhaustion of which is necessary before a staff member can approach the African Court. Rule 62.3 of the Staff Regulations and Rules provides that:

> In the event of breach of contract of employment or violation of these Regulations and Rules, a staff member who has exhausted all the internal procedures provided for by these Regulations and Rules, shall file within sixty (60) days from the date of judgment, an appeal to the African Union's Court of Justice and Human Rights.

[3] The AUAT is the descendant of the *ad hoc* Administrative Tribunal of the Organization of African Unity.

[4] Rule 62.2, AU Staff Regulations and Rules, CM/1745(LVII) Annex 1 Rev. 1.

https://doi.org/10.1017/9781108525343.037 Published online by Cambridge University Press

Article 29(1)(c) of the Protocol cements this right of appeal by noting that:

> The following entities shall be entitled to submit cases to the Court on any issue or dispute provided for in Article 28:
>
> [. . .]
>
> c) A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.

These provisions in Article 29(1)(c) of the Protocol and Rule 62 of the Staff Regulations and Rules represent two significant changes in the processes available to address disputes between staff members and organs of the African Union. First, prior to the 2010 Staff Regulations and Rules, the 1993 OAU Staff Regulations & Rules provided a different form of dispute settlement. In contesting an administrative decision, the then *ad hoc* Administrative Tribunal represented the final recourse available to staff members challenging the organization's alleged non-observance of the Staff Rules or terms of employment. Such finality in its decisions is a common feature in the statutes of the tribunals of other international organizations such as the World Bank,[5] the African Development Bank[6] and the International Labour Organization,[7] which exercises jurisdiction over employment disputes in more than sixty international organizations and some UN agencies.

Under the OAU Staff Regulations & Rules, the staff member in question was first required to 'address a letter to the Secretary-General requesting that the administrative decision in question be reviewed.'[8] If the Secretary-General confirmed the decision, or if the staff member received no response within thirty days of his/her letter, the staff member 'shall be entitled to file, within a further thirty days, an appeal with the Administrative Tribunal in the form prescribed in the Tribunal's Rules of Procedure [. . .].'[9]

The opportunity to appeal the Tribunal's decision to a higher body was non-existent. This proved immensely problematic as the AUAT was non-

[5] Article XI (1) of the Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development Association and International Finance Corporation, available online at https://webapps.worldbank.org/sites/wbat/Pages/Statute.aspx.

[6] Article XII (1) of the Statute of the Administrative Tribunal of the African Development Bank, available online at www.afdb.org.

[7] Article VI (1) of the Statute of the Administrative Tribunal of the International Labour Organization, available online at www.ilo.org/tribunal/about-us/WCMS_249194/lang–en/index.htm.

[8] See Article 62(a), OAU Staff Regulations & Rules, CM/1745 (LVII) Annex 1 Rev. 1.

[9] Ibid.

operational between 1999 and 2014, denying staff members the judicial resolution of their employment disputes.[10] This matter was expressly addressed in the 30 September 2011 decision of the African Court of Human and Peoples' Rights (ACHPR) in the matter of *Efoua Mbozo'o Samuel v. The Pan African Parliament*.[11]

On 6 June 2011, Mr. Efoua Mbozo'o filed a case before the ACHPR against the Pan African Parliament alleging breach of paragraph 4 of his contract of employment and of Articles 13(a)[12] and (b)[13] of the OAU Staff Regulations & Rules. He also claimed there was an improper refusal to renew his employment contract and 're-grade' him. When prompted by the ACHPR Registrar to specify the human rights violations he alleged, the Applicant responded by making further submissions underlining allegations of breach by the Pan African Parliament which included:

a. Paragraph 4 of his contract of Employment and Article 13(a) and (b) of the OAU Staff regulations by refusing to renew his contract and advertising his post even though he had satisfactory evaluation reports; and
b. Executive Council Decision EX.CL/DEC 348 (XI) of June 2007 with regard to the remuneration and grading of his employment.

In finding that it lacked jurisdiction to hear the case, the ACHPR held that:[14]

5. Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

[10] In one of its recent judgments issued on October 2015, the AUAT observed the following: 'This matter was first initiated on 25 February 2000 against the Secretary-General of the Organization of African Unity, now the Chairperson of the African Union Commission. The Tribunal notes, with regret, that the application could only be heard when the Tribunal convened at its September 2014 Session after a long period of inactivity.' See *BW v. Chairman of the African Union Commission*, Judgment No. AUAT/2015/008, at 2.

