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**The Administrative Tribunal
of the International
Labour Organization (ILOAT),
the International Court of Justice (ICJ)
and the Right of Access to Justice
for the Staff of International Organizations:
The Need for a Reform in light
of the ICJ Advisory Opinion
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*The Administrative Tribunal of the International Labour Organization (ILOAT), the International Court 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*

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THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION (ILOAT), THE INTERNATIONAL COURT OF JUSTICE (ICJ) AND THE RIGHT OF ACCESS TO JUSTICE FOR THE STAFF OF INTERNATIONAL ORGANIZATIONS: THE NEED FOR A REFORM IN LIGHT OF THE ICJ ADVISORY OPINION OF 1 FEBRUARY 2012 *

Daniele Gallo**

Abstract

With the Advisory Opinion of February 2012 on Judgment No. 2867 of the ILOAT the ICJ choose to acknowledge, once and for all, the limits of its relationship with the ILOAT – limits it had already emphasized in previous advisory opinions on judgments of the UNAT and ILOAT. Moreover, it has brought attention to the new UN internal justice system and, finally, questioned the compatibility of the procedure provided for by Art. XII of the ILOAT Statute with the “present-day principle of equality of access to courts and tribunals”. In this respect, the main argument implied in the paper is that international organizations should take measures to establish an appellate tribunal.

It is the ILOAT that, insofar as the most representative of international administrative tribunals, should take the initiative. Indeed, with regard to the provisions governing employment relationships, the development, as well as the uniform interpretation and application, of the internal law of international organizations must be ensured, rather than by the ICJ, by international administrative tribunals. Due to their nature and mission, the latter are better equipped to settle staff disputes between an international organization and its staff members.

SUMMARY: 1. The ICJ Advisory Opinion of 1 February 2012 on Judgment No. 2867 of the ILOAT as a privileged *sedes materiae* to grasp the main criticalities concerning the relationship between international administrative tribunals and the ICJ, as well as the law governing the access to justice of international officials. – 2. The “*Mrs Ana Teresa Saez García v. International Fund for Agricultural Development (IFAD) affair*” before the ILOAT: the factual background, the history of the proceedings and the Tribunal’s reasoning. – 3. The Advisory Opinion of the ICJ. – 3.1. The scope of the Court’s jurisdiction and power of review. 3.2. The merits and the response(s) to the questions submitted by IFAD: the jurisdiction *ratione personae* and *ratione materiae* of the ILOAT and the lack of any fundamental procedural fault on the part of the Tribunal. 3.3. The problems concerning the lack of *jus standi* and *jus locus standi in judicio* before the Court. 3.4. Some remarks on Cançado Trindade’s innovative separate opinion: is the recognition of international subjectivity of individuals the only way to secure the right of access to justice for international officials? – 4. A critical appraisal of the Court’s reasoning: is the ICJ the right judge to decide disputes between international organizations and their staff? – 5. The limits of the law governing the relationship between the

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ILOAT and the ICJ and the need for the provision of an appellate tribunal within the internal justice systems of international organizations.

1. As is well known, the statutes of most international organizations provide that disputes concerning employment relations between the organization and its staff must be settled, as a last resort – i.e. in compliance with the (customary) rule on the prior exhaustion of internal administrative (non-strictly jurisdictional) remedies¹ –, by administrative tribunals instituted by the same organizations or, alternatively, by tribunals of other international organizations². In the latter case, the two organizations in question enter into an agreement that the organization to which the international official belongs will accept and recognize the jurisdiction of the organization that established the tribunal.

In particular, as provided for by Art. II.5 of its Statute³, the Administrative Tribunal of the International Labour Organization (ILOAT)⁴ currently exercises its competence over staff disputes involving, besides the International Labour Organization (ILO), 58 international institutions (and their staff)⁵.

In accordance with Art. VI.1 of the ILOAT Statute, the judgments rendered by the Tribunal “shall be final and without appeal”. However, the Statute contains a crucial *caveat*, since Art. XII.1 states that: “[i]n 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

¹ On both the legal *status* and the application of such rule within international organizations see, *inter alia*, Alain Pellet, *Les voies de recours ouvertes aux fonctionnaires internationaux* (Paris: Pedone, 1982), 84-85; Philippe Sands and Pierre Klein, *The Bowett’s Law of International Institutions* (6th edn. London: Sweet & Maxwell, 2009), 426.

² On the international administrative tribunals see generally and most recently Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn. Cambridge: Cambridge University Press, 2009), 269-273; Philippe Sands and Pierre Klein, *The Bowett’s Law*, 421-434; Anna Riddell, “Administrative Boards, Commissions and Tribunals in International Organizations”, in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: OUP, 2012), 66-77; Henry G. Schermers and Niels Blokker, *International Institutional Law. Unity within Diversity* (5th edn. Leiden: Martinus Nijhoff, 2011), 462-467; Chittharanjan Félix Amerasinghe, “Reflections on the Internal Judicial Systems of International Organizations”, in *The Development and Effectiveness of International Administrative Law*, ed. Olufemi Elias (Leiden: Martinus Nijhoff, 2012), 33-58; Pedro Dallari, “Administrative Tribunals of International Organizations and World Constitutionalism”, *ivi*, 59-68; Olufemi Elias and Melissa Thomas, “Administrative Tribunals of International Organizations”, in *The rules, practice, and jurisprudence of international courts and tribunals*, ed. Chiara Giorgetti (Leiden: Martinus Nijhoff, 2012), 159-190; Benedict Kingsbury and Richard Stewart, “Administrative Tribunals of International Organizations from the Perspective of the Emerging Global Administrative Law”, in *The Development*, ed. Elias, 69-104; Angela Del Vecchio, *International Courts and Tribunals between Globalization and Localism* (The Hague: Eleven, 2013), 50-55; Claudio Zanghi, *Diritto delle organizzazioni internazionali* (3rd edn. Turin: Giappichelli, 2013), 234-240.

³ “The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization [...] which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body”.

⁴ The Tribunal was established on 9 October 1946 in the frame of the International Labour Conference and replaced the Administrative Tribunal of the League of Nations, which was competent from 1927 to 1946. Its Statute was adopted on the same day by the Conference and subsequently amended in 1949, 1986, 1992, 1998 and 2008.

⁵ In general, on the ILOAT see, *ex multis*, Frank Gutteridge, “The ILO Administrative Tribunal”, in *International Administration. Law and Management Practice in International Organizations*, ed. Chris De Cooker (5th edn. Leiden: Martinus Nijhoff, 2009), 1-33; on the ILO see Heiko Sauer, “International Labour Organization”, in *Max Planck Encyclopedia*, ed. Wolfrum (Oxford: OUP, 2012), 810-820.

International Court of Justice”. Moreover, Art. XII of the Annex to the Statute extends the jurisdiction of the International Court of Justice (ICJ) to the case in which the challenge of the Tribunal’s decision is made by the executive boards of international organizations – other than the ILO – which have made the declaration specified in Art. II.5 of the Statute. In this regard, it must be recalled that Art. XII.2 provides that the opinion given by the ICJ “shall be binding”.

Art. XII must be read in conjunction with both Art. 65.1 of the ICJ Statute⁶ and Art. 96 of the UN Charter⁷. The first 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 second states, in its paragraph 1, 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”. Moreover, in its paragraph 2, it specifies 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”.

