24 June 2022

Report of the Court on the Internal Justice System

I. INTRODUCTION

1. On 30 September 2020, the Independent Expert Review ("IER") established by the Assembly of States Parties ("Assembly" or "ASP") to the Rome Statute of the International Criminal Court ("Court" or "ICC") issued the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report" ("IER Report").

2. With respect to the Court's internal grievance procedures, the IER Report set forth the following related recommendations in R115 to R121:

> **R115.** The Court's internal justice system should be open to all, including non-staff, former staff and elected officials. In the spirit of the One Court principle, and with the aim of simplifying and centralising the various disciplinary procedures, the Court should employ one internal justice system for all. This will emphasise equality of treatment, promote equal minimum standards of ethics and professionalism for everyone as well as increase the clarity and thus the use of the system.
>
> **R116.** The Court's settlement of disputes would be better served if handled by professionals. The cost-benefit relationship of this proposal is favourable to the Court, and will enhance the settlement of disputes and conflicts and, accordingly, reduce the escalation to the ILOAT. This would involve dissolving the Disciplinary Advisory Board and the Appeals Board, as well as ad hoc mediation currently operated by staff. Such approach would be consistent with other international organisations' decisions to move away from peer-based internal justice mechanisms, such as the UN's decision in 2006.
>
> **R117.** Instead of peer-based appeals against administrative decisions, a straightforward and simple procedure could be set up by employing a First Instance Dispute Judge – a national or international judge, with experience in international administrative matters. The First Instance Dispute Judge would not be a permanent position, but called on to act on a need-basis. A roster of suitable judges could be set up for such purpose. In the case of serious complaints against Judges, the Prosecutor or Deputy Prosecutor, a First Instance Panel, made up of three judges, would decide in first instance.
>
> **R118.** The Court should consider the establishment of an Ombudsperson (an ungraded position to be filled through a competitive recruitment exercise, a true outsider) to deal with disputes and conflicts in an informal, friendly and effective way together with Mediation Services, as a preliminary, non-compulsory instance (subject to the following paragraph) for solving disputes and conflicts.
>
> **R119.** Recourse to mediation services would only be mandatory for parties in an administrative dispute before bringing their complaint to the First Instance Judge. Similarly, complaints dealing with underperformance would initially be reviewed by a human resources analyst and, if necessary, by an independent reviewer appointed by the Head of HRS, before the complaint could be submitted to the First Instance Judge.
>
> **R120.** The Court is encouraged to explore whether resorting to the UN Appeals Tribunal for administrative matters, rather than the ILOAT, would be more cost efficient for the Court. Such a decision would also be in line with the Court's use of the UN Common System.

> **R121.** Any exercise envisaged by the Court in this field should consider the convenience of strengthening transparency, confidentiality and trust for the staff to be able to use it more frequently and for it to be more efficient.[1]

3. On 11 June 2021, the Court submitted to the ASP its overall response to the IER Report, containing a preliminary analysis of the recommendations and information on relevant activities undertaken by the Court ("Overall Response").[2] In paragraph 257 of the Overall Response, the Court relevantly stated that:

> [I]n light of recommendation R120, the Court will produce an assessment detailing the costs that moving from the ILOAT to the UNAT would have for the Court, as well as the legal, policy and practical considerations. The Court notes for instance the resort to ILOAT is specifically enshrined in the Staff Regulations of the Court, and any amendment to those regulations would have to be sanctioned by the ASP. A thorough assessment will therefore be of assistance in fully analysing the proposed recommendation.

4. The present report is submitted further to paragraph 257 of the Overall Response, against the broader backdrop of IER recommendations R115 to R121.

5. The Court consulted with and received information from a wide range of stakeholders, including the United Nations ("UN") Office of Administration of Justice, the Office of the UN Ombudsman and Mediation Services, the Office of Staff Legal Assistance, the International Court of Justice, and several international organizations that are part of the UN system.

II. BACKGROUND

A. Overview of the current system of grievance procedures at the Court

i. Formal grievance procedures

6. The Staff Regulations provide that the "Registrar or the Prosecutor […] shall establish administrative machinery with staff participation" to "advise them" in both "disciplinary cases" and "in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment."[3] [Emphasis added].

7. With respect to administrative appeals, a staff member who wishes to formally contest an administrative decision must first submit a "request for a review of the decision" to the Secretary of the Appeals Board ("Request for Review").[4] The review is conducted by the Registrar or the Prosecutor, as appropriate.[5] If the staff member is not satisfied with the decision resulting from the review by the Registrar or the Prosecutor ("Review Decision"), he

---

[1] IER, "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report" ("IER Report"), pp. 102-103. See also IER Report, p. 23, recommendation R13: "The use of UN Common System should also lead the Court and ASP to review the decision to make use of ILOAT rather than the UN Appeals Tribunals."

[2] Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report", ICC-ASP/20/2, 11 June 2021 ("Overall Response").

[3] Staff Regulations 10.1 and 11.1.

[4] Staff Rule 111.1 (b).

[5] Staff Rule 111.1 (c) and (d).

or she may lodge an appeal with the Appeals Board ("AB").[6] The AB submits advice on the appeal to the Registrar or the Prosecutor for final decision.[7]

8. With respect to disciplinary matters, all allegations of "misconduct" against any staff member must first be submitted to the Independent Oversight Mechanism ("IOM") in accordance with the Operational Mandate of the IOM (Annex II to ICC-ASP/19/Res.6) ("IOM Operational Mandate").[8] The IOM has discretionary authority to assess or investigate any allegations of misconduct against staff.[9] Investigation reports finding that allegations of misconduct are substantiated are submitted to the Registrar or the Prosecutor, as appropriate, along with a recommendation on whether to initiate disciplinary proceedings.[10] The initiation of disciplinary proceedings by the Registrar or the Prosecutor normally results in the referral of the matter to the Disciplinary Advisory Board ("DAB") for advice as to what disciplinary measures, if any, would be appropriate.[11] The DAB submits its advice to the Registrar or the Prosecutor for final decision.[12]

9. During the course of both appeals and disciplinary proceedings, a staff member is "entitled to be represented or assisted by a staff member or a former staff member of his or her choosing […] at his or her own expense."[13] Notably, representation and assistance may be sought from the Staff Union Council ("SUC").

10. The AB and DAB are composed of staff members appointed by the Registrar and the Prosecutor, and elected by the SUC.[14] They serve voluntarily and must attend to their normal duties in addition to their service on the AB and DAB. Both the AB and the DAB are advisory in nature: they are limited to making recommendations to the Registrar or the Prosecutor and neither has the power to issue binding decisions.[15] Accordingly, in both administrative appeals and disciplinary cases, the Registrar and the Prosecutor retain full discretion to decide the matter.[16]

---

[6] Staff Rule 111.1 (d).
[7] Staff Rule 111.1 (f) and (g).
[8] IOM Operational Mandate, para. 8.
[9] IOM Operational Mandate, para. 10.
[10] IOM Operational Mandate, para. 14. See also Administrative Instruction on Investigations of Unsatisfactory Conduct (ICC/AI/2022/001), section 5.
[11] Administrative Instruction on Unsatisfactory Conduct and Disciplinary Proceedings (ICC/AI/2022/002), section 7.
[12] Staff Rules 110.4 (e) and 110.8.
[13] Staff Rules 110.2 (d) and 111.1 (e).
[14] Staff Rules 110.3 (b) and 111.2 (b).
[15] Staff Rules 110.4 (b) and 111.3 (c).
[16] See ILOAT Judgment No. 3862, consideration 20: "The executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached."

11. There are also a number of specialized or technical bodies,[17] such as rebuttal panels which consider "disputed performance assessments and/or appraisal ratings."[18] "Ratings" resulting from the rebuttal process "shall not be subject to further appeal." However, "administrative decisions" which "stem from any final performance appraisal and which affect the conditions of service of a staff member may be appealed" in accordance with the procedure for administrative appeals (i.e. Request for Review; AB; ILOAT).[19] Performance appraisal rebuttals are handled in essentially the same manner at the UN.[20]

12. The Court is considering the IER's recommendation to instead have "complaints dealing with underperformance […] initially […] reviewed by a human resources analyst and, if necessary, by an independent reviewer appointed by the Head of [the Human Resources Section ("HRS")], before the complaint could be submitted to the [first instance process]" (R119).[21] The Court notes that this would entail the abolition of the existing rebuttal process, and would also create an exception to the mandatory requirement to file a Request for Review before seizing the AB. As noted above, this would constitute a deviation from the equivalent UN processes.