[11] *Efoua Mbozo'o Samuel v. The Pan African Parliament*, Application No. 010/2011.

[12] Article 13(a) provides that: 'In order to respect the principle of recruitment according to geographical and sub-regional distribution of staff provided for in sub-paragraph (d) of Article 12 of the Staff Regulations, not more than ten (10) staff of the Frist Category of Group II (Professional Staff) shall be nationals of the same Member State. However, whenever a Member State does not totally fill its quota, the quota may be filled on short term contracts by nationals of any other Member State.'

[13] Article 13(b) provides that: 'The Secretary-General shall determine the age limit for each post to be filled.'

[14] Ibid. at 3.

> 6. On the facts of this case and the prayers sought by the Applicant, it is clear that this application is exclusively grounded upon breach of employment contract in accordance with Article 13 (a) and (b) of the OAU Staff Regulations, for which the Court lacks jurisdiction in terms of Article 3 of the Protocol. This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the Ad hoc Administrative Tribunal of the African Union. Further, in accordance with Article 29(1)(c) of its Protocol, the Court with jurisdiction over any appeals from this Ad hoc Administrative Tribunal is the African Court of Justice and Human Rights. The present Court therefore concludes that, manifestly it doesn't have the jurisdiction to hear the application.

The Protocol on the African Court had not entered into force at the time of Mr. Efoua Mbozo'o's application, and is still yet to do so. The ACHPR centred its decision on its apparent lack of subject matter jurisdiction (*ratione materiae*). While the ACHPR did not expressly state so, it also clearly lacked jurisdiction *ratione personae* given that it has jurisdiction only over complaints against States Parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, and not complaints against regional institutions or their organs. A matter which Justice Fatsah Ouguergouz addressed in his Separate Opinion.[15] Justice Ouguergouz further highlighted certain aspects of the Application which stressed the inaccessibility of AU staff members to an effective internal justice mechanism. He observed that:[16]

> In his application, as supplemented by his letter of 22 August 2011, the Applicant indeed draws the attention of the Court to an appeal which he reportedly lodged before the Ad Hoc Administrative Tribunal of the African Union on 29 January 2009. On 15 April 2009, this appeal is reported to have been declared admissible by the Acting Secretary of the Tribunal and on 29 September 2010, after many reminders addressed to the latter, the Applicant is said to have been informed that the Tribunal 'had not been able to sit for the last 10 (ten) years due to inadequate financial means and due to the fact that the Tribunal did not have any Secretaries.' The Applicant purports that two years and four months after his appeal was declared admissible, the Tribunal was still to sit and that it is due to the 'silence' of the latter that he decided to refer the matter to the Court.

[15] He stated that 'only after establishing its personal jurisdiction that it can look at its material jurisdiction (ratione materiae) and/or, if the case arises, its temporal (ratione temporis) and geographical (ratione loci) jurisdiction. Since its jurisdiction is not compulsory, the Court must first of all ascertain that it has jurisdiction ratione personae to consider the application.' *Efoua Mbozo'o Samuel v. The Pan African Parliament* (Separate Opinion – Fatsah Ouguergouz).

[16] Ibid. at 2.

https://doi.org/10.1017/9781108525343.037 Published online by Cambridge University Press

Mr. Efoua Mbozo'o, like other staff members in his position, was denied access to a justice mechanism to address his dispute with the African Union. The *ad hoc* Administrative Tribunal was, to use the words of the then Chairman of the AU Commission, 'long-moribund,'[17] and the ACHPR, even if it had jurisdiction over the Applicant's claim, did not consider whether this denial of access amounted to a human rights violation.[18]

The second significant change resulting from Article 29(1)(c) of the Protocol is a change in persons eligible to submit cases to the African Court in its capacity as an appellate body reviewing decisions of the AUAT. Article 29(1)(c) is derived from Article 18(1)(c) of the 2003 Protocol of the Court of Justice of the African Union which provides that:[19]

> 1. The following are entitled to submit cases to the Court:
> [...]
> (c) *The Commission or* a member of staff of the Commission in the dispute between them within the limits and under the conditions laid down in the Staff Rules and Regulations of the Union. [Emphasis added].