Furthermore, when what is at stake is the request of an advisory opinion made by an international organization other than the ILO, the above mentioned provisions apply in conjunction with the relevant rules contained in the Relationship Agreement between the UN and that organization – as approved by the UN General Assembly – by which the former recognizes the latter as a specialized agency in accordance with Articles 57 and 63 of the UN Charter and authorizes it to request advisory opinions of the ICJ.

The power to request an advisory opinion of the ICJ on staff disputes is currently available to the ILOAT only, due to the changes occurred within the UN⁸ system of administration of justice⁹ following General Assembly Resolution 50/54 of 11 December 1995¹⁰.

⁶ For a comment on such article see, *inter alia*, Jochen A. Frowein and Karin Oellers-Frahm, “Art. 65”, in *The Statute of the International Court of Justice. A Commentary*, eds. Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian J. Tams (2nd edn. Oxford: OUP, 2012), 1605-1637.

⁷ For a comment on such article see, *inter alia*, “Art. 96”, in *The Charter of the United Nations. A Commentary*, eds. Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (3rd edn. Oxford: OUP, 2012), .

⁸ A procedure for the review of the judgments of the UN Administrative Tribunal (UNAT) by the ICJ was established by General Assembly Resolution 957 (X) of 8 November 1955, following the ICJ’s advisory opinion of 13 July 1954, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal (ICJ Reports, 1954, 47)*. This power of review, which was envisaged in Art. 11 of the UNAT Statute, was then abolished by General Assembly Resolution 50/54 of 11 December 1995 with effect from 1 January 1996. Over this period, three advisory opinions were given by the ICJ: Advisory Opinion of 12 July 1973, *Application for review of judgment n. 158 of the United Nations Administrative Tribunal (ICJ Reports, 1973, 166)*; Advisory Opinion of 20 July 1982, *Application for review of judgment n. 237 of the United Nations Administrative Tribunal (ICJ Reports, 1982, 325)*; Advisory Opinion of 27 May 1987, *Application for review of judgment n. 333 of the United Nations Administrative Tribunal (ICJ Reports, 1982, 18)*. UNAT (which was established by General Assembly Resolution 351 A(IV) of 24 November 1949) was abolished by the General Assembly on 31 December 2009 as result of the General Assembly’s decision to establish a new decentralized system including a two-tier formal system comprising a first instance, the UN Dispute Tribunal, and an appellate instance, the UN Appeals Tribunal (Resolutions 61/261 of 4 April 2007 and 63/253 of 24 December 2008). On the UNAT, its power to request advisory opinions to the ICJ and, more generally, on the former UN judicial system see, *ex multis*, Michael Wood, “United Nations Administrative Tribunal, Applications for Review (Advisory Opinions)”, in *Max Planck Encyclopedia*, ed. Wolfrum (Oxford: OUP, 2012), 209-216.

⁹ On the UN internal system of justice currently in force see, *inter alia*, August Reinisch and Christina Knahr, “From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal: Reform of the Administration of Justice System Within the United Nations”, *Max Planck Yearbook of United Nations Law* 12 (2008): 447; Phyllis Hwang, “Reform of the Administration of Justice System at the United Nations”, *The Law and Practice of International Courts and Tribunals* 8 (2009): 181; Paolo Vargiu, “From Advisory Opinions to Binding Decisions: the New Appeal Mechanism of the UN System of Administration of Justice”, *International Organizations Law Review* 7 (2010): 261; Rishi Gulati, “The Internal Dispute Resolution Regime of the United Nations”, *Max Planck Yearbook of United Nations Law* 15 (2011): 489; Louise Otis and Eric H. Reiter, “The Reform of the United Nations Administration of Justice

This essay focuses, in particular, on the issue of the validity of Judgment No. 2867 of 3 February 2010, rendered by the ILOAT on a complaint filed against the International Fund for Agricultural Development (IFAD)¹¹, as challenged by the latter before the ICJ, considering that IFAD's recognition of the Tribunal's jurisdiction, under Art. II.5 of the ILOAT Statute, took effect from 1 January 1989¹². The ICJ rendered its Opinion on 1 February 2012¹³, under Art. 65 of its Statute, almost 60 years after *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*¹⁴ of 23 October 1956, which is the only other advisory opinion given to date by the ICJ on a decision rendered by the ILOAT.

In its Opinion of February 2012, the ICJ carried out an in-depth analysis of the procedure foreseen by Art. XII of the ILOAT Statute and, more in general, of the powers and competences of the ILOAT. The Court's reasoning is grounded on the ICJ's previous jurisprudence concerning both the UNAT and ILOAT. Therefore, the Opinion, insofar as representing a further step in the evolving path drawn so far by the Court in this area of law, will allow me to make some observations on the nature of staff disputes that come under the jurisdiction not only of the ILOAT, but also of other international administrative tribunals. Indeed, the ILOAT is certainly the most representative and paradigmatic international administrative tribunal, as shown by the relevant number of judgments delivered to date and by the impressive number of international organizations involved¹⁵.

As a consequence, I have decided to focus on the ICJ's recent Opinion insofar as it is the privileged *sedes materiae* to highlight the main features of the law governing the access of international organizations' staff members to justice before international tribunals, as well as the limits of the relationship between the ICJ and ILOAT, especially in terms of enhancing and protecting both the *jus standi* and *jus locus standi in judicio*¹⁶ of staff members. Moreover, the Opinion is crucial in order to understand the problems which arise from internal judicial systems characterized by the lack of an appellate tribunal for settling staff disputes, such as the one provided by the ILO and other international organizations that have recognized the jurisdiction of the ILOAT.

System: The United Nations Appeals Tribunal after One Year", *The Law and Practice of International Courts and Tribunals* 10 (2011): 405; Maritza Struyvenberg, "The New United Nations System of Administration of Justice", in *The Development*, ed. Elias, 243-251.

¹⁰ On the ICJ case law on the international civil service see, *ex multis*, David Ruzié, "La CIJ et la fonction publique internationale", in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, ed. Yoram Dinstein (Leiden: Martinus Nijhoff, 1989), 679-98; Joanna Gomula, "The International Court of Justice and Administrative Tribunals of International Organizations", *Michigan Journal of International Law* 21 (1992): 83; Chittharanjan Félix Amerasinghe, "Cases of the International Court of Justice relating to the Employment in International Organizations", in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, eds. Robert J. Vaughan Lowe and Malgosia Fitzmaurice (eds.) (Cambridge: Cambridge University Press, 1996), 193-209; Kiyon Homi Kaikobad, *The International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgments of the ILO and UN Administrative Tribunals* (Kluwer: The Hague, 2000); Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005. Jurisdiction*, (vol. II, Leiden: Martinus Nijhoff, 2006), 949-1020.

¹¹ See http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2867&p_language_code=EN.

¹² Following the approval by the ILO Secretariat of 18 November 1988.

¹³ *ICJ Reports* 2012, 10.

¹⁴ *ICJ Reports*, 1956, 77. On the case see, amongst others, Langley Hardy, "Jurisdiction of the Administrative Tribunal of the ILO: The Advisory Opinion of the International Court of Justice of October 23 1956", *International and Comparative Law Quarterly* 6 (1957): 338.

¹⁵ See *supra*, in the same §.