13. Staff members may appeal final decisions of the Registrar or the Prosecutor in relation to both administrative appeals and disciplinary cases to the Administrative Tribunal of the International Labour Organization ("ILOAT" or "Tribunal").[22] Pursuant to Article VI, paragraph 1, of the Statute of the ILOAT, the ILOAT's judgments are "final and without appeal", though the Tribunal "may nevertheless consider applications for interpretation, execution or review of a judgment." The ILOAT normally holds sessions two times per year.

14. Staff members' right of access to the ILOAT is conferred by the Staff Regulations and Rules and Article II, paragraph 5, of the ILOAT Statute, the latter of which relevantly provides that the Tribunal is "competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials […] of any other international organization […] recognizing […] the jurisdiction of the Tribunal".

15. Aside from staff members, the ILOAT has ruled that ICC judges are also "officials" of the Court within the meaning of Article II, paragraph 5, of the ILOAT Statute, and may therefore also have recourse to the ILOAT for alleged violations of the terms and conditions of their appointment.[23] Furthermore, unlike staff members, ICC judges may have "direct" recourse to the ILOAT as "there are no other internal mechanisms available to challenge a decision taken

[17] Other examples include the Advisory Board on Compensation Claims, which considers claims for compensation arising from service-incurred illness, injury or death, and the Classification Advisory Board, which provides advice on requests for classification or reclassification pursuant to the Administrative Instruction on Classification and Reclassification of Posts (ICC/AI/2018/002).

[18] Administrative Instruction on Performance Appraisal Rebuttals and Procedures (ICC/AI/2010/002), section 1.3.

[19] Administrative Instruction on Performance Appraisal Rebuttals and Procedures (ICC/AI/2010/002), section 3.8. See above, para. 7.

[20] UN Administrative Instruction on Performance Management and Development System (ST/AI/2010/5), sections 14-15.

[21] IER Report, p. 103, recommendation R119.

[22] Staff Rules 110.8 and 111.5.

[23] ILOAT Judgment No. 3359, considerations 14-17.

in relation to the terms and conditions of their appointment."[24] Considering the aforementioned interpretation of Article II, paragraph 5 of the ILOAT Statute, it stands to reason that the other "elected" non-staff "officials" of the Court ("Elected Officials") – i.e. the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar[25] – may be able to invoke the Tribunal's personal jurisdiction (*ratione personae*) in the same manner.

16. This notwithstanding, the ILOAT has notably held that proceedings invoking articles 46 and 47 of the Rome Statute, concerning removal from office and imposition of disciplinary measures with respect to Elected Officials,[26] "are not within the Tribunal's competence."[27]

17. Other individuals working at the Court, such as interns, visiting professionals, consultants, individual contractors, counsel and members of counsel teams, do not have recourse to the Court's formal grievance procedures or a right of access to the ILOAT. However, some form of dispute settlement or remedy may be available to such individuals on a contractual or *ad hoc* basis. With respect to consultants and individual contractors, for example, "[a]ny dispute, controversy or claim between the parties arising out of the contract, or the breach, termination or invalidity thereof, unless settled amicably, […] shall be referred by either of the parties to arbitration in accordance with the UNCITRAL Rules then obtaining."[28]

ii. Informal dispute resolution

18. There is currently no established mechanism for informal dispute resolution at the ICC. However, possibilities for mediation are offered by the Court.

19. The Human Resources Section ("HRS") has identified, through a procurement process, a company based in Amsterdam that can deliver mediation services. Alternatively, recourse may be had to certified mediators amongst the Court's staff.

20. Mediation is voluntary and requires the consent of all parties concerned. The necessary arrangements to appoint a mediator are made by HRS once there is agreement between the parties to hold a mediation.

21. The Court is currently in the process of implementing IER recommendation R118 on the establishment of an Ombudsperson, whose scope of service will include the provision of mediation services. In an effort to capture the spirit of the IER's recommendation that "[t]he Court's internal justice system should be open to all" (R115),[29] the Ombudsperson will be open not only to staff members and Elected Officials, but also to other individuals working at the ICC (e.g. interns, visiting professionals, consultants, individual contractors, counsel and members of counsel teams).[30] Resources to contract an Ombudsperson on a consultancy basis

[24] ILOAT Judgment No. 3359, consideration 18.
[25] See Rome Statute, articles 42 (4) and 43 (4); Headquarters Agreement between the International Criminal Court and the host State, article 1 (j).
[26] See also chapter 2, section IV, subsection 1 of the Rules of Procedure and Evidence.
[27] Judgment No. 4060, consideration 11.
[28] Administrative Instruction on Consultants and Individual Contractors (ICC/AI/2016/002 Corr.1), Annex I, section 16.
[29] IER Report, p. 102, recommendation R115.
[30] See e.g. Administrative Instruction Addressing Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority (ICC/AI/2022/003), section 5.10.

for six months have been included in the 2022 budget. This is line with the IER's recommendation for the Ombudsperson to be "an ungraded position to be filled through a competitive recruitment exercise, a true outsider" (R118).[31] The Court is currently finalizing the terms of reference and vacancy announcement for the Ombudsperson, and it is expected that the recruitment process will begin soon.

22. In the long term, the Court could explore whether to avail itself of the services of the Office of the UN Ombudsman and Mediation Services ("UNOMS"). The modalities and costs of the arrangement would have to be agreed with UNOMS. In this regard, it bears noting that UNOMS does not have a regional office in The Hague.

23. The Court takes note of the IER's recommendation to make recourse to mediation services "mandatory for parties in an administrative dispute" prior to bringing their complaint to the first instance process (R119).[32] In this regard, the Court notes that the consent of the parties remains an essential basis for the mediation of staff disputes in the UN system.[33] The Secretary-General's bulletin on Terms of reference for UNOMS (ST/SGB/2016/7), for example, provides that "[t]he referral of a dispute to mediation will […] take place only with the consent of all parties concerned."[34] By the same token, the United Nations Dispute Tribunal may only "propose to refer [a] case to mediation", and cannot suspend the proceedings for this purpose without the "consent of the parties".[35]

24. As another option, the Court could explore other mediation initiatives which do not go as far as mandating mediation, such as provisions which affirmatively encourage mediation during a "cooling off period", or which create an obligation only for the parties to discuss and consider referring a dispute to mediation.

B. The UN system of administration of justice

i. Reform of the UN system

25. Prior to July 2009, the system of grievance procedures at the UN closely resembled that of the Court: the Secretary-General, as the chief administrative officer of the UN, would make final decisions on employment-related issues following peer review by an advisory body composed of volunteer staff members. The main advisory bodies for this purpose were the Joint Appeals Boards ("JABs") for administrative appeals and the Joint Disciplinary Committees ("JDCs") for disciplinary matters. Staff members could seek legal and other advice on employment-related issues from the Panel of Counsel, which was staffed by volunteer staff members. The Secretary-General's decisions could be challenged before a

[31] IER Report, p. 103, recommendation R118.
[32] IER Report, p. 103, recommendation R119.
[33] However, with respect to other types of disputes, recent years have seen an increase in mandatory mediation as a pre-condition to litigation or arbitration. See e.g. International Centre for Settlement of Investment Disputes, "Overview of Investment Treaty Clauses on Mediation", July 2021; International Chamber of Commerce, "Mediation Clauses", at https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/ on 17 June 2022, M. Hanks, "Perspectives on Mandatory Mediation", 35 *UNSW Law Journal* (2012), p. 929.
[34] Secretary-General's bulletin on Terms of reference for UNOMS (ST/SGB/2016/7), section 5.4.
[35] Statute of the United Nations Dispute Tribunal ("UNDT Statute"), Article 10 (3).

single judicial body, the United Nations Administrative Tribunal ("UNAdT"), whose judgments were final and without appeal.[36]

26. On 13 April 2005, amidst growing concern about the performance of the system, the General Assembly ("UNGA") decided that the Secretary-General should "form a panel of external and independent experts to consider redesigning the system of administration of justice" at the UN.[37] This panel, known as the "Redesign Panel", submitted its report on 28 July 2006.[38] In summary, with regard to the existing system, the Redesign Panel found that:

> [T]he administration of justice in the [UN] is neither professional nor independent. The system of administration of justice as it currently stands is extremely slow, underresourced, inefficient and, thus, ultimately ineffective. It fails to meet many basic standards of due process established in international human rights instruments. For all these reasons, staff of the [UN] have little or no confidence in the system as it currently exists.[39]

27. In view of these flaws, the Redesign Panel recommended the establishment by the UNGA of a completely new system of administration of justice:

> In essence, the Redesign Panel proposes the creation of a new, decentralized, independent and streamlined system by strengthening the informal system of internal justice, by providing for a strong mediation mechanism in the Office of the Ombudsman and by merging the offices of the Ombudsman of the United Nations and its funds and programmes; by establishing a new, formal system of justice that replaces advisory boards with a professional and decentralized first-instance adjudicatory body that issues binding decisions that either party can appeal to UNAT; and by guaranteeing "equality of arms", thus ensuring for all staff members access to professionalized and decentralized legal representation.[40]

28. The Secretary-General agreed that a new system was needed, and accepted most of the Redesign Panel's recommendations in their entirety.[41] On 4 April 2007, following receipt of the Secretary-General's response to the Redesign Panel's report, the UNGA decided "to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice".[42]

29. The new system was negotiated in the UNGA between 2007 and 2009. In its resolution 62/228 of 22 December 2007, the UNGA notably established: the Office of Administration of Justice ("OAJ"); the Office of Staff Legal Assistance ("OSLA"), to replace the Panel of Counsel; a single integrated and decentralized Office of the Ombudsman; a Mediation Division; a two-

---

[36] Between 1955 and 1995, UNAdT judgments were subject to review by the International Court of Justice ("ICJ"). See UN General Assembly ("UNGA") resolution 957 (X), A/RES/957(X), 8 November 1955; UNGA resolution 50/54, A/RES/50/54, 11 December 1995.

[37] UNGA resolution 59/283, A/RES/59/283, 13 April 2005, para. 47.

[38] UN, "Report of the Redesign Panel on the United Nations system of administration of justice", A/61/205, 28 July 2006 ("Report of the Redesign Panel").

[39] Report of the Redesign Panel, para. 5.

[40] Report of the Redesign Panel, para. 14.

[41] UN, "Note by the Secretary-General on the Report of the Redesign Panel on the United Nations system of administration of justice", A/61/758, 23 February 2007.

[42] UNGA resolution 61/261, A/RES/61/261, 4 April 2007, para. 4.

tier formal system of administration of justice, comprising a first instance United Nations Dispute Tribunal ("UNDT" or "Dispute Tribunal") and an appellate instance United Nations Appeals Tribunal ("UNAT" or "Appeals Tribunal"); and an independent Management Evaluation Unit.[43]

30. The new system of administration of justice at the UN established by the UNGA went into effect on 1 July 2009. The JABs and JCDs were abolished as of the same date, and the UNAdT was abolished on 31 December 2009.[44]

ii. The current system of administration of justice at the UN

31. The system of administration of justice at the UN is comprised of an informal system and a formal system.

32. The informal system consists of informal conflict resolution provided by UNOMS.[45] All staff members of the UN system may contact UNOMS at any time to seek assistance, and possible intervention.[46]

33. The formal system generally begins when a staff member submits a request to the Secretary-General for a "management evaluation" of an administrative decision.[47] This is essentially the equivalent of a Request for Review in the Court's internal justice system. The majority of management evaluations are conducted by the Management Evaluation Unit in the Department of Management. A management evaluation is a mandatory first step in the formal system, unless the contested administrative decision: (a) was taken pursuant to advice from "technical bodies"; or (b) involves the imposition of a disciplinary or non-disciplinary measure following the completion of a disciplinary process.[48]

34. A staff member who is dissatisfied with a management evaluation may file an application to the UNDT. Where a staff member is not required to request a management evaluation, he or she may file an application directly with the UNDT.[49] The UNDT is an independent first instance tribunal comprised of professional judges appointed by the UNGA, and operates on a full-time basis. The respondent before the UNDT is always the Secretary-General. As noted above, "[a]t any time during the deliberations, the [UNDT] may propose to refer the case to mediation".[50] Judgments and orders of the UNDT are binding upon the parties (i.e. the staff member and the Secretary-General).[51]

---

[43] UNGA resolution 62/228, A/RES/62/228, 22 December 2007, paras. 10, 13, 25, 30, 39 and 52.
[44] UNGA resolution 63/253, A/RES/63/253, 24 December 2008, paras. 38 and 43.
[45] See UN Staff Rule 11.1; Secretary-General's bulletin on Terms of reference for UNOMS (ST/SGB/2016/7).
[46] UNOMS also has agreements in place to assist employees of the ICJ and the World Meteorological Organization ("WMO").
[47] UN Staff Rule 11.2 (a).
[48] UN Staff Rule 11.2 (b). "Technical bodies" are: (a) medical boards or independent medical practitioners duly authorized to review medical decisions or medical recommendations; and (b) classification appeals committees. See UN Administrative Instruction on Technical Bodies (ST/AI/2018/7).
[49] UN Staff Rule 11.4.
[50] UNDT Statute, Article 10 (3).
[51] UNDT Statute, Article 11 (3).

35. Either party may appeal UNDT judgments (and certain interlocutory orders) to the UNAT, which is the second and final instance of appeal within the internal justice system. The UNAT is composed of seven judges appointed by the UNGA and normally holds sessions three times per year. The general jurisdiction of the UNAT is to hear and pass judgment on appeals alleging that the UNDT has exceeded or failed to exercise its jurisdiction or competence, erred on a question of law or procedure, or erred on a question of fact resulting in a manifestly unreasonable decision.[52] In addition, as discussed in more detail below, specialized agencies and other entities participating in the UN common system may conclude a special agreement with the Secretary-General to accept the jurisdiction of the UNAT.[53] UNAT judgments are "final and without appeal",[54] though the UNAT may consider applications for revision, correction, interpretation or execution of a judgment.[55]

36. At any stage of the dispute resolution process, staff members may seek independent legal advice and/or representation from OSLA. OSLA's services are free of charge to staff members.

III. THE ILOAT AND THE UNAT: A COMPARATIVE ANALYSIS

A. Jurisdiction *ratione personae*

37. The ILOAT's jurisdiction *ratione personae*, as defined in the ILOAT Statute, is limited to hearing and determining grievances from "officials" (or former officials or individuals to whom the official's rights have devolved) of international organizations which have recognized the Tribunal's jurisdiction.[56] As noted above, both the Court's staff and its judges are considered "officials" for the purposes of the Tribunal's jurisdiction.[57] In view of the inclusion of the judges, it is reasonable to assume that the ILOAT Statute also confers a right of access on the other Elected Officials of the Court.

38. The jurisdiction *ratione personae* of the UN tribunals, in contrast, is expressly limited to "staff members"; a "narrower category".[58] As the UNAT has recently explained:

> [T]he jurisdiction *ratione materiae* of the Appeals Tribunal is subject to its jurisdiction *ratione personae*. In terms of Article 7(1)(b) of the [UNAT] Statute, an appeal shall be receivable if the appellant is eligible to file the appeal pursuant to Article 2(2) of the [UNAT] Statute, which in turn provides that an appeal may be filed "by either party (i.e., the applicant, a person making claims in the name of an incapacitated or deceased applicant, or the respondent) to a judgment of the Dispute Tribunal". This latter provision has to be read with Article 3(1) of the UNDT Statute, which provides:
>
> > An application under article 2, paragraph 1, of the [UNDT] statute may be filed by:
> >
> > (a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

[52] Statute of the United Nations Appeals Tribunal ("UNAT Statute"), Article 2 (1).
[53] UNAT Statute, Article 2 (10).
[54] UNAT Statute, Article 10.
[55] UNAT Statute, Article 11.
[56] Statute of the Tribunal ("ILOAT Statute"), Article II (1), (5) and (6).
[57] See above, paras. 14-15.
[58] UNAT, *Mindua v. Secretary-General of the UN*, Judgment No. 2019-UNAT-921, para. 15.
See UNDT Statute, Article 3 (1).

> (b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;
>
> (c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.
>
> […]
>
> Allowing persons other than staff members, former staff members or the representatives of incapacitated or deceased staff members to access the appellate jurisdiction of the Appeals Tribunal by way of an application for judicial review of the decision of the UNDT […] not only does violence to the language of the [UNAT] Statute but also detracts from the purpose of the [UNAT] Statute to establish an internal justice system for the benefit solely of the staff of the Organization.[59] [Emphasis added].