Conspicuously missing from Article 29(1)(c) is that the African Union Commission, which represents the AU organs in employment disputes, is equally eligible to appeal decisions of the AUAT. This omission is significant for the reasons stated in the observations below.

2. OBSERVATIONS ON THE COURT'S APPELLATE JURISDICTION IN INTERNATIONAL ADMINISTRATIVE LAW

A. *Unequal Access to the African Court*

The AU Commission's exclusion from the Court's jurisdiction represents an interesting twist in the discourse and debate on procedural inequality in the rare appeal of decisions by administrative tribunals, which are otherwise intended to be final and binding. This discussion revolves around the fact

[17] *Welcome Remarks of the Chairperson of the African Union Commission, Dr. Nkosazana Dlamini Zuma, to the 28th Ordinary Session of the Permanent Representative Committee, Malabo, Equatorial Guinea*, 20 June 2014, available online at https://au.int/en/newsevents/29234/welcome-remarks-chairperson-african-union-commission-dr-nkosazana-dlamini-zuma-28th.

[18] On this matter see R. Boryslawska et al, 'Identifying the Actors Responsible for Human Rights Violations Committed against Staff Members of International Organizations: An Impossible Quest for Justice?' *Human Rights & International Legal Discourse* 1 (2007), 381.

[19] Protocol of the Court of Justice of the African Union, available online at https://au.int/en/treaties/protocol-court-justice-african-union.

that previously, under the Statute of the Administrative Tribunal of the International Labour Organization (ILOAT), organizations which were dissatisfied with the decision of the Tribunal could submit a request to the ICJ for an Advisory Opinion to review the decision of the ILOAT.[20] In its request, the organization either challenged 'a decision of the Tribunal confirming its jurisdiction', or 'considered that a decision by the Tribunal is vitiated by a fundamental fault in the procedure followed'.[21] The staff member, however, did not have the same right or access to the ICJ.

In its 1956 Advisory Opinion on *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U. N. E.S. C. O.*,[22] the ICJ made the following observation about this inequality of access:[23]

> According to generally accepted practice, legal remedies against a judgment are equally open to either party. In this respect each possesses equal rights for the submission of its case to the tribunal called upon to examine the matter. This concept of the equality of parties to judicial proceedings finds, in a different sphere, an expression in Article 35, paragraph 2, of the Statute of the Court which, when providing that the Security Council shall lay down the conditions under which the Court shall be open to States not parties to the Statute, adds "but in no case shall such conditions place the parties in a position of inequality before the Court." However, the advisory proceedings which have been instituted in the present case involve a certain absence of equality between Unesco and the officials both in the origin and in the progress of those proceedings. In the first place, in challenging the four Judgments and applying to the Court, the Executive Board availed itself of a legal remedy which was open to it alone. Officials have no such remedy

[20] Since this chapter was first written, the International Labour Conference, at its 105th Session (June 2016), adopted amendments to the Statute of the ILO Administrative Tribunal which deleted Article XII which enabled only the defendant organizations to challenge a decision. See www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_498369/lang–en/index.htm.

[21] Former Article XII of the Statute of the ILOAT provided that:

1. In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.
2. The opinion given by the Court shall be binding.

[22] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U. N. E.S. C. O.*, Advisory Opinion of October 23rd, 1956, ICJ Reports 1956, 77.

[23] Ibid. at 85.

> against the Judgments of the Administrative Tribunal. Notwithstanding its limited scope, Article XII of the Statute of the Administrative Tribunal in this respect confers an exclusive right on the Executive Board.

This matter arose once again in 2010 when the International Fund for Agricultural Development (IFAD) submitted a request for an Advisory Opinion to the ICJ, challenging the decision rendered by the ILOAT in Judgment No. 2867, and questioning the validity of that Judgment.[24] The ICJ observed that the development of the principles of equality of access may be seen in Article 14(1) of the 1966 International Covenant on Civil and Political Rights which provides that '[a]ll persons shall be equal before the courts and tribunals.' In its General Comment on this Article, the Human Rights Committee in 2007 noted that this right guarantees equal access and equality of arms. The ICJ held that:[25]

> While in non-criminal matters the right of equal access does not address the issue of the right of appeal, if procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds [. . .]. In the case of the ILOAT, the Court is unable to see any such justification for the provision for review of the Tribunal's decisions which favours the employer to the disadvantage of the staff member."