¹⁶ On the notion of "standing" before international tribunals see, *ex multis*, Angela Del Vecchio, "Standing", in *Max Planck Encyclopedia*, ed. Wolfrum, (Oxford: OUP, 2012), 627-639.

2. Before venturing into an in-depth analysis of the ICJ Advisory Opinion of February 2012, it is necessary to recall the main facts and features of the Judgment rendered by the ILOAT on 3 February 2010¹⁷.

The complaint against IFAD was filed with the on 8 July 2008 by Mrs Ana Teresa Saez García. She maintained that: (i) the decision not to renew her fixed-term contract as Programme Manager for Latin American and Caribbean within the Global Mechanism¹⁸ was tainted with abuse of authority; (ii) IFAD acted in breach of its duty of care and good faith; and (iii) the termination of her contract was abrupt, unjustified and damaged her professional reputation. That decision, which was taken on 15 December 2005 by the Managing Director of Global Mechanism and was based on the abolition of the complainant's post for reasons of budgetary constraint, was contrary to the recommendation of the Joint Appeals Board. In its report of 13 December 2007, the Board held, *inter alia*, that there was no evidence showing that the Managing Director consulted or obtained the approval of the IFAD President before abolishing Mrs Saez García's post. By a memorandum of 4 April 2008, which is the impugned decision before ILOAT, the President of IFAD departed from the Board's recommendations and, by doing so, rejected Mrs Saez García's appeal, since the decision not to renew her contract was considered to be in accordance with Sect. 1.21.1 of the Human Resources Procedures Manual, which provides that a fixed-term contract expires on the date mentioned in the contract.

In light of the above, Mrs Saez García asked the Tribunal to quash the decision of the IFAD President dismissing her appeal and to order IFAD to reinstate her, for a minimum of two years, in her previous post or in an equivalent post in IFAD with retroactive effect, claiming reimbursement for loss of salary and various allowances and entitlements.

A preliminary question to be answered by the Tribunal arose as to whether the Tribunal had jurisdiction and, therefore, could review the decision of the President of IFAD. The crucial problem thus revolved around the *status* of the Global Mechanism, in its relationship with IFAD.

The Global Mechanism, as a body of the UNCCD¹⁹, is housed by IFAD. Its functions are set out in a Memorandum of Understanding (MOU) signed between the Conference of the Parties of the Convention (COP) and IFAD on 26 November 1999. It provides that: "the Global Mechanism has a separate identity within IFAD and is an organic part of the structure of the Fund directly under the President of the Fund"²⁰; "the Managing Director of the Global Mechanism is responsible for preparing the Global Mechanism's programme of work and budget [...] and his proposals are reviewed and approved by the President of the Fund before being forwarded to the Executive Secretary of the Convention for consideration in the preparation of the budget estimates of the Convention"²¹; "the Managing Director, on behalf of the President of the Fund, will submit a report to each ordinary session of the Conference on the activities of the Global Mechanism"²².

According to IFAD, the ILOAT was not competent to hear the various arguments raised by the complainant, as this could entail examining the decision-making process in the Global

¹⁷ See http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2867&p_language_code=EN.

¹⁸ The Global Mechanism is a specialized body of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (further referred to as UNCCD), of 17 June 1994, in force since 26 December 1996.

¹⁹ See Art. 21.4 of the Convention.

²⁰ See Sect. II.A of the MOU.

²¹ See Sect. III.A.4 of the MOU.

²² See Sect. III.B of the MOU.

Mechanism. Such an examination could not be admitted because: the Global Mechanism is not an organ of the Fund; it is accountable to the Conference of the Parties; and the acts of its Managing Director are not attributable to the Fund. IFAD consequently took the view that its role should be restricted to housing the Global Mechanism, which has a separate identity within the Fund²³. Moreover, IFAD first of all argued that the acceptance of the jurisdiction of the Tribunal did not extend to entities that it may host pursuant to international agreements with third parties; secondly, it observed that neither the COP nor the Global Mechanism had recognized the jurisdiction of the Tribunal; thirdly, it underlined that Mrs Saez García was not a staff member of IFAD and, for that reason, the procedures concerning redundancy laid down in the Manual did not apply to her mainly because para. 11(c) of IFAD President's Bulletin No. PB/04/01 of 21 January 2004 provides that "IFAD's rules and regulations on the provision of career contracts for fixed-term staff shall not apply to staff of the Global Mechanism"; fourthly, it submitted that the Fund had no authority to examine whether the core budget approved by the UN Conference of the Parties warranted the abolition of the complainant's post, because decisions concerning the employment in the frame of the Global Mechanism were not taken by the Fund but by the Conference itself, with the result that IFAD could not be deemed responsible for the decision of the Managing Director²⁴.

In this respect, the complainant, on one hand, declared that the denial of ILOAT's jurisdiction would deprive her of any legal redress and, on the other, asserted that she was a staff member of IFAD²⁵.

The Tribunal begun its reasoning by stating that: the fact that the Global Mechanism is an integral part of the Convention and is accountable to the Conference does not necessarily imply that it has its own legal identity; the Global Mechanism is simply the mechanism by which the Conference gives effect to certain obligations created by the Convention; the statement in the MOU of November 1999 that the Global Mechanism is to have a "separate identity" does not mean that "it has a separate legal identity or [...] that it has separate legal personality". In this context, the Tribunal, by recalling Section II.A of the MOU, clarified why and to what extent the Global Mechanism must be seen as an "organic part of the structure of the IFAD": "the Managing Director is to report to the President of the Fund"; the chain of accountability runs "directly from the Managing Director to the President of the Fund to the Conference"; "the Managing Director [...] reports to the Conference on behalf of the President of the Fund"; the President of the Fund is to review the programme of work and the budget prepared by the Managing Director of the Global Mechanism before it is forwarded to the Executive Secretary of the Convention for consideration"; "the Global Mechanism is not financially autonomous"²⁶. As a result, the Tribunal emphasized that the sentence "an organic part of the structure of the Fund" must be interpreted in the sense that the Global Mechanism must be assimilated to the various administrative units of the Fund for all administrative purposes with the effect that "administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund"²⁷. Therefore, there is no need to amend the Convention or the Agreement establishing IFAD, as claimed by the latter. Moreover, there is no doubt, according to the Tribunal, that the officials of the Global Mechanism are staff members of the Fund²⁸.

²³ See para. C, p. 6 of the Judgment.

²⁴ See para. C, pp. 6-7 of the Judgment.

²⁵ See para. D, pp. 7-8 of the Judgment.

²⁶ See paras 5-8 of the Judgment.

²⁷ See para. 7 of the Judgment.

²⁸ See paras 9-11 of the Judgment.

In light of the above, the Tribunal held that IFAD's administrative decisions on the staff of the Global Mechanism were subject to internal review on the same grounds that applied to the decisions concerning other staff members of the Fund, including the right to resort to the ILOAT²⁹.

As for the merits of the case, since the Global Mechanism functions under the authority of the COP and the Conference did not authorize its Managing Director to abolish the complainant's post, the Tribunal concluded that this abolition "was impliedly forbidden by the Conference decision"³⁰. Accordingly, the decision of the Managing Director was taken without authority and thus the President of IFAD erred in law in not so finding when considering Mrs Saez García's internal appeal. It follows that the President's decision of 4 April 2008 dismissing the complainant's internal appeal had to be set aside³¹.