39. Applied to the ICC, the narrower jurisdiction of the UNAT would almost certainly exclude the Court's Elected Officials, who are not "staff members" within the meaning of the Rome Statute and the Staff Regulations and Rules.[60]

40. Indeed, the OAJ has confirmed, in unequivocal terms, that ICC judges would not have access to the UNAT. The situation is the same for the judges of the ICJ and the International Residual Mechanism for Criminal Tribunals. In *Mindua v. Secretary-General of the United Nations*, for example, the UNAT found that the appellant, a former *ad litem* judge at the International Criminal Tribunal for the former Yugoslavia, "was not a staff member […]. Hence, the UNDT did not err in dismissing the application as not receivable *ratione personae*."[61]

41. The *Mindua* case is, in fact, notable for the UNDT's recognition of the lack of access to justice at the UN for non-staff personnel more broadly, particularly in view of the jurisdictional immunity enjoyed by international organizations:

> Unfortunately, the jurisdiction of the UNDT is defined […] narrowly, leaving a number of individuals working for the Organization without access to the internal justice system. This includes judges but also consultants, gratis personnel and interns.
>
> The right to access to justice, and its subsidiary right of access to court, are recognised by art. 10 of the Universal Declaration of Human Rights, which provides that "all persons are entitled in full equity to a fair and public hearing by an independent and impartial tribunal". It is also enshrined in art. 14(1) of the International Covenant on Civil and Political Rights.
>
> These provisions on the right of access to justice have become accepted norms of customary international law that are binding not only on United Nations member states but also upon the Organization.
>
> The lack of internal recourse for judges to settle their disputes with the Organization is particularly problematic in view of the Organization's jurisdictional immunity enshrined in the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations. It raises an issue of compliance of the Organization with sec. 29 of said Convention, which demands that "the United Nations shall make provisions for

[59] UNAT, *Matthew Russell Lee v. Secretary-General of the UN*, Judgment No. 2021-UNAT-1170, paras.
[60] See Rome Statute, articles 35, 42, 43, 44 and 49; Staff Regulations, "Scope and purpose" (Annex to ICC/PRESD/G/2016/002).
[61] UNAT, *Mindua v. Secretary-General of the UN*, Judgment No. 2019-UNAT-921, para. 25.

> appropriate modes of settlement of … [d]isputes arising out of contracts or other disputes of a private law character to which the United Nations is a party".
>
> The right to have access to justice in the context of International Organizations that benefit from immunity of jurisdiction was also reinforced by the European Court for Human Rights ("ECHR") in both Judgements *Beer and Regan v. Germany* (Application No. 28934/95) and *Waite and Kennedy v. Germany* (Application No. 16083/94). In its case law, the ECHR stated that International Organizations have to guarantee their staff members access to courts due to the prominent place held in democratic societies by the right to a fair trial guaranteed under art. 6(1) of the European Convention on Human Rights. It held in *Waite and Kennedy* that:
>
> > 68. For the Court, a material factor in determining whether granting [the European Space Agency] immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.[62]

42. The UNAT, concurring, added that:

> The UNDT correctly acknowledged that access to justice is a norm of customary international law. Mr. Mindua suggests that the terms "individual" and "staff member" in Articles 2(1) and 3(1) of the UNDT Statute should be read teleologically and contextually to read into the provisions a broader personal jurisdiction; otherwise judges would have no legal recourse in disputes regarding their benefits. The concern may be legitimate, but, as Secretary-General notes, when the General Assembly defined the scope of the UNDT's jurisdiction, it specifically considered and rejected proposals to include non-staff personnel. The General Assembly has in turn emphasized that the Tribunals shall not have powers beyond those statutorily conferred on them by their respective statutes. If the current situation is in violation of the norms of customary international law, as it appears to be, such is a matter for the General Assembly, and not this Tribunal, to rectify. It will therefore be prudent and in the interests of the Organization for this Judgement to be brought to the attention of the President of the General Assembly for consideration and possible action.[63] [Emphasis added].

43. It follows from the foregoing that moving from the ILOAT to the UNAT would (without provision for alternative means of employment dispute settlement) effectively remove access to justice for the Court's judges and other Elected Officials. As per the UNAT's dictum, this may leave the ICC – an international court – in a "situation" which "appears to be" in "violation of the norms of customary international law".[64] In this respect, the question arises whether, in light of the abovementioned *Waite and Kennedy v. Germany* judgment, European national courts (such as those of the host State) would uphold the Court's jurisdictional immunity in a case brought by an Elected Official if the ICC fails to offer any "reasonable alternative means" for dispute settlement.[65]

44. The Court is informed by the OAJ that the UNGA has been seized of the issue of access to justice for UN judges and other non-staff personnel. However, it has taken no decision on the matter. In the meantime, all issues concerning appointment and conditions of service for

---

[62] UNDT, *Mindua v. Secretary-General of the UN*, Judgment No. UNDT/2018/097, paras. 28-32.
[63] UNAT, *Mindua v. Secretary-General of the UN*, Judgment No. 2019-UNAT-921, para. 26.
[64] *Ibid*.
[65] European Court of Human Rights, *Waite and Kennedy v. Germany*, Application No. 26083/94, para. 68.

judges in the UN justice system are addressed directly to the UNGA for its consideration and decision.

45. Without access to the ILOAT or the UNAT, Elected Officials could have recourse to an essentially similar political process under the auspices of the ASP.[66] Furthermore, building on the IER's recommendation R117, an alternative form of access to justice for Elected Officials could be explored in the form of an independent and impartial "Panel […] made up of three judges" with judicial experience in the field of (international) labour and administrative law.[67] The Court understands from informal consultations with the ILOAT Registry that a "partial" recognition by the ICC of ILOAT jurisdiction to provide a right of access only for Elected Officials would not be possible under the ILOAT Statute.[68]

B. Standard of proof in disciplinary cases

46. The ILOAT requires international organizations "to prove allegations of misconduct beyond a reasonable doubt before a disciplinary sanction can be imposed".[69] This is the highest standard of proof, and it has been pointed out that the same formulation is used in certain national legal systems to establish the burden of proof in criminal proceedings.[70]

47. The ILOAT has held that, "[f]or a finding of misconduct to withstand scrutiny, each of the elements of the alleged misconduct must be proved beyond a reasonable doubt."[71] Furthermore,

> [t]he standard of beyond reasonable doubt concerns both the finding of specific facts and the overall level of satisfaction that the case against the staff member has been made out. In relation to the proof of any essential relevant fact, the person or body charged with the task of assessing the evidence and making a decision in the context of determining disciplinary proceedings must be satisfied beyond reasonable doubt that a particular fact exists.[72]

48. It bears emphasizing that the ILOAT's role in disciplinary cases "is not to assess the evidence itself and determine whether the charge of misconduct has been established beyond reasonable doubt but rather to assess whether there was evidence available to the relevant decision-maker to reach that conclusion". Thus, the ILOAT will "assess whether the decision-maker properly applied the standard when evaluating the evidence".[73]

49. The ILOAT has explained the rationale for this particularly high standard of proof, as follows:

> The standard of proof of beyond reasonable doubt does not exist to create an insuperable barrier for organisations to successfully prosecute disciplinary proceedings against staff members. Indeed it should not have that effect […]. Rather the standard involves the

[66] See e.g. the panel referred to in the Resolution on the remuneration of the judges of the International Criminal Court, Resolution ICC-ASP/18/Res.2, 6 December 2019.
[67] IER Report, pp. 102-103, recommendation R117.
[68] See ILOAT Statute, Article II (5); Annex to ILOAT Statute, paras. 3-4.
[69] ILOAT Judgment No. 4227, consideration 6.
[70] See ILOAT Judgment No. 4047, consideration 6.
[71] ILOAT Judgment No. 3880, consideration 17.
[72] ILOAT Judgment No. 4362, consideration 10.
[73] ILOAT Judgment No. 4362, consideration 7.