The ICJ recalled its 1956 Advisory Opinion in which it held that '[t]he principle of equality of the parties follows from the requirements of good administration of justice.'[26] It further emphasized that this principle 'must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds.'[27]

The matter at hand is whether the inequality of access to the African Court can be justified on objective and reasonable grounds. There are no public *travaux préparatoires* or explanatory comments to shed light on the reasoning behind the removal of the African Union Commission's access to the African Court in employment disputes. This is unfortunate as the changes made are significant. On the one hand, one could contend that staff members are generally at a disadvantage since they do not readily have access to a litigation

[24] See *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ Reports (2012) 10.
[25] Ibid. at 27, § 39.
[26] Ibid. at 86.
[27] Ibid. at 29, § 44.

department, so provision of an additional procedural right of appeal levels the playing field. However, on the other hand, the inability of one party to challenge a decision which can freely be challenged by the other party connotes an image of inequality and unfairness in the process, regardless of who the disenfranchised party is.

In performing its functions as an appellate body on administrative law matters, the African Court operates akin to the United Nations Appeals Tribunal (UNAT). In 2009, the United Nations General Assembly introduced a new system for handling internal disputes and disciplinary matters. In redesigning the UN system of administration of justice, a two-tier judicial system was created with judges serving on the UN Dispute Tribunal (UNDT) and on the UNAT. Under this system, both staff members and the administration can appeal a decision by the UNDT to the UNAT.

At the ICJ, the Court attempted to cure the inequality of access by providing equal opportunity for the parties to address the issues before it. This meant providing the staff member with the opportunity to comment and bring statements to the attention of the ICJ. The ICJ further determined that there would be no oral proceedings since the Statute of the ICJ does not permit individuals to appear before it.

It is indeed laudable that the Statute of the African Court provides staff members of the AU with the right to appeal to the region's highest court. That they are provided this unique standing before the African Court is worthy of recognition. Article 29(1)(c) falls short, however, with the exclusion of the organization from this appeal mechanism. Should Article 29(1)(c) remain unamended to include the African Commission, the African Court would need to take steps to ensure that the views of the organization concerned are heard and addressed on an equal footing as the staff member in light of the fact that any appellate judgment is binding on the organization.

B. *Scope of the African Court's Appellate Jurisdiction*

The next issue to be explored is the scope of the African Court's appellate jurisdiction. Article 29(1)(c) of the Protocol does not elaborate on this matter, merely providing that the staff member's appeal must be 'within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.' Rule 62.3 of the AU Staff Regulations also does not address the scope of the African Court's appellate review; rather it notes the subject matter of the appeal must be allegations of breach of the employment contract or violation of the Staff Regulations and Rules. It thereby appears that the scope of the African Court's appellate jurisdiction is unrestricted, and the Court

may, in theory, conduct a *de novo* review of the merits of each application submitted on appeal.

Such a broad scope is noteworthy in light of the fact that other judicial bodies with a similar appellate function are limited in their scope of review. For instance, the UNAT which is competent to hear and pass judgment on an appeal filed against a judgment rendered by the UNDT, is only able to review assertions that the UNDT:[28]

(a) Exceeded its jurisdiction or competence;
(b) Failed to exercise jurisdiction vested in it;
(c) Erred on a question of law;
(d) Committed an error in procedure, such as to affect the decision of the case; or
(e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

Furthermore, the power of the ICJ to review a judgment of the ILOAT by reference to Article XII of the Annex to the Statute of the ILOAT was limited to two clearly defined scenarios. First, that the ILOAT wrongly confirmed its jurisdiction, or second, that the decision is vitiated by a fundamental fault in the procedure followed.[29] In its 1956 Advisory Opinion on *Judgments of the Administrative Tribunal of the I.L.O.*, the ICJ held that the '[r]equest for an Advisory Opinion under Article XII is not in the nature of an appeal on the merits of the judgment. It is limited to a challenge of the decision of the Tribunal confirming its jurisdiction or to cases of fundamental fault of procedure. Apart from this, there is no remedy against decisions of the Administrative Tribunal.'[30]

At first glance, a broad scope of review may be appealing, particularly to the staff member who would have another opportunity to plead his or her case. Yet, such a broad scope further undermines the finality of the AUAT's judgment, which as detailed above, would otherwise be binding. Elaborating on the

[28] See Article 2(1), United Nations Appeals Tribunal Statute, January 2016, available online at www.un.org/en/oaj/files/unat/basic/2012-04-11-statute.pdf.