3. Having briefly examined the judgment delivered by the ILOAT, I will now turn to the Opinion of the ICJ concerning its validity.

The ICJ initially focused on the matter of jurisdiction. Then, it considered the extent of its own power of review. Subsequently, it examined the scope of its discretion and, by so doing, dealt with the core issue at stake, that is, the nature and limits of the whole procedure provided for by Art. XII of the ILOAT Statute. Finally, it answered ten questions posed by IFAD concerning the merits of the case³². In the present article, the latter issue will be quickly examined after a brief discussion on the question of jurisdiction. The analysis will be, in fact, devoted primarily to the problem of the procedural inequality before the ICJ, which is at the core of the Opinion as well as of §§ 3.3-5 of this essay.

3.1. The Court considered whether it had jurisdiction to reply to IFAD's request, first of all by recalling that Mrs Saez García contended that some of the questions posed by IFAD on both the jurisdiction of the ILOAT and the validity of its judgment of 3 February 2010 did not fall within the scope of Art. XII of the Annex to the ILOAT Statute. The Court subsequently clarified that certain requirements must be met if an opinion is to be requested and, in this regard, maintained that, in light of those requirements, IFAD's request for review of a judgment by the ILOAT which concerned the hosting of the Global Mechanism and the problem of whether Mrs Saez García was its staff member "do present 'legal questions' which "arise within the scope of the Fund's activities"³³.

The Court then emphasized that the authority to challenge decisions of the ILOAT by a request for an advisory opinion of the ICJ derived from a combination of Art. XII. of the Annex to the ILOAT Statute with Art. 96.2 of the UN Charter, Art. 65.1 of the ICJ Statute and Art. XIII.2 of the Relationship Agreement between the UN and IFAD (further referred to as "the Relationship Agreement")³⁴. In particular, in Art. XIII.2 of the Relationship Agreement the General Assembly authorized the Fund to request advisory opinions of the ICJ on "questions arising within the scope of the Fund's activities". It is thus the General Assembly that is vested with that authority and not the ILO itself – which, after adopting the ILOAT Statute, could not give its organs or other institutions the power to challenge judgments passed by the

²⁹ See para. 11 of the Judgment.

³⁰ See para. 16 of the Judgment.

³¹ See para. 17 of the Judgment.

³² On the meaning of "merits" and on the limits of the Court's jurisdiction see *infra*, § 3.2.

³³ See paras 21-26 of the Advisory Opinion.

³⁴ The Agreement came into force on 15 December 1977, the date of its approval by the General Assembly with resolution 32/107.

Tribunal³⁵. Accordingly, the ICJ finally concluded that IFAD had the power to make the request of an advisory opinion and, therefore, that the Court was competent to consider that request³⁶.

With regard to the scope of the ICJ's jurisdiction, the Court made clear that its power to review the ILOAT's judgment on Ms Saez García was limited to whether the Tribunal wrongly confirmed its jurisdiction or the decision given by the latter was vitiated by a fundamental fault in the procedure followed. By highlighting this aspect, the ICJ intended to distinguish between the merits and jurisdiction, as done in the *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* of October 1956, where it stated that "[t]he circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction"³⁷. Therefore only those mistakes that ILOAT may make vis-à-vis its jurisdiction could be detected by the Court through its advisory opinion, while errors of fact or of law on the part of the Administrative Tribunal on the merits cannot give rise to the procedure envisaged under Art. XII of the Annex to the ILOAT Statute. As already stated by the Court in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, the review "is not in the nature of an appeal on the merits of the judgment"³⁸.

As far as the meaning of "fundamental fault in the procedure followed" – that is, the second ground for challenge – is concerned, the ICJ observed that "[a]n 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" and in that sense to deprive him/her of justice³⁹.

3.2. In order to answer the first question posed by IFAD regarding the competence of the ILOAT to hear the complaint brought against the Fund by Mrs Saez García in accordance with Art. 5 of its Statute, the Court had to decide, as already done by the Tribunal, whether the following two conditions foreseen in that provision were fulfilled: firstly, the complaint should be brought by an official of an organization that has recognized the jurisdiction of the Tribunal and, secondly, it should relate to the non-observance of the terms of appointment for that official and/or of the Staff Regulations of the organization. The two conditions pertain to the competence, respectively, *ratione personae* and *ratione materiae* of the Tribunal⁴⁰.

As to the first condition, the problem is whether Mrs Saez García was to be considered a staff member of the Global Mechanism, that is, of an entity which has not recognized ILOAT's jurisdiction, as contended by IFAD, or an official of the Fund, as maintained by Mrs Saez García.

The Court clarified that the problem revolved around the nature of the relationship between the UNCCD, namely the COP, IFAD and the Global Mechanism. In this connection, it observed that neither the Convention nor the MOU between the COP and IFAD confer legal personality on the Global Mechanism or otherwise accord to it the competence to enter into legal arrangements⁴¹. Furthermore, according to the Court, the Global Mechanism had no power to enter into contracts, agreements or 'arrangements', at both international and

³⁵ See paras 25-26 of the Advisory Opinion.

³⁶ See para. 27 of the Advisory Opinion.

³⁷ See para. 29 of the Advisory Opinion.

³⁸ On the notion of "appeal" see *infra*, § 5.

³⁹ See paras 30-32 of the Advisory Opinion.

⁴⁰ See para. 68 of the Advisory Opinion.

⁴¹ See para. 61 of the Advisory Opinion.

national level. This means that Mrs. Saez García was right when she argued that the Managing Director of the Global Mechanism is an officer of the Fund and that his actions are, in law, the actions of the Fund⁴².

In light of the above, the Court, by noting that an employment relationship was established between Mrs Saez García and the Fund and that this relationship qualified her as a staff member of the Fund, concluded that the Tribunal was competent *ratione personae* to consider the complaint filed by Ms Saez García against IFAD⁴³.

As for the second condition, the problem is whether Mrs Saez García's complaint may be included, in accordance with the terms of Art. II.5 of ILOAT Statute, among the complaints alleging non-observance, in substance or form, of the terms of appointment of officials or those alleging non-observance of provisions of the Staff Regulations. The Court, by stressing the fact that the Managing Director of the Global Mechanism was a staff member of the Fund when the decision of non-renewal of Ms Saez García's contract was taken, upheld the official's argument according to which the Tribunal was competent to hear claims that challenge the international organization's decisions due to the consideration that they would be based on wrong reasons or vitiated by substantive or procedural flaws. In both cases, in fact, the allegations would fit within those covered by Art. II.5 of the ILOAT Statute⁴⁴.

As a consequence, the Court held that the Tribunal was competent *ratione personae* because Ms Saez García was a staff member of the Fund and also *ratione materiae* because her appointment was governed by IFAD's provisions on the terms of appointment of its staff members.

Acknowledging that the ILOAT had jurisdiction, the Court made it clear that it had answered not only the first question, but all the issues regarding the question of jurisdiction raised by the Fund in its other seven questions⁴⁵. With regard to the remaining claim brought by IFAD concerning a "fundamental fault in the procedure" that may have been committed by ILOAT, the Court limited itself to consider that no fault had been identified⁴⁶.

On the basis of the reasoning briefly described above, the Court responded to the last question posed by IFAD and found "that the decision given by the ILOAT in its judgment No. 2867 is valid"⁴⁷.

