

The ADBAT before the Human Rights Committee: Globalising *Waite and Kennedy* but Failing to Protect Judicial Independence Effectively

Dana Burchardt*

WZB Berlin Social Science Center, Berlin, Germany

dana.burchardt@wzb.eu

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Abstract

In its views adopted on 18 July 2024 that concerned the Administrative Tribunal of the Asian Development Bank, the United Nations (UN) Human Rights Committee adopted the rationale of the *Waite and Kennedy* decision of the European Court of Human Rights, a decision aiming at ensuring procedural guarantees within international organisations. This is an important step towards addressing rule of law and fair trial issues within international organisations. This article analyses the way in which the Committee takes up the *Waite and Kennedy* approach, globalising it as a general standard for international organisations. Yet the article also shows that the Committee failed to apply the relevant legal standard in an appropriate manner in the case at hand, in particular in relation to the principle of judicial independence. It concludes by discussing whether the approach taken by the Committee strikes a convincing balance between the benefits and risks of establishing procedural requirements in a transnational manner.

* PD Dr., WZB Berlin Social Science Center.

Keywords

international organisations – internal justice mechanisms – fair trial standards – judicial independence – transnational procedural guarantees

I. Introduction

Fair trial and judicial independence standards in disputes between international organisations and individuals are an important aspect of the rule of law on the international level. Structurally, such standards have, however, been difficult to monitor and enforce, in particular because international organisations are not parties to international and/or regional human rights instruments and thus not subject to the supervision by these instruments' judicial and quasi-judicial bodies. For the individuals concerned by acts of international organisations, the access to court in disputes with international organisations has been, for the most part, limited by the functional immunities of the international organisation. The (attempted) alternative of accessing justice has been to bring cases against the member states of the international organisation. Both these ways to access to justice – directly against the international organisation and indirectly via the member states – have been controversial for a long time, with the jurisprudence of different international and domestic courts diverging on the matter. A key case in this regard is the *Waite and Kennedy* decision of the European Court of Human Rights (ECtHR) of 1999.¹ This case has been the starting point for a jurisprudence both of the ECtHR and of several domestic courts that aims at ensuring procedural guarantees on the international level.

In its views adopted on 18 July 2024 in communication No. 3581/2019 (*M. L. D. v. Philippines*) that concerned the Administrative Tribunal of the Asian Development Bank (ADBAT), the UN Human Rights Committee adopted the rationale of the *Waite and Kennedy* decision. By doing so, it took an important step towards addressing rule of law and fair trial issues within international organisations and their internal justice mechanisms. Although the Human Rights Committee's decision is not without weaknesses (see below), the overall approach of expanding fair trial requirements of international organisations beyond the European legal space – in other words: of globalising these requirements – is a very welcome and necessary develop-

¹ ECtHR (Grand Chamber), *Waite and Kennedy v. Germany*, judgment of 18 February 1999, no. 26083/94.

ment for the international legal order. This globalising effect is the first important impact of the ADBAT case.

The Committee's decision is relevant not only for the Asian Development Bank but also for other international organisations and their member states. Accordingly, it has already been prominently cited at the International Law Commission by Special Rapporteur August Reinisch in his 'Third report on the settlement of disputes to which international organizations are parties'.² In light of the decision's general importance, it is thus useful to consider its elements in more detail. Section II of this article outlines the facts of the case before the Human Rights Committee (HRC) and its relevance for other international organisations. Section III shows how the Committee adopts and thus globalises the Waite and Kennedy approach. Section IV analyses the fair trial standard that the Committee establishes for cases involving international organisations.

However, despite the welcome adoption of the Waite and Kennedy approach, the Committee unfortunately failed to apply the relevant legal standard in an appropriate manner in the case at hand. As section V outlines, the Committee did not assess the independence of the Administrative Tribunal in an appropriate depth and manner. By doing so, it missed an opportunity to protect judicial independence and the related fair trial rights of applicants before international bodies. Rather, as section V shows, it might have undermined judicial independence as a standard for international justice mechanisms of international organisations. This is the second significant, yet unwelcome, impact of this decision. Against this backdrop, section VI discusses whether the approach taken by the Human Rights Committee in its decision of July 2024 strikes a convincing balance between the benefits and risks of establishing procedural requirements in a transnational manner.