[29] Article XII(1) of the Statute of the ILOAT provides that: 'In any case in which the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Governing Body, for an advisory opinion, to the International Court of Justice.'

[30] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, supra note 22, at 98.

finality of its judgments, the World Bank Administrative Tribunal (WBAT) stated in *van Gent (No. 2)*:[31]

> Article XI lays down the general principle of the finality of all judgments of the Tribunal. It explicitly stipulates that judgments shall be "final and without appeal." No party to a dispute before the Tribunal may, therefore, bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff.

The WBAT also stated in *Mpoy-Kamulayi (No. 7)* that: 'This rule of finality of the Tribunal's judgments is essential to the operation of the Bank's internal justice system. Once the Tribunal has spoken, that must end the matter; no one must be allowed to look back to search for grounds for further litigation.'[32] That concept of finality is enshrined in the 1967 Statute of the *ad hoc* Administrative Tribunal of the OAU which the AUAT appears to still utilize.[33] Article 17(vi) of that Statute provides for the finality of the Tribunal's decisions subject to an application by any party for review upon the discovery of a new fact of a decisive nature,[34] or for annulment on specific grounds.[35] With the

[31] *M. van Gent (No. 2)*, (No. 13), 1983, § 21, available online at www.worldbank.org/tribunal.

[32] *Mpoy-Kamulayi (No. 7)*, (No. 477), 2013, § 27, available online at www.worldbank.org/tribunal.

[33] Upon request by the author to the Secretariat of the AUAT for its Statute and Rules, the author was provided with the Statute and Rules of the OAU *ad hoc* Administrative Tribunal.

[34] Article 20 of the 1967 Statute of the Administrative Tribunal of the Organization of African Unity provides that:

> (i) Any party to the dispute may apply to the Tribunal for review of a judgment on the basis of the discovery of some new fact of such a nature as to be decisive factor, which factor was unknown to the Tribunal and also to the party claiming review when the judgment was given. The application must be made within six months of the notification of the judgment;
> (i) The party claiming the review shall communicate the new fact to the Tribunal, and if the Tribunal is satisfied, the judgment shall be reviewed.

[35] Article 21 of the 1967 Statute of the Administrative Tribunal of the Organization of African Unity provides that:

> Any party to the dispute may request annulment of the award by applying to the Tribunal on one or more of the following grounds:
>
> (ii) That the Tribunal has manifestly exceeded its competence or that it has failed to exercise jurisdiction vested in it;
> (iii) That there has been a serious departure from a rule of procedure;
> (iv) That the Tribunal has erred on a question of law to the Charter of OAU and to this Statute;
> (v) That rules of natural justice were not observed.

introduction of Article 29(1)(c) and Rule 63, a staff member appears to also have the right to a second decision on the merits of their case.

In performing its appellate review of the AUAT's decisions, it is recommended that the African Court establishes specific rules on the scope of this review. First, it may be guided by the functioning of its appellate review in its International Criminal Law Section. The new Article 18 of the Court's Statute, contained in the Amendments Protocol,[36] provides that:

2. In the case of the International Criminal Law Section, a decision of the Pre-Trial Chamber or the Trial Chamber may be appealed against by the Prosecutor or the accused, on the following grounds: (a) A procedural error; (b) An error of law; (c) An error of fact.
3. An appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.
4. The Appellate Chamber may affirm, reverse or revise the decision appealed against. The decision of the Appellate Chamber shall be final.

The basis of previous appeals to the ICJ from the ILOAT could also serve as further guidance to the African Court. As noted above, an organization was previously ale to challenge the ILOAT's decision confirming its jurisdiction, or contend that the decision is 'vitiated by a fundamental fault in the procedure followed'. It is useful to note, as the ICJ did, that a 'challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision.'[37] Furthermore, addressing an appeal on the grounds that the ILOAT made a 'fundamental error in procedure,' the ICJ observed in its 1973 *Advisory Opinion on Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, paragraph 92, that while it may not be easy to exhaustively state what is involved in the concept of a 'fundamental error in procedure which has occasioned a failure of justice,' the essence of this ground for appeal:

> may be found in the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes "a failure of justice" when it is of such a kind as to violate the official's right to a fair hearing as above defined and in that sense to deprive him of justice. . . . [C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which

[36] See Article 9 of the Amendments Protocol.