3.3. The recent Advisory Opinion rendered by the Court was the occasion for it to deal with the extent and limits of the application of the principle of equality before the ICJ, with regard to the *status* of international organizations on one hand and of their staff members on the other. The issue was already at stake in the context of previous requests brought to the Court by way of applications for review of judgments of both the UNAT and ILOAT⁴⁸, in which the ICJ had affirmed, *inter alia*, that not responding to the request for an advisory opinion would endanger the functioning of the regime established by the ILOAT Statute for the judicial protection of officials⁴⁹.

⁴² See paras 87-88 of the Advisory Opinion.

⁴³ See paras 71-82 of the Advisory Opinion.

⁴⁴ See paras 83-95 of the Advisory Opinion.

⁴⁵ See paras 96-97 of the Advisory Opinion.

⁴⁶ See para. 98 of the Advisory Opinion.

⁴⁷ See para. 99 of the Advisory Opinion.

⁴⁸ See especially *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, p. 85; see also the opinions mentioned *supra*, footnotes 8 and 14, and also *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* of 4 December 1935, Series 1935, 40.

⁴⁹ See para. 36 of the Advisory Opinion and *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, p. 86.

The concerns relate to two sides of the same coin, which is represented by the principle of equality: the notion of *jus standi* and *jus locus standi in judicio*, that is to say, the (in)equality in the access to the Court and the (in)equalities in the proceedings before it. The crucial problem is that it is only the organization that is entitled to request an opinion of the ICJ and to participate in the proceedings before it.

As far as *jus standi* is concerned, the Court began its reasoning by making a comparison between the former UN system of administration of justice, in force from 1955 to 1995 as already noted above⁵⁰, and the one established by the Annex to Art. XII.1 of the ILOAT Statute⁵¹. In fact, Art. 11.1-4 of the former UNAT Statute⁵² allowed staff members, as well as their employer, the Secretary General and Member States of the UN, to object to the Tribunal's judgment and "make a written application" to a Committee composed of "the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly", so that the Committee may request an advisory opinion of the ICJ on the matter. This means that even though the official, given the well-known limits *ratione personae* concerning the scope of Art. 96 of the ICJ Statute – that permits only to the General Assembly, the Security Council and other organs of the UN and specialized agencies (so authorized by the General Assembly) to request the opinion –, had no direct power for resorting to the Court, there was a way for him/her to initiate the procedure of request to the ICJ, unlike the system established by the ILOAT Statute.

The Court then focused on the developments occurred at international level in relation to the right of access to justice and did so by recalling two comments, adopted in 1984 and 2007 by the UN Human Rights Committee, on Art 14.1 of the International Covenant on Civil and Political Rights of 19 December 1966, which requires that "[a]ll persons shall be equal before the courts and tribunals". In particular, in the second comment it is stated that "if procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds".

Further, the ICJ responded to IFAD's statement that the request for an advisory opinion pertained "not to any dispute between the Fund and Ms Saez García, but to the relationship between the Fund and the ILO as it relates to the ILOAT, a subsidiary body of the ILO". In the Court's opinion, the "real" dispute was between Mrs Saez García and the Fund, not between the Fund and the ILO. Plus, the Court clarified that IFAD would not be able to bring a matter about its relationship with the ILO before the Court, since the General Assembly, when authorizing IFAD to seek advisory opinions, under Art 96.2 of the UN Charter, expressly excluded questions concerning the mutual relationships of the Fund and the UN or other specialized agencies⁵³.

Moreover, the Court was of the opinion that the argument submitted by IFAD – according to which the procedure set out in Art. XII of the Annex to the ILOAT Statute seemed to have many features in common with investor-State arbitration – was not well founded. IFAD had observed, first of all, that in such arbitrations it is only the investor that may initiate the dispute settlement process, and, secondly, with regard to bilateral free trade and investment treaties, that they contain clauses enabling the State parties to declare, by joint decision, at the request of one of them, their interpretation, which is binding on the tribunal hearing an investment dispute including those brought by the investor. In this connection, the Court

⁵⁰ See *supra*, footnote 10.

⁵¹ See para. 36 of the Advisory Opinion.

⁵² It is interesting to clarify that between 1995 and 2009 the UN system contained no provision at all on the review of the decisions of the UNAT.

⁵³ See para. 42 of the Advisory Opinion.

made clear that those situations bear little resemblance to the procedure set out in Art. XII of the Annex to the ILOAT Statute. In fact, while “parties to treaties are in general free to agree on their interpretation”, in the present case “the Court is concerned with the initiation of a review process to be carried out by an independent tribunal”⁵⁴.

In this context, the ICJ acknowledged, as already done in its advisory opinion of 1956⁵⁵, that there is a concern about the inequality of access to the Court arising from the combination of Art. XII of the Annex to the ILOAT Statute, Art. 65 of the ICJ Statute and Art. 96 of the UN Charter. It is the system established in 1946 by the UN, with respect to the review of ILOAT’s decisions, to be put (at least partially) in question by the Court⁵⁶. Therefore the ICJ seems to implicitly have said that this system is not in line neither with the law governing the UN system of administration of justice now in force nor with the current developments of international law aimed at fostering the individuals’ right of access to justice before international and supranational jurisdictions⁵⁷. This is clear also when the Court noted that, in the case of the ILOAT, there wasn’t any justification for the provision for review of the Tribunal’s decisions which favors the employer to the disadvantage of the staff member⁵⁸.

The ICJ clarified that it cannot reform the system as it stands for what concerns the (in)equality of access, i.e. the *jus standi*, since, as known, for amendments of the UN Charter it must be followed the procedure set out in its Chapter XVIII. This is why the Court decided to dwell upon the (strongly connected) issue of the *jus locus standi in judicio*, that is of the (in)equality of arms in the proceedings before it. This way the Court tried to balance the problems arising from the inequality of access by diminishing the unequal position before the Court of the employing institution and its official. To this end the ICJ determined: not to admit oral proceedings, since, as known, the Court’s Statute does allow only the international organization concerned – not the individual – to appear before the Court⁵⁹; to oblige the President of IFAD to transmit to the Court any statement Mrs Saez García intends to convey to the latter; to fix the same time-limits for the filing of the two parties’ written statements⁶⁰.

In the last part of the opinion concerning the extent and limits of the principle of equality, the Court noted that, notwithstanding its approach aimed at giving more attention to the official’s prerogatives, there have been several difficulties throughout the proceedings⁶¹. However, these difficulties were not decisive as, by the end of the process, it had all information it required to decide upon the request filed by IFAD: “in essence, the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice, has been met”⁶².

3.4. Judge Cançado Trindade appended a very long, accurate separate opinion to the advisory opinion of the ICJ, which deserves close attention⁶³. The Judge’s main argument is that cases such as the one at stake show the urgent need for a “reconsideration” of the whole

⁵⁴ See para. 43 of the Advisory Opinion.

⁵⁵ See *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*, p. 85.

⁵⁶ See para. 44 of the Advisory Opinion.

⁵⁷ On this topic see the analysis of Judge Cançado Trindade’s separate opinion carried out *infra*, § 3.4.

⁵⁸ See para. 44 of the Advisory Opinion.

⁵⁹ On this aspect see also *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, para. 34.

⁶⁰ See para. 45 of the Advisory Opinion.

⁶¹ On this point see *infra*, § 4.