II. Facts of the Case and the Relevance of the Matter for Other International Organisations

The case was brought against the Philippines by a former staff member of the Asian Development Bank (ADB) in relation to an employment dispute. The ADB is an international organisation created in 1966 and headquartered in the Philippines with 68 member states both from the Asia-Pacific region and from beyond.³ For employment disputes, this organisation provides an

² ILC, 'Third Report on the Settlement of Disputes to Which International Organizations Are Parties', by August Reinisch, Special Rapporteur, 30 January 2025, A/CN.4/782.

³ See Agreement Establishing the Asian Development Bank, in force since 22 August 1966, available at <<https://www.adb.org/sites/default/files/institutional-document/32120/charter.pdf>>, last access 18 March 2026.

internal justice mechanism. In case of dispute, staff members can bring their case to the ADB's Administrative Tribunal (ADBAT).⁴ This tribunal has been set up in 1991 by the Board of Directors of the ADB. It is composed of five judges (Article IV (1) Statute of the ADBAT).

The ADB staff member (M. L. D.) that later became the applicant before the Human Rights Committee challenged a termination of her employment contract before the ADBAT. Her contract had been terminated for reasons of alleged unsatisfactory performance.⁵ In 2017, the ADBAT decided her case in favour of the ADB.⁶

She approached the Human Rights Committee claiming that the ADBAT has structural deficiencies, in particular that it is not an independent and impartial tribunal.⁷ As a result, she argued that the ADB falls short of its obligations to provide an independent and impartial internal justice mechanism. According to the applicant, 'as held by the International Court of Justice, civil service tribunals at international organizations must render justice independently and impartially, and in compliance with the right to a fair trial'.⁸ She further argued that when and as far as international organisations enjoy (functional) immunities and thus their actions cannot be challenged before domestic courts, they have to provide 'reasonable alternative means' of dispute resolution to their staff members as required by the ECtHR in its *Waite and Kennedy* decision of 1999.⁹ In addition to this main claim as to the right to an independent and impartial tribunal, she also claimed that her right to a fair trial was violated as she was denied an oral hearing despite a contestation of the facts and of her credibility, and further procedural issues occurred such as that the ADBAT not taking evidence adduced by the author into account, the ADBAT failing to address the allegations of reprisals by the ADB against witnesses, the ADBAT not allowing the Ombudsperson to provide a witness testimony and the lacking possibility to appeal the ADBAT decision.¹⁰

With regard to these structural and particular issues, she saw the responsibility of the Philippines, the host state of the ADB, to be engaged. She approached the Philippines' Department of Foreign Affairs, urging the Phil-

⁴ See Statute of the Administrative Tribunal of the Asian Development Bank, available at <<https://www.adb.org/sites/default/files/institutional-document/33394/statute-adb-tribunal.pdf>>, last access 18 March 2026.

⁵ HRC, *M. L. D. v. Phillipines*, views of 18 July 2024, no. 3581/2019, CCPR/C/141/D/3581/201, para. 2.1.

⁶ HRC, *M. L. D. v. Phillipines* (n. 5), para. 2.2.

⁷ HRC, *M. L. D. v. Phillipines* (n. 5), para. 3.2.

⁸ HRC, *M. L. D. v. Phillipines* (n. 5), para. 3.1.

⁹ HRC, *M. L. D. v. Phillipines* (n. 5), para. 3.1.

¹⁰ HRC, *M. L. D. v. Phillipines* (n. 5), para. 3.2.

ippines to ensure that the violations were brought to an end and that her fair trial rights were restored.¹¹ As this remained without success, she filed a complaint to the Human Rights Committee. She claimed in particular that her rights under article 14 (1), read in conjunction with article 2 (3) of the Covenant were violated as she did not have access to an independent and impartial tribunal and as the procedure before the ADBAT did not fulfil fair trial standards.¹²

The issues raised in this case are of a general relevance that goes beyond the context of the ADB. Similar issues with regard to judicial independence and fair trial as the ones addressed by the applicant in this case exist in the internal dispute resolution mechanisms of other international organisations.¹³ For example, even in long established tribunals such as the Administrative Tribunal of the International Labour Organisation, independence deficits have been observed by various authors¹⁴ – although attempts have been made to enhance the judges' independence. The issues include lacking de jure safeguards as to judicial independence, lacking transparency as to the funding of the tribunal and of the selection of judges and, for a long time until a recent reform, the fact that the judges were appointed for short three-year renewable terms. Due to the criticism of the latter aspect as to its risk for judicial independence,¹⁵ the judges are now appointed for a period of 5 years, renewable once. This development also provides an insightful background for assessing the independence of the ADBAT.