[37] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U. N. E.S. C. O*, supra note 22, at 99.

> have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision.

Article 2(1) of the UNAT's Statute also lays down concrete grounds of appeal which the African Court may wish to consider:

> The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:
>
> (a) Exceeded its jurisdiction or competence;
> (b) Failed to exercise jurisdiction vested in it;
> (c) Erred on a question of law;
> (d) Committed an error in procedure, such as to affect the decision of the case; or
> (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

Finally, the African Court may also be guided by Article 21 of the Statute of the *ad hoc* Administrative Tribunal which provides grounds for a request for an annulment of the Tribunal's judgment. It is unclear whether the Tribunal has conducted such a review in the past given the limited information available on its decisions prior to 2014, and the fact that it was non-operational for over a decade. With the introduction of an appeal in the legal regime governing employment matters at the African Union, it is curious to discover how the annulment process in Article 21 will operate alongside the right of appeal.

It is proposed that once the Statute of the African Court enters into force, the Court should adopt rules which consolidate and address any discrepancies in the implementation of its appellate jurisdiction. It is recommended first, that Article 29(1)(c) of the Statute be amended to permit appeals from the AU Commission. It is further recommended that the text of Article 21 of the *ad hoc* Administrative Tribunal's Statute, as well as the grounds described above, be merged to establish a concrete scope of the Court's appellate jurisdiction over decisions of the AUAT. These concrete grounds could be contained in the Court's Rules and Procedures to avoid further amendments of its Statute.

C. *Applicable Law*

This section addresses the sources of law which the General Section of the African Court will rely on in performing its appellate jurisdiction. Article

https://doi.org/10.1017/9781108525343.037 Published online by Cambridge University Press

31 of the Protocol lays out the applicable law governing the functions of the African Court in general. These are: the Constitutive Act of the African Union; international treaties of a general or specialized nature; international custom, as evidence of a general practice accepted as law; general principles of law recognized universally or by African States; judicial decisions and writings of the 'most highly qualified publicists of various nations,' as well as regulations, directives and decisions of the African Union as a subsidiary means of determining the rules of law; and 'any other law relevant to the determination of the case.'[38]

Although Article 31 of the Protocol does not specify the sources of law applicable in the exercise of the Court's appellate review of AUAT decisions, the specific sources of law applicable in international administrative law are well covered under the provision for 'any other law relevant to the determination of the case' (Article 31(1)(f)). As Amerasinghe observes, '[i]n seeking the sources of employment law (international administrative law) it would be too naïve and simple to draw analogies from the sources of public international law.'[39] Indeed, '[i]t is tempting to assume that the sources of international administrative law may easily be derived, at least by analogy, from the sources of public international law, because international administrative law is a part of public international law.'[40]

Few statutes of international administrative tribunals expressly state the applicable law. Three exceptions can be found in the statutes of the Commonwealth Secretariat Arbitral Tribunal (CSAT), the African Development Bank Administrative Tribunal (AfDBAT) and the Administrative Tribunal of the Organization of American States (OASAT).

Article XII(1) of the Statute of the CSAT provides that the CSAT shall be 'bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries.'[41] The Statute further provides that in other cases the CSAT 'shall apply the law specified in the contract. Failing that, it shall apply the law most closely connected with the contract in question.' Article V(1) of the Statute of the AfDBAT provides that 'the Tribunal shall apply the internal rules and regulations of the Bank, and generally recognized principles of international

[38] Article 31(1)(f), Protocol on the Statute of the African Court of Justice and Human Rights.

[39] C.F. Amerasinghe, *Principles of the Institutional Law of International Organization*, (2nd edn., Cambridge: Cambridge University Press, 2005), at 283.

[40] Ibid.