⁶² See paras 46-48 of the Advisory Opinion.

⁶³ *ICJ Reports* 2012, 51; see also the declaration appended by Judge Greenwood (*ICJ Reports* 2012, 94).

procedure concerning the review of the ILOAT's judgments by the ICJ⁶⁴. The meaning of "reconsideration" is not clarified by Cançado Trindade, who observes as well that "[l]egal instruments, whichever their hierarchy, are a product of their time, and I am sure that we all agree as to the need to work for the realization of justice at the level of the challenges of our time, so as to respond properly to them"⁶⁵. It is reasonable to think that Cançado Trindade is asking for an amendment of the ILOAT Statute, the UN Charter and the ICJ Statute⁶⁶ since, quite clearly, a "simple" (re)interpretation of the relevant provisions would not be enough.

The aim of this radical changeover of perspective would be to grant individuals, like Mrs Saez García, the right to request an advisory opinion (*jus standi*) and participate as a party at the proceedings which take place before the ICJ (*jus locus standi in judicio*). According to Cançado Trindade, the problem of the inequality of the parties in review procedures before the ICJ was already raised by several judges of the ICJ⁶⁷ in their declarations, separate and dissenting opinions, starting with the dissenting opinion of 1956 appended by Judge Córdova⁶⁸ to the Court's advisory opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*⁶⁹. Cançado Trindade conducted a resolute criticism. He noted, *inter alia*, that "[f]or 56 years the force of inertia and mental lethargy have prevailed"⁷⁰, since the ICJ is still deferent to the dogma that individuals cannot appear before the Court because they are not subjects of international law. In Cançado Trindade's opinion, the procedure set out in Art. XII of the ILOAT Statute, combined with the prohibition for individuals to appear before the ICJ, is "prehistoric and fossilized" and "defies logic, common sense and the basic principle of the good administration of justice"⁷¹.

At the core of Cançado Trindade's opinion lies the consideration that "the emergence and consolidation of individuals as subjects of International Law"⁷² solicit the ICJ – as well as the legal scholarship – to secure the right of access to justice of international organizations' officials before international tribunals, including the ICJ. Cançado Trindade's reasoning is grounded on the theories of a number of philosophers and jurists who have emphasized, over the centuries, the role of human beings within the *societas gentium* by stressing that the law governs not only the relationships between States but above all the relationships amongst all members of the "universal society"⁷³.

⁶⁴ The term "reconsideration" is used in para. 81 of the Separate Opinion.

⁶⁵ See para. 118 of the Separate Opinion.

⁶⁶ L. Gross, "Participation of Individuals in Advisory Proceedings before the International Court of Justice: Question of Equality between the Parties", *American Journal of International Law* 52 (1958): 40, had already suggested the insertion of an additional chapter in the UN Charter.

⁶⁷ In addition to the judges' scientific essays, as it is the case of Shabtai Rosenne, "Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice", in *International Arbitration – Liber Amicorum for M. Domke*, ed. Pieter Sanders (Kluwer: The Hague, 1967), 242 and 249, cited by Cançado Trindade at para. 81 of the Separate Opinion.

⁶⁸ *ICJ Reports* 1956, 155.

⁶⁹ Like M. Zafrulla Khan, R. Córdova, F. de Castro, P. Morozov, A. Gros, H. Mosler, R. Ago; on this point see especially paras 37-42, 44, 46, 50, of the Separate Opinion.

⁷⁰ See para. 48 of the Separate Opinion.

⁷¹ *Ibidem*.

⁷² See paras 51 and 56 of the Separate Opinion.

⁷³ See paras 58-63 of the Separate Opinion, where Cançado Trindade recalled "the illuminating thoughts and vision of the so-called founding fathers of International Law" (para. 62) such as Francisco de Vitoria, Alberico Gentili, Hugo Grotius, Samuel Pufendorf, Christian Wolff, Bynkershoek, Hegel.

Cançado Trindade then noted that at regional level the direct access to international tribunals is extensively granted not only to States but also to individuals. This is the case of the Central American Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights⁷⁴.

The above considerations led Cançado Trindade to highlight that many cases brought before the ICJ pertained to the condition of individuals whose presence before the Court would have enriched the proceedings and facilitated the work of the Court. He subsequently concluded, as to the case of Mrs Saez García, that, "keeping [...] dogmatism apart, it can hardly be denied that there should have been a hearing", with the presence of both the legal representative of the IFAD and its official's⁷⁵.

As it will be clarified in the following §§, Cançado Trindade's theory is embraceable in that he calls into question the procedure envisaged under Art. XII of the Annex to the ILOAT Statute on the grounds that it does not secure to the official involved in a dispute against the organization neither the right to initiate the proceedings before the ICJ nor the right to participate as a party. It is true that such procedure seems to infringe the right of access to justice *lato sensu*, that is the right to a fair trial, with its corollaries, amongst which the principle of equality of arms, the principles of good administration of justice and the *principe du contradictoire*. It is also true that international law as it stands grants a great protection to individuals who seek to vindicate their rights before national and international tribunals.

However, two main arguments made by Cançado Trindade cannot be sustained. Firstly, according to Cançado Trindade, it seems that the fact *ex se* that individuals are entitled to exercise rights towards sovereign States, at national, regional and also international levels, implies automatically that they are always to be considered as having international juridical personality. Although the aim of this article is clearly not to confront with such issue, what I maintain here is that the argument raised by Cançado Trindade tends to simplify too much in that it seems to provide a solution that cannot be valid for all legal contexts and scenarios. In this connection, the obstacle for granting to international organizations' staff members a full right of access to justice is represented above all by the UN legal order and the ILOAT Statute rather than by mental inertia and lethargy. Secondly (and most importantly), unlike Cançado Trindade, I believe that the ICJ's competence *ex se* to give advisory opinion on disputes between international organizations and their staff system is at odds with the evolving *status* of the right of access to justice under international law and the law of the international civil service. The crucial question, therefore, is not whether international officials, like other categories of individuals, are to be considered as subjects of international law. On the contrary, scholars should consider whether the ICJ is the most appropriate *forum* to settle this kind of controversies.

4. As it has been shown⁷⁶, the ICJ formulated a number of legal remedies to face the problem arising from the lack of *jus standi* upon Mrs Saez García. The solution chosen by the Court was to secure more equality between IFAD and its official in the proceedings before it (*jus locus standi in judicio*). The Court decided not to hold oral hearings and to allow Mrs Saez García to transmit to the Court, through the President of IFAD, any written statement which she might wish to bring to the attention of the Judges. Furthermore, the ICJ fixed the same time-limits for Mrs Saez García as for IFAD for the filing of statements in the first round as well as of comments to the counterpart's arguments in the second round.

⁷⁴ See paras 64-68 of the Separate Opinion.

⁷⁵ See paras. 78-109 of the Separate Opinion.

⁷⁶ See *supra*, § 3.3.

Although the above measures reduced inequality between the parties, the Court clearly did not re-establish equality of arms between them. As to the choice not to hold oral hearings, I do not agree with the criticism, made by Cançado Trindade in his separate opinion⁷⁷, according to which by this solution the Court would have deprived itself to instruct better the *dossier* of the case, with the result to impose, *ex ante*, a limit to the freedom of expression of the actors concerned. In fact, as it happens in other jurisdictional systems where cases are generally settled through written proceedings⁷⁸, the fairness of a trial is not necessarily associated with the oral character of the procedure. The problem concerning the proceedings before the ICJ is the impossibility for the official to interact with the Court autonomously, i.e. without necessarily passing through the pseudo-gatekeeper function exercised by the organization.