Further, even in the reformed UN internal justice system, independence deficits continue to exist.¹⁶ Amongst other things¹⁷, the UN Dispute Tribunal and the UN Appeals Tribunal are not administratively independent from the Office of Administration of Justice (OAJ), whose Executive Director reports to the Secretary General of the UN. As the UN Dispute Tribunal itself noted, '[t]he Executive Director cannot bona fide serve two masters

¹¹ HRC, *M. L. D. v. Phillipines* (n. 5), para. 2.4.

¹² HRC, *M. L. D. v. Phillipines* (n. 5), para. 3.1.

¹³ For an overview, see Rishi Gulati, *Access to Justice and International Organisations – Coordinating Jurisdiction Between the National and Institutional Legal Orders* (Cambridge University Press 2022). See also Pierre Schmitt, *Access to Justice and International Organizations* (Edward Elgar 2017).

¹⁴ Gulati (n. 13); Schmitt (n. 13); Erica Cannon and Isabelle Wárlám, 'The Judicial Independence of the International Labour Organization Administrative Tribunal: Potential For Reform' (Amsterdam International Law Clinic 2007).

¹⁵ See e. g. Cannon and Wárlám (n. 14); Gulati (n. 13), 104 – with further references.

¹⁶ On the reform, see 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 UNYB* 12 (2008), 447-483.

¹⁷ See for an in-depth assessment of all independence and fair trial issues at these tribunals, Gulati (n. 13), 73-98.

whose interests are in conflict'.¹⁸ Similarly, the Principal Registrar who oversees the operation of both UN tribunals and who is under the authority of the OAJ's Executive Director contributes to a deficient independence of these tribunals. As the UN Dispute Tribunal noted: there is an 'inevitable tension between the principle of the independence of judges and some interference by the Executive Director and the Principal Registrar in the action of the Tribunal, as well as from the structural ambiguity between the authority of the judges and that of the Executive Director and the Principal Registrar over the registry staff'.¹⁹ The UN Appeals Tribunal also pointed to interference with its internal organisation of proceeding as 'the Administration has begun to get involved in the way that the Appeals Tribunal manages its proceedings'.²⁰

Furthermore, many international organisations do not have any tribunal at all, providing at the most access to an ombudsman procedure or similar informal dispute resolution mechanisms. Such procedures however do not fulfil the requirements of access to justice or independence. They aim at finding a 'friendly solution' and do not lead to a binding decision.²¹ With a view to fair trial and access to justice, these mechanisms cannot replace a judicial dispute resolution mechanism. As will be further outlined below, for international organisations without such mechanisms, the *Waite and Kennedy* rationale thus becomes crucial in determining whether their functional immunity will be upheld before domestic courts.

III. Globalising *Waite and Kennedy*

With the present decision, the Human Rights Committee has significantly developed its jurisprudence on rule of law and fair trial standards within international organisations and the related obligations of their member states. Both in relation to admissibility and to merits, the Committee referred to the jurisprudence of the ECtHR in *Waite and Kennedy* and related decisions. This is an important step because the ECtHR jurisprudence, while broadly

¹⁸ Report of the Internal Justice Council – Administration of Justice, A/72/210 (24 July 2017), Annex II (Views of the UNDT), para. 34.

¹⁹ Report of the Internal Justice Council – Administration of Justice, A/75/154 (10 July 2020), Annex 2 (Views of the UNDT), para. 7.

²⁰ Report of the Internal Justice Council 2020 (n. 19), Annex 1 (Views of the UNAT), para. 10.

²¹ Herwig C.H. Hofmann, 'The Developing Role of the European Ombudsman' in: Herwig C.H. Hofmann and Jacques Ziller (eds), *Accountability in the EU – The Role of the European Ombudsman* (Edward Elgar 2017), 1-27 (16 f.).

discussed by scholars of many regions of the world,²² only addresses fair trial obligations of European member states of international organisations; other regional human rights courts have not addressed this question yet. By adopting the *Waite and Kennedy* approach and linking it to the International Covenant on Civil and Political Rights, the Human Rights Committee establishes that the approach has global reach.²³ It creates fair trial obligations also for non-European member states of international organisations.