> recognition that often disciplinary proceedings can have severe consequences for the affected staff member, including dismissal and potentially serious adverse consequences on the reputation of the staff member and her or his career as an international civil servant, and in these circumstances it is appropriate to require a high level of satisfaction on the part of the organisation that the disciplinary measure is justified because the misconduct has been proved. The likelihood of misconduct having occurred is insufficient and does not afford appropriate protection to international civil servants. It is fundamentally unproductive to say, critically, this standard is the "criminal" standard in some domestic legal systems and a more appropriate standard is the "civil" standard in the same systems involving the assessment of evidence and proof on the balance of probabilities. The standard of beyond reasonable doubt derived from the Tribunal's case law as it has evolved over the decades, serves a purpose peculiar to the law of the international civil service.[74]

50. In contrast, the UNAT has expressly rejected the ILOAT's "beyond a reasonable doubt" standard and instead applies a standard of "clear and convincing evidence":

> We will not follow the ILOAT in holding that the standard of proof in disciplinary cases is beyond a reasonable doubt. While it is correct that beyond a reasonable doubt is the standard at the ILOAT, this has never been the standard at the United Nations. In disciplinary cases we have required that when a disciplinary sanction is imposed by the Administration, "the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence". But we have not as yet set an exact standard for the quantum of proof required.
>
> Disciplinary cases are not criminal. Liberty is not at stake. But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence.[75]

51. "Clear and convincing evidence" is a less rigorous standard than "beyond a reasonable doubt", and is therefore easier to satisfy. However, it is still a relatively high standard of proof which "requires more than a preponderance of the evidence"[76] (i.e. more than a balance of probabilities):

> [C]lear and convincing evidence of misconduct, including serious misconduct, imports two high evidential standards. The first standard: "clear" evidence is that the evidence of misconduct must be unequivocal and manifest. Separately, the second standard: "convincing" requires that this clear evidence must be persuasive to a high degree, appropriate to the gravity of the allegation against the staff member and in light of the severity of the consequence of its acceptance. Evidence, which is required to be clear and convincing, can be direct evidence of events or may be of evidential inferences that can be properly drawn from other direct evidence.[77]

[74] ILOAT Judgment No. 4362, consideration 8.
[75] UNAT, *Molari v. Secretary-General of the UN*, Judgment No. 2011-UNAT-164, paras. 29-30.
[76] UNAT, *Molari v. Secretary-General of the UN*, Judgment No. 2011-UNAT-164, para. 30.
[77] UNAT, *Ahmad Shuaib Payenda v. Secretary-General of the UN*, Judgment No. 2021-UNAT-1156, para. 30.

C. Costs

i. ILOAT

52. The costs of the ILOAT are borne by the ILO and by the other organizations that have accepted its jurisdiction. These costs fall into two categories: (i) overhead costs, which consist of the costs of the core secretariat of the Tribunal; and (ii) session costs, which consist of the direct costs of preparing and running each session and producing the final judgments.

53. The Court's contribution to the ILOAT's overhead costs amounts to approximately 2,000 USD per year.

54. The ILOAT's session costs, from which the cost per judgment may be derived, vary with each session. The ILOAT calculates a total session cost, which is then divided amongst the organizations. The costs are apportioned relative to how many of the organization's cases were considered by the ILOAT at that particular session.

- $Cost\ per\ judgment = \frac{Total\ session\ cost}{Total\ number\ of\ cases\ considered}$

- $ICC\ session\ costs = Cost\ per\ judgment \times Number\ of\ ICC\ cases\ considered$

55. In recent years, the average cost per judgment for the Court has been 16,933 USD.[78] No distinction is made in this regard between a "full" judgment and decisions on applications for interpretation, execution or review of a judgment. However, organizations are not charged for cases which are summarily dismissed as "clearly irreceivable or devoid of merit" under the procedure provided for in Article 7 of the Rules of the Tribunal.

56. Organizations are invoiced for session costs only after a session has been completed and judgments have been delivered.

ii. UNAT[79]

57. The UNAT charges a flat fee of 16,778 USD per full judgment, and 10,468 USD per decision on applications for revision, correction, interpretation or execution of a judgment.

58. A flat fee of 600 USD is charged for interlocutory orders disposing of a procedural motion filed by a party.

59. These fees cover all costs associated with the UNAT's processes. Accordingly, there are no separate overhead costs.

[78] Based on the 10 most recent ILOAT sessions for which the Court received an invoice.

[79] Information provided by the OAJ.

D. Other notable aspects of comparison

i. Administrative and procedural aspects

	ILOAT	UNAT
Timeframe for judgment issuance	Between 2 – 4.5 years for full judgments. The average timeframe is approximately 2.5 years.[80] Cases are prioritized according to the ILOAT's assessment of their urgency. Decisions on applications for review or execution of a judgment are normally issued within 1 year.	The average timeframe for full judgments is approximately 10 months.[81]
Languages	Complaints may be filed in English or French. The language chosen for the complaint must be used in any subsequent written pleadings.	Submissions may be filed in any of the six official languages of the UN (Arabic, Chinese, English, French, Russian and Spanish).
Page and word limits	No page and word limits.	Appeal, answer, cross-appeal and answer to cross-appeal: 15 pages. Application for revision of a judgment: 5 pages. Applications for interpretation, correction or execution of a judgment: 2 pages. Word limits: 6,750 words for a 15-page brief; 2,250 words for a five-page brief; 900 words for a two-page brief.
Time limits	Complaint: Within 90 days of notification of the impugned decision. Reply: Within 30 days of receipt of the complaint. Rejoinder: Within 30 days of receipt of the reply. Surrejoinder: Within 30 days of receipt of the rejoinder. Applications for interpretation, execution or review of a judgment: No time limit. The ICC normally requests an extension of 60 days to file its submissions in light of other pressing commitments.	Appeal: Within 60 calendar days of receipt of UNDT judgment. The time limit for filing an appeal may be extended upon written request in exceptional cases. Answer: Within 60 calendar days of receipt of the appeal. Cross-appeal: Within 60 calendar days of notification of the appeal. Answer to cross-appeal: Within 60 calendar days of notification of cross-appeal. Application for revision of a judgment: Within 30 calendar days of discovery of a decisive fact that was unknown at the time the judgment was rendered. Applications for interpretation, correction or execution: No time limit.

[80] Based on the 20 most recent full judgments concerning the Court.

[81] Based on data in June 2022 provided by the OAJ.

		The President of the UNAT or the panel hearing a case "may shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require".[82]
Transmission of documents	Documents may be transmitted electronically by email. The Registry of the ILOAT may request hard copies of the written submissions at a later stage and determine the number of copies needed, or may decide to itself make copies of less voluminous submissions.	Documents should be submitted electronically through the UNAT's e-filing system. Otherwise, submissions may be filed by email or by other means.

ii. Liability-related aspects

	ILOAT	**UNAT**
Rescission/ Specific performance and reinstatement	If satisfied that the complaint was well founded, "shall order the rescinding of the decision impugned or the performance of the obligation relied upon." Compensation is awarded only if such rescinding of a decision or execution of an obligation "is not possible or advisable".[83] There is no requirement to set an amount of compensation *in lieu* as an alternative to rescission or specific performance. Reinstatement of an official on a fixed-term contract is ordered "only in exceptional cases".[84] "As a rule, an official dismissed on disciplinary grounds whose dismissal is set aside is entitled to be reinstated. However, the Tribunal may refuse to make such an order if reinstatement is no longer possible or if it is inappropriate […]. [R]einstatement is inadvisable when an employer has valid reasons for losing confidence in an employee".[85]	May order "[r]escission of the contested administrative decision or specific performance, provided that, <u>where the contested administrative decision concerns appointment, promotion or termination, the [UNAT] shall also set an amount of compensation that the respondent may elect to pay as an alternative</u> to the rescission of the contested administrative decision or specific performance ordered".[86] [Emphasis added]. Accordingly, where the UNAT orders reinstatement or re-employment, it must set an amount of compensation *in lieu* that the Secretary-General may elect to pay as an alternative. This effectively means that "the Secretary-General is granted a power to override the decision of the tribunal ordering reinstatement or re-employment."[87]

[82] Rules of Procedure of the UNAT, Article 30.
[83] ILOAT Statute, Article VIII.
[84] ILOAT Judgment No. 4063, consideration 11.
[85] ILOAT Judgment No. 4310, consideration 13.
[86] UNAT Statute, Article 9 (1) (a).
[87] UNAT, *Alex Lucchini v. Secretary-General of the UN*, Judgment No. 2021-UNAT-1121, para. 60.