For what concerns the obligation imposed upon IFAD to receive any statements made by Mrs Saez García and to transmit it to the Court, it does not seem to be a valid alternative to be applied in the present situation as well as *pro futuro* in other cases by the ICJ. This is demonstrated by a number of circumstances and difficulties occurred during the proceedings. First of all, IFAD's choice to request an advisory opinion has been used as an *escamotage* for not executing Judgment No. 2867 of ILOAT inasmuch as the Fund maintained that it might become entitled to repayment of the amounts due if the Court would declare the ILOAT's decision invalid. Secondly, the filing of "all documents likely to throw light upon the question" pursuant to Art. 65.2 of the ICJ Statute was completed only after more than 15 months from the submission of the request by IFAD. Thirdly, IFAD failed several times, as indicated by the Court, to inform Mrs Saez García in a timely way of the documents it was transmitting to the Court. Fourthly, IFAD did not transmit to the Court certain communications that Mrs Saez García wished to submit to the ICJ. It is true that the Fund's behavior prompted the Registry of the Court to intervene in order to ensure that Mrs Saez García's statements would be taken into due consideration⁷⁹. However, the issue is not whether the ICJ, in this case, has done its best to reduce the disparities between Mrs Saez García and IFAD, so that the former may receive a fair hearing. The Court's *activism* is not, in itself, a remedy able to conceal the fact that the official's interests will be defended and represented depending on the willingness of the organizations to do so. Moreover, it is likely that IFAD's attitude will be taken also by other organizations in the case of new requests for an advisory opinion which challenge a decision taken by the ILOAT.

The circumstances described above must be read in light of two more features that define the procedure envisaged under the ILOAT Statute, and which differentiate it from other types of requests for advisory opinions made by the General Assembly⁸⁰ in cases such as *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* of 22 July 2010⁸¹.

The first distinctive element of the advisory opinions of the ICJ regarding staff disputes in the frame of Art. XII of the ILOAT Statute is that such opinions, in accordance with Art. XII.2, are binding, even though formally defined as "advisory" under Art. 65.1 of the Court's

⁷⁷ See para. 52 of the Separate Opinion.

⁷⁸ One example is represented by the European Court of Human Rights.

⁷⁹ See para. 46 of the Advisory Opinion.

⁸⁰ On the advisory function of the ICJ more in general see the observations made, amongst others, by Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (4th edn. The Hague: Martinus Nijhoff, 2010), 382-292; Sergio Marchisio, *L'ONU: il diritto delle Nazioni Unite* (2nd edn. Bologna: Il Mulino, 2012), 286-291.

⁸¹ *ICJ Reports* 2010, 403.

Statute⁸². This means that the ICJ's opinion, if favorable for the organization which filed the request (having the Court recognized that the ILOAT, under Art XII of the ILOAT Statute, has exceeded its jurisdiction, or that there has been a fundamental flaw in procedure), may entail that the staff member will lose the compensation awarded to her. Therefore, in cases regarding the review of the decisions of the ILOAT, what is at stake is always a dispute between the official and the organization, rather than the clarification of a complex legal issue which falls under the competence of the UN specialized agencies.

The second aspect that characterizes the procedure under Art. XII of the ILOAT Statute is that the law at the heart of the ICJ's reasoning – unlike what it happens in the other proceedings initiated by the UN specialized agencies pursuant to Art. 65.1 of the ICJ Statute – is the internal law of international organizations, namely the law governing the employment relationships between the staff members and the organization. Now, what I want to stress here is that this branch of law⁸³ follows *sui generis* principles very much different from those which define international law⁸⁴. It is a self-contained regime, not to be assimilated with international law, even though it does derive from the latter⁸⁵, i.e. from both the treaty which established the organization and the Staff Regulations and Rules generally adopted by, respectively, the Assembly and the Secretariat of the organization⁸⁶. The legal problems and questions to be investigated by the ICJ under the procedure governed by Art. XII of the ILOAT Statute are very different from those included in the scope of Art. 96.2 of the UN Charter. Furthermore, the applicable law is mainly contained in the organization's founding agreement, in the headquarters agreement between the organization and the host State, in the ILOAT Statute, in the Staff Regulations and Rules, in the contract signed by the official and his/her employer and in the other not written sources of law⁸⁷, rather than in sources of public international law *stricto sensu*⁸⁸.

It does not seem to me that the only way to prevent the risks of fragmentation in the regulation of the *status* of the international civil service (and the arbitrariness of international

⁸² On the (formally advisory) opinions of the ICJ having been given a conclusive and binding *status* also with respect to disputes between international organizations and States, see Roberto Ago, "Binding Advisory Opinions of the International Court of Justice", *American Journal of International Law* 85 (1991): 439.

⁸³ For what concerns the nature of this discipline, it cannot be shared the opinion of those who deny the legal character of the rules governing the *status* of international organizations' staff members as well as the recognition of the officials as subjects of law; see Giorgio Ballardore Pallieri, "Le droit interne des organisations internationales", in *Recueil des Cours de l'Académie de droit international de La Haye CXXI* (1969), 13; Rolando Quadri, *Diritto internazionale pubblico* (Napoli: Liguori, 1968), 86.

⁸⁴ On the topic see recently D. Gallo, "Status, privilegi, immunità e tutela giurisdizionale dei funzionari delle organizzazioni internazionali", in *Diritto delle organizzazioni internazionali*, ed. Angela Del Vecchio (Edizioni Scientifiche Italiane: Naples, 2012), 280-282.

⁸⁵ On the subject see Chittharanjan Félix Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn. Cambridge: Cambridge University Press, 2005), 274.

⁸⁶ Authors such as Philippe Cahier, "Le droit interne des organisations internationales", *Revue générale de droit international public* (1963): 573 and Riccardo Pisillo Mazzeschi, "Funzionario internazionale", in *Digesto delle discipline pubblicistiche* (VII, Turin: UTET, 1991), 48, have already clearly demonstrated that the internal legal order of an international organization can be considered as independent from international law, even though it derives from it: there is no interdependence between the aspect concerning the origin of that legal order and that of its autonomy.

⁸⁷ On the sources of law governing employment relationships see, *inter alia*, C. Wilfred Jenks, *The Proper Law of International Organizations* (London: Stevens, 1962); Michael Barton Akehurst, *The Law Governing Employment in International Organizations* (Cambridge: Cambridge University Press, 1967); Amerasinghe, *Principles*, 282-289; Felice Morgenstern, "The law applicable to international officials", *International and Comparative Law Quarterly* 18 (1969): 739; Gallo, *Status*, 282-289.