What is the core of this approach? In *Waite and Kennedy*, the ECtHR had decided that

‘where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.’²⁴

The Court thus established, first, that member states of international organisations remain bound by their human rights obligations in the context of, and in relation to, their membership in this organisation. According to the court ‘this is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial’.²⁵

²² For non-European scholarship that refers to *Waite and Kennedy*, see e.g. Shin-ichi Ago, ‘A Few Thoughts About the Concepts of International Administrative Tribunals and International Administrative Law’, *Asian Journal of International Law* 12 (2022), 207-215; Davinia Aziz, ‘Global Public-Private Partnerships in International Law’, *Asian Journal of International Law* 2 (2012), 339-374; Kristina Daugirdas and Sachi Shuricht, ‘Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies’, *Asian Infrastructure Investment Bank Yearbook of International Law* 3 (2020), 54-87; Joanna Jandali, ‘Jammed from Justice: How International Organization Immunity Enshrines Impunity’, *Ariz. St. L.J.* 55 (2023), 733-763; Edward Chukwumeke Okeke, ‘The Tension Between the Jurisdictional Immunity of International Organizations and the Right of Access to Court’, *Asian Infrastructure Investment Bank Yearbook of International Law* 3 (2020), 25-53; Juan Carlos E. Vargas A. and Eduardo Rodríguez-Weil, ‘La Inmunidad De Jurisdicción Y Ejecución De Las Organizaciones Internacionales: Un Tema Antiguo Con Relevancia Actual’, *Anuario Hispano-Luso-Americano de derecho internacional* 21 (2013), 511-538.

²³ Generally on fair trial standards in international law, Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2021); Francesco Francioni, ‘The Rights of Access to Justice Under Customary International Law’ in: Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press 2007), 1-56; Gulati (n. 13); Rishi Gulati, ‘An International Administrative Procedural Law of Fair Trial: Reality or Rhetoric?’, *Max Planck UNYB* 21 (2018), 210-270; Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011).

²⁴ ECtHR, *Waite and Kennedy* (n. 1), para. 67.

²⁵ ECtHR, *Waite and Kennedy* (n. 1), para. 67.

Second, this obligation has a consequence for the domestic courts of the respective member states. Although international organisations have in principle functional immunity from the jurisdiction of domestic courts,²⁶ these courts can (and must) exercise jurisdiction if the international organisation's fair trial standards are deficient. The Court stated:

‘a material factor in determining whether granting [an international organisation] immunity from [domestic] 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.’²⁷

The Human Rights Committee explicitly took up both prongs of this ECtHR jurisprudence. As to the admissibility of the case, the Committee decided – citing *Waite and Kennedy* – that

‘while international organizations have an international legal personality and enjoy jurisdictional immunities, the host State party may still have jurisdiction under the Covenant if the international organization does not provide a reasonable alternative means of dispute resolution’.²⁸

It thus rejected the Philippines' argument that the claimant was not under its jurisdiction and that thus any Convention obligation of the Philippines could not have been engaged. It accepts the ECtHR's approach according to which the host state can have jurisdiction over disputes between international organisations and their staff members if there is no appropriate internal justice mechanism provided by this organisation. In the case at hand, the Committee also recognised that, in view of the admissibility criterion of Article 5 (2) (b) of the Optional Protocol that requires the prior exhaustion of domestic remedies, there were no effective domestic remedies available to the applicant. This was the case because the Supreme Court of the Philippines has held, with regard to employment cases, that international organisations cannot be subjected to the jurisdiction of the courts of the Philippines by virtue of the organisation's immunities.²⁹

Adopting the *Waite and Kennedy* approach to jurisdiction also has potential far-reaching implications for domestic courts. The Human Rights Committee decision now provides an additional legal reference for domestic

²⁶ Generally on functional immunities of international organisations, Edward Chukwue-meke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press 2018); August Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013).

²⁷ ECtHR, *Waite and Kennedy* (n. 1), para. 68.

²⁸ HRC, *M. L. D. v. Phillipines* (n. 5), para. 8.6.

²⁹ Supreme Court of the Philippines, *Department of Foreign Affairs v. National Labour Relations Commission*, decision of 18 September 1996, GR No. 113191.

courts to exercise jurisdiction over international organisations – despite the fact that international organisations enjoy, in principle, functional immunities. According to the *Waite and Kennedy* rationale, claimants can bring cases against international organisations before domestic courts when the international organisation does not provide ‘reasonable alternative means’ of dispute resolution. This includes organisations that do not provide for any internal justice mechanism as well as organisations whose internal justice mechanism falls short of the standard of a reasonable alternative. From the perspective of legal policy, if domestic courts take up this novel opportunity, this will contribute to creating further incentives for international organisations and their member states to attend to the rule of law deficits that exists due to lacking or deficient internal justice mechanisms.