Compensation	No limit on compensation for injury.	Compensation for harm "shall normally not exceed the equivalent of two years' net base salary of the applicant."[88] However, the UNAT may order payment of a higher compensation in "exceptional cases".[89]
Counterclaims for costs	Possesses the inherent power to impose a costs penalty upon a complainant. However, counterclaims are almost never awarded in practice: "Clearly, such power must be exercised with the greatest care and only in the most exceptional situations since it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards of costs."[90] Even where counterclaims are awarded, the amounts will be "nominal" (i.e. 1-100 EUR) if it is the "first time the Tribunal has had to act against the […] complainant."[91]	May award costs against a party when that party has "manifestly abused the appeals process".[92] Awards of costs against staff members are potentially substantial, and in some cases may correspond to half or even the full cost of a UNAT judgment.[93] The UNGA has emphasized the importance of effective measures against the filing of frivolous applications, and has encouraged judges to make use of measures available to them.[94]
Punitive or exemplary damages	An award of punitive damages can be made "only in exceptional circumstances, for instance where an organisation's conduct has been in gross breach of its obligation to act in good faith."[95] The complainant must demonstrate "bias, ill will, malice, bad faith or other improper purpose".[96] Punitive damages are awarded as a "punishment and deterrent".[97]	Prohibited from awarding exemplary or punitive damages.[98]

[88] UNAT Statute, Article 9 (1) (b).
[89] *Ibid*.
[90] ILOAT Judgment No. 1884, consideration 8.
[91] ILOAT Judgment No. 4025, consideration 12; ILOAT Judgment No. 2211, consideration 8
[92] UNAT Statute, Article 9 (b) (2).
[93] See UNAT, *Chaaban v Commissioner-General of the UN Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2015-UNAT-554, paras. 41-45; UNAT, *Chaaban v Commissioner-General of the UN Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2016-UNAT-611, para. 27.
[94] UNGA resolution 67/241, A/RES/67/241, 24 December 2012, para. 42. See UNAT, *Monarawila v. Secretary-General of the UN*, Judgment No. 2016-UNAT-694, paras. 36-37.
[95] ILOAT Judgment No. 4391, consideration 14, citing ILOAT Judgment No. 3966, consideration 11.
[96] ILOAT Judgment No. 3286, consideration 27.
[97] ILOAT Judgment No. 4493, consideration 11.
[98] UNAT Statute, Article 9 (b) (3).

IV. MOVING FROM THE ILOAT TO THE UNAT

A. Withdrawal from ILOAT jurisdiction

60. The procedure for withdrawal from the ILOAT's jurisdiction is set forth in paragraphs 3 and 4 of the Annex to the ILOAT Statute:

> 3. An international organization may withdraw its declaration recognizing the jurisdiction of the Tribunal in keeping with the principles of good faith and transparency. The organization shall address to the Director-General an official communication notifying the relevant decision which should emanate from the same organ which decided to recognize the Tribunal's jurisdiction or the organ currently competent to take such a decision, reaffirming its commitment to faithfully execute judgments on any pending cases and indicating, as appropriate, the reasons for withdrawing the recognition of the Tribunal's jurisdiction, the alternative means of employment dispute settlement envisaged and any consultations with the staff representative bodies prior to the withdrawal decision.
>
> 4. At its next session following the notification of withdrawal, the Governing Body, after consultation with the Tribunal, shall take note of the withdrawal of the organization concerned, and shall confirm that as of that date, or any other later date as may be agreed upon with the organization concerned, the organization shall no longer be subject to the competence of the Tribunal. No new complaint filed against the organization after the effective date of the withdrawal shall be entertained by the Tribunal.

61. Notably, "[t]he last sentence of paragraph 4 referring to complaints filed after the effective date of the withdrawal, should […] not be interpreted as excluding the Tribunal's competence to consider applications for interpretation, execution or review" of a judgment.[99]

62. The abovementioned paragraphs are intentionally described as a "procedure" in Article II, paragraph 5, of the ILOAT Statute, rather than "conditions". This is "to clarify that withdrawal is not subject to legally binding requirements."[100] This notwithstanding, the position of the Governing Body of the International Labour Office ("ILO Governing Body")[101] is that, "[w]hile the recognition of the Tribunal's jurisdiction is in essence a unilateral declaration by an international organization which can be unilaterally revoked, a withdrawal from the Tribunal's membership needs to be […] confirmed by the Governing Body to become effective."[102]

63. In the case of the Court, the "official communication" pursuant to paragraph 3 would take the form of a letter from the Registrar of the Court, acting under authority vested by the ASP, to the ILO Director-General.[103]

---

[99] ILO Governing Body, "Proposed amendments to the Statute of the Tribunal", GB.341/PFA/15/1, 19 February 2021, para. 8.

[100] *Ibid*.

[101] The ILO Governing Body is the executive body of the International Labour Organization.

[102] ILO Governing Body, "Withdrawal of the recognition of the Tribunal's jurisdiction by the Universal Postal Union", GB.341bis/PFA/4(Rev.1), 18 May 2021, para. 4.

[103] See ILO Governing Body, "Recognition of the Tribunal's jurisdiction by the International Criminal Court (ICC)", GB.286/PFA/17/3(Rev.), March 2003.

B. Accepting UNAT jurisdiction

i. Jurisdictional preconditions of Article 2 (10) of the UNAT Statute

64. Article 2 (10) of the UNAT Statute provides for the extension of the UNAT's appellate jurisdiction to specialized agencies, international organizations and other entities established by a treaty and participating in the UN common system:

> The [UNAT] shall be competent to hear and pass judgement on an application filed against a specialized agency […] 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 [UNAT], consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the [UNAT] and be responsible for the payment of any compensation awarded by the [UNAT] in respect of its own staff members and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the [UNAT] and concerning its sharing of the expenses of the [UNAT]. Such special agreement shall also contain other provisions required for the [UNAT] to carry out its functions *vis-a-vis* the agency, organization or entity. Such 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. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

65. The ICC is not part of the UN common system; however, it voluntarily applies the UN common system of salaries, allowances and other conditions of service,[104] and has been brought into a relationship with the UN through an agreement.[105] Accordingly, the Court would be eligible to accept the jurisdiction of the UNAT.

66. The Court takes note of the IER's recommendation that "resorting to the [UNAT] […] would […] be in line with the Court's use of the UN Common System" (R120). At the same time, it bears noting that several organizations of the UN common system (or voluntarily applying the common system), including seven UN specialized agencies, recognize the jurisdiction of the ILOAT.[106]

67. In summary, UNAT jurisdiction may be extended to the Court only if the following conditions precedent are established:

    i) A special agreement must be concluded between the ICC and the Secretary-General to accept the terms of jurisdiction, consonant with the UNAT Statute, and binding it to the judgments of the UNAT;

---

[104] See e.g. Staff Regulations, Articles II, III, V, VI and IX; Staff Rules, Chapters II and III.

[105] See Rome Statute, article 2; Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Resolution ICC-ASP/3/Res.1, 7 September 2004.

[106] International Labour Organization, "Organizations recognizing the jurisdiction", at https://www.ilo.org/tribunal/membership/lang--en/index.htm on 17 June 2022.

ii) The agreement will only be binding if the ICC utilizes a neutral first instance process;

iii) The neutral first instance process must include a written record of all evidence adduced before it;

iv) The neutral first instance process must include a written decision; and

v) The written decision of the neutral first instance process must provide reasons (findings of fact and law upon which the result is based).[107]

68. The UNAT has held in unequivocal terms that it will have no jurisdiction to consider an appeal unless each of the preconditions of Article 2 (10) of the UNAT Statute have been complied with.[108]

69. Notably, there is no requirement for the Court to avail itself of the other main components of the UN internal justice system (i.e. the UNDT, OSLA and UNOMS).

ii. The requirement of a neutral first instance decision-making body

70. Since 2019, there have been several instances of the UNAT declining to review cases where it considered that the requirement of a decision by a neutral first instance body was not met, often resulting in such cases being remanded to the organizations.[109] This recurring issue has recently been highlighted by the UNAT itself:

> We wish to add the following observation for the benefit of other parties in a similar position to the Respondent, that is other agencies which have elected to join the United Nations' internal justice system. We have been advised of uncertainty among such agencies and we are aware of the unfortunate history of some cases being remanded more than once to internal appeals boards to bring cases within our jurisdiction. That has benefitted no-one, whether staff or the agencies, and has added to our already stretched dockets of appeal cases.
>
> As the leading cases on this issue have made clear, the problem arises when the conditions attaching to Article 2(10) of the UNAT Statute are not met, that is most commonly when the agency does not have a neutral decision-making body from which appeals may go to the UNAT. That is an essential prerequisite of the UNAT's remit – unless that condition is fulfilled, then the UNAT has no jurisdiction to consider the appeal substantively and must

[107] See UNAT, *Margaret Mary Fogarty et al. v. Secretary-General of the International Maritime Organization* ("IMO"), Judgment No. 2021-UNAT-1148, para. 10.
[108] UNAT, *Margaret Mary Fogarty et al. v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1148, para. 14; UNAT, *Louis Savadogo v. Registrar of the International Tribunal for the Law of the Sea* ("ITLOS"), Judgment No. 2022-UNAT-1189, para. 22.
[109] See e.g. UNAT, *Spinardi v. Secretary-General of the IMO*, Judgment No. 2019-UNAT-957; UNAT, *RoseMarie Heftberger v. Secretary-General of the International Civil Aviation Organisation* ("ICAO"), Judgment No. 2020-UNAT-1012; UNAT, *Abrate et al. v. Secretary-General of the WMO*, Judgment No. 2020-UNAT-1031; UNAT, *Margaret Mary Fogarty v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1117; UNAT, *Louis Savadogo v. Registrar of the ITLOS*, Judgment No. 2022-UNAT-1189.

> say so. In such cases, the UNAT has sent the case back to the agency to be decided by a properly constituted, neutral decision-making (not advisory) body.[110]

71. While the exact parameters of what constitutes an acceptable "neutral first instance process" are less than clear, the UNAT has offered the following general guidance:

> For the UNAT to have jurisdiction to consider an appeal from a staff member of such a body as the [International Tribunal for the Law of the Sea ("ITLOS")], the staff member's claim had to be decided by a neutral (that is, an independent) authority and not by the employer (in the person of the head of the Agency) on the recommendation of such a neutral first instance body.
>
> […]
>
> The "neutral first instance process" referred to in the UNAT Statute must be a decision-making process. Neutrality means independence of the body, person or agency against whom the claim is brought. The neutrality cannot encompass a process in which the appellate decision-maker is the same person as made the original decision which is the subject of the appeal. Nor is it sufficient that only part of the decision-making process is neutral, that is independent of the employer […]. The decision-maker in the staff member's case must be neutral and must be part of that required neutral process. Indeed, the decision-making part of that process is arguably its most important element and so must be neutral, that is independent of the parties to the case […].[111]

72. It is obvious from the foregoing that the ICC's internal justice system does not currently utilize a "neutral first instance process" within the meaning of Article 2 (10) of the UNAT Statute. As noted above,[112] the Court's AB and DAB are advisory peer-review bodies that are limited to making recommendations to the Registrar or the Prosecutor. Neither has the power to issue binding decisions.[113] Furthermore, the Registrar and the Prosecutor, who retain full discretion to decide administrative appeals and disciplinary cases, "cannot be a neutral or disinterested body"[114] as they are the "human embodiment of the [staff members'] employer".[115] It is precisely this kind of "recommendatory regime" that "recent judgments of [the UNAT] indicate […] [does] not accord with Article 2(10) of the UNAT Statute".[116]

73. Accordingly, in order for the UNAT to extend its jurisdiction to the ICC, the Court must first replace the current recommendatory regime with a neutral first instance body that issues binding decisions.

---

[110] UNAT, *Louis Savadogo v. Registrar of the ITLOS*, Judgment No. 2022-UNAT-1189, paras. 21-22.
[111] UNAT, *Louis Savadogo v. Registrar of the ITLOS*, Judgment No. 2022-UNAT-1189, paras. 21-22.
[112] See above, para. 10.
[113] It may also be doubted whether a body composed solely of staff members would be sufficiently "neutral" for the purposes of Article 2 (10) of the UNAT Statute.
[114] UNAT, *Andrea Barbato v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1150, para. 60.
[115] UNAT, *Louis Savadogo v. Registrar of the ITLOS*, Judgment No. 2022-UNAT-1189, para. 9. See Rome Statute, articles 42-44.
[116] UNAT, *Louis Savadogo v. Registrar of the ITLOS*, Judgment No. 2022-UNAT-1189, para. 17.

iii. Options for a neutral first instance decision-making body and the professionalization of the Court's internal justice system

74. Different potential modalities can be explored in order to meet the requirement for a neutral first instance decision-making body:

    (a) **Independent and impartial first instance judge.** As a short-term solution, the Court could engage a judge or former judge with judicial experience in the field of (international) labour and administrative law. This could be done along the lines of recommendation R117 of the IER Report, which recommends that the "First Instance Dispute Judge would not be a permanent position, but called on to act on a need-basis. A roster of suitable judges could be set up for such purpose."[117]

    (b) **UNDT.** The Court could accept the jurisdiction of the UNDT under the terms of Article 2 (5) of the UNDT Statute. Unlike submission to UNAT jurisdiction, the only jurisdictional precondition is that a special agreement must be concluded between the ICC and the Secretary-General to accept the terms of jurisdiction, consonant with the UNDT Statute, and binding it to the judgments of the UNDT.[118] The UNDT charges a flat fee of 14,153 USD per full judgment, and 10,468 USD per decision on applications for revision, correction, interpretation or execution of a judgment. These fees cover all costs associated with the UNDT's processes. Accordingly, there are no separate overhead costs.[119] Regarding the timeframe for judgment issuance, data for UNDT cases disposed in 2022 shows that 40 of 104 cases were disposed of within 100 days, while the remaining 64 cases were disposed of within 100 to 500-plus days.[120] For comparison, the average timeframe for reports issued by the Court's AB and DAB in recent years is approximately 128 days for AB reports and 123 days for DAB reports.[121]

    (c) In the long term, the Court could explore the establishment of a more permanent **ICC-specific mechanism** or the formation of an **inter-organizational body with other organizations**. Initial discussions with other organizations show that there is interest in exploring such a shared mechanism. However, this might prove difficult to implement in practice.

75. The Court notes that options to professionalize the ICC's internal justice system may be explored even if the Court decides not to submit to UNAT jurisdiction. However, if the Court decides to submit to UNDT jurisdiction, then it must also accept the jurisdiction of the UNAT.[122]

76. In this connection, the Court takes note of the IER's recommendation that the replacement of the current peer-review system by a professionalized first instance decision-making body would be "favourable to the Court" from a cost-benefit perspective, "and will enhance the

[117] IER Report, p. 102.
[118] UNDT Statute, Article 2 (5).
[119] Information provided by the OAJ.
[120] Data provided by the OAJ.
[121] Based on data for 2019-2021.
[122] UNDT Statute, Article 11 (3); UNAT Statute, Article 2.

settlement of disputes and, accordingly, reduce escalation" to the final instance tribunal (R116).[123]

77. At the same time, it is important also to note that the Court would have to bear the additional costs associated with engaging a first instance judge; submission to UNDT jurisdiction; and/or the establishment of a new mechanism. In the existing system, by contrast, the members, Secretary and alternate Secretary of the AB and DAB fulfil their functions in the first instance process voluntarily at no explicit additional cost to the Court.[124]

78. The Court also takes note of the IER's observation that "[s]taff members elected to be part of the peer-based mechanisms are not trained for these additional responsibilities and are not given enough time to work on them. Moreover, the Court lacks transparency in the appointment of members of these bodies."[125] It may be added that many staff are engaged in the work of the AB and DAB at times when they would otherwise be performing their official duties.[126]

79. Accordingly, as suggested by the IER in recommendation R121, the move to a professionalized system of internal justice may indeed provide "the convenience of strengthening transparency, confidentiality and trust for the staff to be able to use it more frequently and for it to be more efficient".[127]

iv. Amendments to the Court's legal framework

80. Moving from the ILOAT to the UNAT, and the corresponding need to ensure compliance with the jurisdictional requirements of Article 2 (10) of the UNAT Statute, would require fundamental and extensive changes to the Court's administrative legal framework. In particular, the existing recommendatory regime utilizing the AB and DAB would need to be abolished and replaced with a neutral first instance decision-making process.