⁸⁸ See also the Dissenting opinion of Judge Córdova, pp. 165-166 as well as the observations by L. GROSS, *op. cit.*, 25-26.

administrative tribunals) as well as to entail the effectiveness of the law of international administrative tribunals⁸⁹ may be to empower the ICJ with the competence to develop a uniform regime governing staff disputes⁹⁰. On the contrary, in this article I maintain that the relationship between the ICJ and ILOAT is grounded on a basic defect, that is, the lack of *jus standi* and *jus locus standi in judicio*. In particular, as to the latter, the remedies provided by the ICJ in its advisory opinion of February 2012 are not conclusive; they do not entail a sort of *equivalent protection* of the rights of the individual, such as the doctrine of equivalent protection established by the European Court of Human Rights to address the issue of the compatibility of EU law – including the case law of the Court of Justice of the EU – with the European Convention on Human Rights⁹¹. As a consequence, I believe that, as long as there is no drastic change of perspective at UN level that may lead to an amendment of the UN Charter as well as of the ICJ Statute, the ICJ is not the right *forum* to resort to in order to determine the validity of a decision by the ILOAT. Only the full exercise of the right of access to the ICJ – on the part of the officials involved in the dispute – and the full respect of general principles of law – such as the equality of arms, the *contradictoire*⁹² and the good administration of justice – may secure a fair instruction of the process and above all may ensure that the relationship between the ICJ and ILOAT may be compatible with the modern concepts and dimensions of due process⁹³ and, ultimately, justice.

5. If the ICJ is not the right judge, in my opinion, to adjudicate staff disputes previously settled by the ILOAT, which would be the right judicial organ to do it?

My opinion is that, as happened in the UN internal justice system, an appellate degree should be established for all staff disputes within international organizations. More specifically, as to the ILOAT, it seems to me that a tribunal should be instituted and empowered with the competence to rule as judge of second and last degree vested with power to review appeals against decisions taken by ILOAT within the same limits prescribed by Art. 2 of the Statute of the UN Appeals Tribunal (UNAsT)⁹⁴, according to which the UNAsT shall be competent to hear and pass judgment on an appeal filed by the UN Dispute Tribunal if

⁸⁹ Recently, on the role and development of international administrative law see Melissa Thomas, Olufemi Elias, “The Role of International Administrative Law, in The Development”, in *The Development*, ed. Elias, 397-410; on the emergence of general principles on the international civil service see Francesco Salerno, *Diritto internazionale* (2nd. Padua: Cedam, 2011), 206.

⁹⁰ On the limits of the ICJ’s contribution to the development of international administrative law see Joanna Gomula, “The Review of Decisions of International Administrative Tribunals by the International Court of Justice”, in *The Development*, ed. Elias, 367-372; *contra* Pierre Pescatore, “Two Tribunals and One Court. Some Current Problems of International Staff Administration in the Jurisdiction of the ILO and UN Administrative Tribunals and the International Court of Justice”, in *Towards More Effective Supervision by International Organizations. Essays in Honour of Henry G. Schermers*, eds. Niels Blokker and A. Sam Muller (Leiden: Martinus Nijhoff, 1994), 225 and 230-237; Riddell, “Administrative Boards”, 75.

⁹¹ On the notion of European “equivalent protection” of rights see, amongst others, P. De Hert and F. Korenica, *The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights*, *German Law Journal* 13 (2012): 874, available at http://www.germanlawjournal.com/pdfs/Vol13-No7/PDF_Vol_13_No_07_874-895_Developments_DeHertKorenica.pdf.

⁹² On the topic see the contributions in Hélène Ruiz Fabri and Jean-Marc Sorel (eds.), *Le principe du contradictoire devant les juridictions internationales* (Paris: Pedone, 2004).

⁹³ On due process and international administrative tribunals see Maritza Struyvenberg, “International Administrative Law: Due Process in the Justice System”, in “International Administrative Tribunals in a Changing World: United Nations Administrative Tribunal Conference organized under the Auspices of the Executive Office of the Secretary-General, New York, Friday, 9 November 2007”, eds. Katerina Papanikolaou and Martha Hiskaki (London: Esperia, 2008), 173-180.

⁹⁴ See *supra*, § 1.

the latter has exceeded its jurisdiction, failed to exercise its jurisdiction, or if it erred on a question of fact, law, or procedure⁹⁵.

Moreover, in the wake of the changes occurred at UN level, the need for a reform within ILO as well as within other international organizations through which granting to the international organizations' staff members the same right of access to justice than those accorded to their employers is even more urgent if we consider that the ICJ itself seems to act as judge vested with a power of review of a tribunal's decision very much similar to that exercised by a tribunal of appellate degree⁹⁶. Well, such a hybrid – advisory proceedings that are judicial in character, but whose procedural rules do not satisfy the equality of arms – is clearly at odds with the notion of justice at the core of the international principles and norms aimed at safeguarding the individual and his fundamental right of access to justice.

In conclusion, international organizations should take measures to establish an appellate tribunal⁹⁷. And it is the ILOAT that, insofar as the most representative of international administrative tribunals, should take the initiative. My main argument is that, with regard to the provisions governing employment relationships, the development, as well as the uniform interpretation and application, of the internal law of international organizations must be ensured, rather than by the ICJ, by international administrative tribunals. Due to their nature and mission, the latter are better equipped to settle staff disputes between an international organization and its staff members⁹⁸.

As for the ICJ Advisory Opinion of February 2012 on Judgment No. 2867 of the ILOAT, an important observation must be made on the approach taken by the Court. Not only did the ICJ choose to acknowledge, once and for all, the limits of its relationship with the ILOAT – limits it had already emphasized in previous advisory opinions on judgments of the UNAT and ILOAT –, but it also brought attention to the new UN internal justice system and, finally, questioned the compatibility of the procedure provided for by Art. XII of the ILOAT Statute⁹⁹ with the “present-day principle of equality of access to courts and tribunals”¹⁰⁰. In my opinion, this must be understood as a recognition, by the ICJ itself, of the crucial function performed by international administrative tribunals in promoting, at international level, the right of access to justice. In this respect, I will not be surprised if the ICJ Opinion were interpreted, first of all by international organizations, as an implicit invitation for those international organizations

⁹⁵ On the need for a double degree within international organizations' internal justice systems see David Ruzié, “Le double degré de juridiction dans le contentieux de la fonction publique internationale”, in *Mélanges offerts à Hubert Thierry: l'évolution du droit International* (Paris: Pedone, 1999), 369-381.

⁹⁶ In this sense see also Gomula, *The Review*, 357.

⁹⁷ To my knowledge, the only alternative (but perhaps, at present, less feasible) solution would be to rely on Art. 2.10 of the UNAsT Statute, according to which “[t]he Appeals Tribunal shall be competent to hear and pass judgment on an application filed against a specialized agency brought into relationship with the United Nations [...] or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute”. The article states as well that “[s]uch special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law”.

⁹⁸ See also Suzanne Bastid, “Have the U. N. Administrative Tribunals Contributed to the Development of International Law?”, in *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup*, eds. Wolfgang Friedmann, Louis Henkin, Oliver Lissitzyn (New York-London: Columbia University Press, 1972), 298-312; August Reinisch, “The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals”, *Chinese Journal of International Law* 7 (2008): 285, 286.

⁹⁹ In combination with Art. 65 of the ICJ Statute and Art. 96 of the UN Charter.

¹⁰⁰ See para. 44 of the Advisory Opinion.

which have not yet established administrative tribunals or accepted the jurisdiction of the ILOAT or the UN internal judicial bodies to do so in the near future. For the organizations that, on the other hand, have already done so, I believe that from the Opinion there emerges an implicit invitation to establish tribunals that are vested with the power of reviewing appeals against judgments rendered by first instance courts.