[41] Article XII(1) of the Statute of the Commonwealth Secretariat Arbitral Tribunal.

administrative law concerning the resolution of employment disputes of staff in international organizations.'[42]

The Statute of the OASAT makes clear that '[f]or the adjudication of any disputes involving the personnel of the General Secretariat, the internal legislation of the Organization shall take precedence over general principles of labour law and the laws of any member State; and, within that internal legislation, the Charter is the instrument of the highest legal order, followed by the resolutions of the General Assembly, and then by the resolutions of the Permanent Council, and finally by the norms adopted by the other organs under the Charter - each acting within its respective sphere of competence.'[43]

In performing its appellate review of decisions of the AUAT, the applicable primary sources of law would be the AU Staff Regulations and Rules and the contracts, conditions and terms of appointment of the staff member submitting an appeal before the African Court. As the WBAT clarified in its first case, though the employment contract may be the *sine qua non* between the staff member and the international organization, 'it remains no more than one of a number of elements which collectively establish the ensemble of conditions of employment operative between the [organization] and its staff members.'[44]

Further sources of law could include Articles of Agreement, By-laws, administrative circulars, manuals and statements issued by management of the African Union depending on the circumstances of the case. Rule 78.3 of the 2010 Staff Regulations and Rules[45] enumerates these administrative documents, which could be applicable depending on the case under review:

(a) Administrative Circulars;
(b) Administrative Procedure Manual;
(c) Code of Ethics;
(d) Policy on Sexual Harassment;
(e) Information, Communication and Technology Policy;
(f) Medical Assistance Plan;
(g) African Union Travel Policy;
(h) Orientation Training Manual;
(i) Performance Appraisal Policy;
(j) Policy on Education Allowance;
(k) Policy on the Management of HIV/AIDS at the Workplace;

[42] Article V(1) of the Statute of the Administrative Tribunal of the African Development Bank.
[43] Article 1(v) of the Statute of the Administrative Tribunal of the Organization of American States.
[44] *de Merode*, (No. 1), 1981, § 18, available online at www.worldbank.org/tribunal.
[45] Rule 78.3, Assembly/AU/4/(XV), at 82–3.

(l) Procurement Manual;
(m) Pension Policy;
(n) Safety and Security Guideline;
(o) Training Policy; and
(p) Recruitment, Advancement, Upgrading and Promotion Policy.

The practice of the organization may also become part of the conditions of employment in certain circumstances. General principles of law would include those applicable in the law of contracts, and other jurisprudence developed by other administrative courts and tribunals. Finally, it is worth noting the overlap, in some areas, between human rights and international administrative law. Where necessary, the Court may rely on applicable human rights treaties as well as established human rights principles.

D. *Procedural Matters*

This section briefly explores a limited number of observations on procedural matters. Some procedural matters not addressed here include the need to extend the definition of eligible persons to include former staff members who may be challenging decisions concerning their pension, as well as beneficiaries of deceased staff members.

1. Binding Force and the Availability of Enforcement Measures

Article 46(2) of the Court's Statute as amended by the Amendments Protocol, provides that '[s]ubject to the provisions of Article 18 (as amended) and paragraph 3 of Article 41 of the Statute, the judgment of the Court is final'.[46] Article 46 further includes provisions on enforcement measures which, while evidently drafted with inter-state disputes in mind, could be equally relied upon by appellants to ensure full compliance by the African Union with remedies awarded such as re-instatement in the event of termination of employment, or compensation.

According to Article 46(4) where a party has failed to comply with a judgment, the 'Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment.' This may be useful to rely upon in the event that the organization is reluctant to

[46] See Article 21(2) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

implement the awards and remedies issued, and it would be interesting to observe whether an appellant is able to rely on this provision in practice.

2. Remedies and Compensation

Article 45 of the Protocol offers a general basis on which to determine the appropriate compensation. Article 45 provides that:[47]

> Without prejudice to its competence to rule on issues of compensation at the request of a party by virtue of paragraph 1(h), of Article 28 of the present Statute, the Court may, if it considers that there was a violation of a human or peoples' right, order any appropriate measures in order to remedy the situation, including granting fair compensation.