As to the merits of the case, the Committee emphasises the member states’ human rights obligations as to the structures and institutions of the international organisations of which they are a party. It almost word by word repeats the ECtHR’s above-cited statement:

“Taking into account the jurisprudence of international judicial bodies, the Committee is of the opinion that where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activity, and where they transfer to those organizations certain competencies and accord them immunities, there may be implications as to the protection of fundamental rights. It would therefore be incompatible with the object and purpose of the Covenant if States parties were thereby absolved of their obligations under the Covenant in relation to the field of activity covered by such transfer. The Committee recalls that the Covenant is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is also true for the right of access to courts, in view of the prominent place held in all societies by the right to a fair trial, under article 14 of the Covenant.”³⁰

The Committee also takes up the ECtHR’s formulation that international organisations have to provide ‘reasonable alternative means of dispute resolution’ and endorses this obligation that follows at least indirectly from the above obligations of the member states:

“The Committee considers that it is incumbent on international organizations, including the Asian Development Bank, to provide for reasonable alternative means of dispute resolution such as in labour disputes between the international organization and its staff.”³¹

³⁰ HRC, *M. L. D. v. Phillipines* (n. 5), para. 9.6.

³¹ HRC, *M. L. D. v. Phillipines* (n. 5), para. 9.7.

The fact that the Committee has established this obligation is most welcome from the perspective of the rule of law on the international level. It addresses the fair trial and judicial independence deficits that are still but too common within internal justice mechanisms of many international organisations.

IV. Fair Trial Standards Concerning International Organisations Before the HRC

Based on this adoption of the Waite and Kennedy approach, what substantive standard does the Committee establish in detail? To start with, it is worth noting that the Committee – much like the ECtHR – does not limit the human rights requirements of the international organisations' member states to a minimum standard. In the jurisprudence of the ECtHR, the requirement of 'reasonable alternative means' encompasses in principle the full standard of procedural protection as required by the Convention. The Court speaks of 'reasonable alternative means to protect effectively [the] rights under the Convention'.³² The Human Rights Committee seems to have adopted this approach. It did not mention a minimum standard but referred to the ECtHR jurisprudence without limiting it in this way. This is noteworthy because in similar cases, some domestic courts such as the German Federal Constitutional Court (FCC) in its decision regarding the European Patent Office have indeed limited the constitutional requirements vis-à-vis fair trial standards explicitly to a minimum standard of protection.³³

However, the ECtHR has reduced the protection provided by the Convention in a different manner. It has created a presumption that the legal protection on the level of the international organisation is in conformity with the Convention. Applicants can only rebut this presumption when they show that the standard of protection is 'manifestly deficient'.³⁴ In substance, that means that, for cases in which member states are not directly involved (such as by implementing acts of the international organisation), they must only guarantee a *general* level of human rights protection that is equivalent to that

³² ECtHR, *Waite and Kennedy* (n. 1), para. 68.

³³ German Federal Constitutional Court, decision of 22 November 2022, 2 BvR 2480/10. See for a discussion of this decision, Dana Burchardt, 'Transnational Procedural Guarantees – The Role of Domestic Courts', *King's Law Journal* 34 (2023), 562-578.

³⁴ ECtHR, *Roland Klausecker v. Germany*, judgment of 6 January 2015, no. 415/07, para. 95; ECtHR, *Gasparini v. Italy and Belgium*, judgement of 12 May 2009, no. 10750/03; ECtHR (Grand Chamber), *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005, no. 45036/98, para. 156.

required by the Convention. If an individual act of the international organisation, including a decision of an internal justice mechanism, falls short of this standard, this fact alone does not engage the responsibility of the member states. In contrast, when applicants can show that, in general – that is beyond their individual case –, the human rights protection is ‘manifestly deficient’, they can successfully bring a claim against the member states of this organisation.

The Human Rights Committee does not refer to these parts of the ECtHR’s jurisprudence. It did not require the applicant to demonstrate structural deficits within the ADBAT. This indicates that the court would consider it sufficient for an applicant to demonstrate that fair trial issues existed in the individual case. In this regard, the Committee goes in fact further than the ECtHR. It makes it possible for applicants to engage the responsibility of member states for each individual act of an international organisation if this act does not comply with Covenant rights.