81. In this regard, it would also be necessary to make provision for clear transitional procedures. In the case of the reform of the UN system, for example, the UNGA requested the Secretary-General "to ensure that the current formal system of administration of justice continues to function, as appropriate, until the completion of the transition to the new system", and decided that "all cases pending before [JABs and JDCs] [would] be transferred, as from the abolishment of those bodies, to the [UNDT]".[128]

---

[123] IER Report, p. 102, recommendation R116.

[124] *Cf.* Report of the Redesign Panel, paras. 133-138, observing that the use of peer-review advisory bodies may entail "significant hidden costs".

[125] IER Report, para. 296.

[126] See Report of the Redesign Panel, paras. 133-138.

[127] IER Report, p. 103, recommendation R121.

[128] UNGA resolution 63/253, A/RES/63/253, 24 December 2008, paras. 35-51. See also Report of the Redesign Panel, para. 148: "[T]he Panel considers that the JABs and JDCs should proceed with all current matters and all matters filed until 1 January 2008, but that matters not disposed of by that date should be transferred to the Dispute Tribunal to be determined in accordance with the pleadings as filed and such further pleadings as may be directed."

82. The provisions that would be affected by these changes include, but are not limited to, the following:

Staff Regulations
10.1 The Registrar or the Prosecutor, as appropriate, shall establish administrative machinery with staff participation which will be available to advise them in disciplinary cases.
11.1 The Registrar or the Prosecutor, as appropriate, shall establish administrative machinery with staff participation which will be available to advise them in disciplinary cases.
11.2 The Administrative Tribunal of the International Labour Organization shall, under conditions prescribed in its statute, hear and pass judgment on applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules.
Staff Rules
Chapter X: Disciplinary Measures
Chapter XI: Appeals
Administrative Issuances
Administrative Instruction on Equal Employment Opportunity and Treatment (ICC/AI/2005/006)
Administrative Instruction on Short-Term Appointments (ICC/AI/2016/001)
Administrative Instruction on Rules of Procedure of the Appeals Board (ICC/AI/2019/005) and Annex to ICC/AI/2019/005
Administrative Instruction on Rules of Procedure of the Disciplinary Advisory Board (ICC/AI/2019/006) and Annex to ICC/AI/2019/006
Administrative Instruction on Investigations of Unsatisfactory Conduct (ICC/AI/2022/001)
Administrative Instruction on Unsatisfactory Conduct and Disciplinary Proceedings (ICC/AI/2022/002)
Information Circular on Composition of the Appeals Board
Information Circular on Composition of the Disciplinary Advisory Board

83. The precise nature of the changes to be made would in many cases depend on the chosen neutral first instance decision-making body.

84. The legality of rule change in the context of organizations' attempts to achieve compliance with Article 2 (10) of the UNAT Statute is another recurring issue that the UNAT has recently highlighted in its jurisprudence:

> Confusion appears to have arisen also about whether, when, and how an agency may have to change its Staff Regulations and Rules or other legislative codes which establish […] a [neutral decision-making body] to which staff can look if they wish to challenge administrative decisions of the agency. It is not the function of the UNAT to tell or advise an agency how to make such changes as may be necessary to achieve that compliance with its special agreement with the United Nations to allow appeals to come to the UNAT. Agencies must take their own legal advice about what they may need to do in this regard. Nevertheless, getting these policies and procedures right is also a matter of whether the UNAT has jurisdiction under Article 2(10): a special agreement between an agency and the

> United Nations can only be concluded if the agency utilizes a neutral first instance process that, among other things, provides a written decision.[129] [Emphasis added].

85. The case of the International Maritime Organization ("IMO") is illustrative in this regard.

86. On 30 July 2020, the Secretary-General of the IMO circulated an internal memorandum to all IMO staff announcing that the IMO would undertake a complete review of its Staff Rules and Regulations in order to ensure that IMO's system complied with recent UNAT jurisprudence on the requirements of Article 2 (10) of the UNAT Statute. As this was likely to take time, the IMO Secretary-General decided that a number of IMO Staff Rules would be partially suspended so that IMO's Staff Appeals Board ("SAB") would no longer make recommendations to him regarding the cases before it. Instead, the SAB would serve as a neutral first-instance body and issue binding decisions.[130]

87. When the legality of this amendment came before the UNAT in *Margaret Mary Fogarty v. Secretary-General of the IMO*, the UNAT found that the evidence and submissions on record did not allow it to determine whether the IMO Secretary-General in fact had the power to amend the IMO Staff Rules (and thus the powers of the SAB) in this manner.[131] The case was remanded back to the SAB for it to "elucidate the factual and legal basis of its jurisdiction to render a decision when the express language and context of the [IMO] Staff Rules in their present form give it no power."[132]

88. Subsequently, in *Margaret Mary Fogarty et al. v. Secretary-General of the IMO*, the UNAT opined that, "[i]n the final analysis, the defects in the internal legal framework exposed by the litigation call for new effective [IMO] Staff Regulations and Staff Rules to be formulated and enacted in terms of IMO's applicable power of amendment."[133] In the same vein, the UNAT further opined that, if the IMO Secretary-General's decision was indeed an invalid exercise of the power of amendment, the situation could "most probably […] be very easily cured by a retrospective amendment properly formulated and enacted on the basis of sound, professional, expert, legal advice."[134]

89. It follows from the foregoing that, when amending its internal legal framework to accord with the requirements of Article 2 (10) of the UNAT Statute, the Court would need to ensure timely and strict compliance with the "applicable power of amendment".[135]

---

[129] UNAT, *Louis Savadogo v. Registrar of the ITLOS*, Judgment No. 2022-UNAT-1189, para. 23.
[130] UNAT, *Margaret Mary Fogarty et al. v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1148, paras. 22-23. See also UNAT, *Margaret Mary Fogarty v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1117, para. 23.
[131] UNAT, *Margaret Mary Fogarty v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1117, para. 36.
[132] UNAT, *Margaret Mary Fogarty et al. v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1148, para. 29.
[133] UNAT, *Margaret Mary Fogarty et al. v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1148, para. 53.
[134] UNAT, *Margaret Mary Fogarty et al. v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1148, para. 68.
[135] UNAT, *Margaret Mary Fogarty et al. v. Secretary-General of the IMO*, Judgment No. 2021-UNAT-1148, para. 53.

90. In the case of the Staff Regulations and Rules, amendments must be made in accordance with the requirements of Article XII of the Staff Regulations[136]:

> 12.1 The present Regulations may be supplemented or amended by the Assembly of States Parties, on the proposal of the Registrar, with the agreement of the Presidency and the Prosecutor, without prejudice to the acquired rights of staff members.
>
> 12.2 The Registrar, with the agreement of the Presidency and the Prosecutor, shall provide such staff rules that are consistent with the present Staff Regulations as they consider necessary. The full text of provisional staff rules and amendments shall be reported annually to the Assembly. Should the Assembly, upon consideration, find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rule and/or amendment be withdrawn or modified.[137]

91. Amendments to the Staff Regulations and Rules are automatically incorporated into staff members' employment contracts upon their entry into force.[138]

92. Amendments or abolition of Administrative Instructions and Information Circulars may only be effected by Presidential Directives and Administrative Instructions duly promulgated in accordance with the requirements of the Presidential Directive on Procedures for the Promulgation of Administrative Issuances (ICC/PRESD/G/2003/001).[139]

C. Timeline for implementation

93. The timeline for implementation will depend on the outcome of the ASP's deliberations on the issues raised in this report, including in particular whether to submit to UNAT jurisdiction, and the allocation of adequate resources. In the event of a decision to move from the ILOAT to the UNAT, the Court will expedite the drafting of proposed new text for the Staff Regulations and Rules along with related Administrative Issuances. In view of the potentially extensive changes to the Court's administrative legal framework, it is envisaged that the new internal justice system could be operational by 2024, if the decision to move to the UNAT is taken at the ASP in 2022.

***

[136] See also Staff Rule 112.1: "These Staff Rules may be amended in accordance with article XII of the Staff Regulations."

[137] See also Rome Statute, article 44 (3): "The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties."

[138] See Staff Rule 104.1 (b) (v) and Staff Rule 104.2 (a) (vi). The offer of appointment and letter of appointment comprising staff members' employment contracts specify "[t]hat the appointment shall be governed by the provisions of the Staff Regulations and Rules and any subsequent amendments thereto".

[139] See e.g. Administrative Instruction on Abolition of Some Information Circulars (ICC/AI/2019/004).