Other remedies which are available in international administrative law include rescission of the contested decision, specific performance, restitution and moral damages. In light of the fact that the African Court will review the decision of the AUAT, and not the administrative or disciplinary decision of the organization, applicable remedies could also include vacation of the AUAT's decision, affirming, reversing, modifying the findings of the AUAT, or remanding the decision back to the AUAT for additional finding of fact. The latter, which is a remedy available in the UNAT Statute, may be difficult to apply since the AUAT Judges sit together in plenary.[48]

3. Non-Suspensive Effect of AUAT Decisions and the Availability of Provisional Measures

It is observed that there are two provisions which would need to be reconciled on the matter of non-suspensive effect and availability of provisional measures. The first is Rule 62.4 of the AU Staff Regulations and Rules which provides that '[t]he filing of an appeal with the African Court of Justice and Human Rights shall not have the effect of suspending the execution of the Administrative Tribunal decision being contested.' The second provision, contained in the Protocol, is Article 35 on provisional measures. Article 35(1) permits the

[47] Article 28(1)(h) provides that the Court shall have jurisdiction over cases and all legal disputes which relate to the nature or extent of the reparation to be made for the breach of an international obligation.

[48] It is unclear how remanding the decision to the AUAT would work. At the UNAT this is one of the options but it includes the option to require a different judge to adjudicate the matter. (Article 2(6) of the UNAT Statute). However, all judges at the AUAT sit in plenary to determine each case.

Court, 'on its own motion or on application by the parties, to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of the parties.'

With the exception of the UN internal justice system,[49] the non-suspensive effect of administrative decisions is standard in administrative law jurisprudence. However, it is equally accepted that a staff member may request interim or provisional measures to suspend a decision where it is demonstrated that the execution of that decision would cause irreparable hardship. For instance, Rule 13(1) of the Rules of the WBAT provides that though the filing of an application would not have suspensive effect on the contested decision, the applicant may submit 'a request to suspend the contested decision until the Tribunal renders its judgment in the case'. Rule 13(3) further adds that '[t]he Tribunal, or when the Tribunal is not in session, the President of the Tribunal may grant such a request in a case in which the execution of the decision is shown to be highly likely to result in grave hardship to the applicant that cannot otherwise be redressed.'[50]

Article VI (4) of the Statute of the Administrative Tribunal of the International Monetary Fund also provides that the filing of an application shall not have the effect of suspending the implementation of the contested decision. However, its accompanying Commentary notes that:[51]

> Section 4 follows the principle applicable to other tribunals that the filing of an application does not stay the effectiveness of the decision being challenged. This is considered necessary for the efficient operation of the organization, so that the pendency of a case would not disrupt day-to-day administration or the effectiveness of disciplinary measures, including removal from staff in termination cases. This rule is also consistent with the principle, strictly applied in the employment context, that an aggrieved employee will not be granted a preliminary injunction unless he would suffer irreparable injury without the injunction. [...] [I]t is difficult to envisage a situation in which the harm to an applicant, in the absence of interim measures, would be "irreparable," as that concept has been construed by the courts. Nevertheless, the statute would not preclude the tribunal from ordering such measures if warranted by the circumstances of a particular case.

[49] Article 7(5) of the UNAT's Statute provides that '[t]he filing of appeals shall have the effect of suspending the execution of the judgement or order contested.'

[50] Rule 13(3) of the Rules of the World Bank Administrative Tribunal, available online at www.worldbank.org/tribunal.

[51] Commentary on the Statute, Administrative Tribunal of the IMF [2009], available online at www.imf.org/external/imfat/report.htm.

It would be useful for the Court to make clear, in its Rules, the conditions upon which a request for provisional measures may be granted in appeals by employees of the AU, thereby reconciling the above-mentioned provisions and ensuring consistency with international administrative law.

3. CONCLUSION

The availability of the African Court as a viable extension of the justice mechanisms for staff members of the African Union depends on the politics of when, and if, the Protocol enters into force, and the African Court becomes operational. Nevertheless, the extension of the Court's jurisdiction to matters of international administrative law provides an opportunity for a more robust system for the resolution of such disputes, given the immunities enjoyed by the African Union. The Court has the potential to greatly impact and develop the law of international organizations, given its unique position as the region's highest court and its mandate to interpret fundamental principles of international law.

As a body conducting appellate reviews of decisions of the AUAT, it is imperative that the Court ensures equality of access and protects the due process rights of each party. Recommendations noted above include amendment of Article 29(1)(c) to include the African Commission as an entity eligible to appeal decisions of the AUAT. To ensure consistency with the jurisprudence and practice of international administrative tribunals, it is also recommended that the adopted Rules of Procedure: (a) clarify the scope of the Court's appellate review; and (b) consolidate provisions on the non-suspensive effect of AUAT decisions and the availability of provisional measures.