Nonetheless, the Committee relativises the obligation of international organisations to provide ‘reasonable alternative means’ of dispute resolution and the ensuing obligation of member states in a different manner. It accepts that, ‘[w]here the internal affairs of the international organization are concerned’, the required ‘standard of fair trial guarantees applicable to the resolution of internal disputes might differ depending on the type of dispute’.³⁵ It refers to ‘jurisprudence of international judicial bodies’ for examples of such modified standards (yet without any concrete references in the footnotes):

‘that oral hearings and witness testimonies are not required when the dispute concerns internal matters of the international organization, without external impact, and that the organization has discretion as to the reasonable alternative means of dispute resolution, taking into account the principles of objectivity, necessity and impartiality, and not amounting to arbitrariness or denial of justice.’³⁶

This is a formulation that gives a considerable leeway to international organisations. With regard to the specific aspects mentioned by the Committee and in particular with regard to judicial independence, it gives little to no guidance as to what are acceptable standards under the Covenant. What could result from this approach, is that fair trial standards within international organisation continue to be undermined in the name of the organisation’s ‘discretion’ as to the reasonable alternative means of dispute resolution. Although human rights bodies do not and should not require a fully uniform

³⁵ HRC, *M. L. D. v. Phillipines* (n. 5), para. 9.7.

³⁶ HRC, *M. L. D. v. Phillipines* (n. 5), para. 9.7.

design of judicial bodies and procedures, certain principles and values such as judicial independence and impartiality should not be hollowed out in this way.

A final point that bears mentioning is that, despite the fact that the respondent in the ADBAT case has been the host state of this international organisation, the obligations regarding fair trial guarantees and access to justice that follow from the Committee's adoption of *Waite and Kennedy* are not limited to the host state. All member states of the respective international organisation must ensure under human rights law that the organisation provides 'reasonable alternative means' of dispute resolution that comply with the standard of the Covenant. As a result, arguments by the respondent state in the ADBAT case as to its responsibilities as a host state do not have the desired effect. The Philippines had argued, inter alia, that 'concluding a Headquarters Agreement with an international organization cannot in any way be interpreted as being in contravention with the State party's obligations under the Covenant'.³⁷ Although neither becoming member of an international organisation nor hosting the organisation's infrastructure is of course per se a violation of human rights, states are responsible for the actions of this organisation in the sense that they have to ensure, in line with the *Waite and Kennedy* rationale, that human rights standards are respected by this organisation. This also means that the further argument by the Philippines that a failure by the ADB to provide fair trial 'could not be attributed to the State party as it does not exercise any control or supervision over the Bank, an independent international organization located within its territory' did not succeed.³⁸ The responsibility of the member states under human rights law does not stem from a control over the individual actions of the international organisation but from the membership as such.

V. Failing to Protect Judicial Independence

Despite embracing *Waite and Kennedy* as a positive step for protecting the rule of law and fair trial standards on the international level, the Human Rights Committee does not put this legal standard into action. When applying it to the ADBAT, it unfortunately does not implement *Waite and Kennedy* in a meaningful manner. In a short paragraph that is so superficial and trivial that it almost does not merit to be called application to the facts, the Committee merely dismisses the applicant's claims as to issues with the

³⁷ HRC, M. L. D. v. Philippines (n. 5), para. 4.2.

³⁸ HRC, M. L. D. v. Philippines (n. 5), para. 4.5.

independence of the ADBAT. It does not engage with the long list of issues addressed in the application including, in particular: the significant role of the President of the ADB – who is formally a counterparty in any employment related dispute – in renewing an ADBAT judge’s appointment every three years; extra-judicial activities and personal contacts between the ADBAT members and the ADB management; the absence of an oral hearing despite a contestation of the facts and of the applicant’s credibility.

The Committee merely stated that the applicant

‘had access to internal review mechanisms, including the Ombudsman and a conciliation procedure, before resorting to the Administrative Tribunal, whose members are appointed by the Board of Directors, in line with the Administrative Tribunal’s statute and the principles of independence and impartiality. The Committee observes that the Administrative Tribunal considered individual claims by the author, concluding in that regard, by a reasoned decision and taking into account the available evidence, that no oral hearing or witness testimonies were required, and found her claims to be not sufficiently substantiated. Recalling the applicable threshold for the assessment of reasonable alternative dispute resolution mechanisms provided by the international organizations, the Committee considers that the author has not supported with evidence the claim that the Bank’s remedial mechanisms acted arbitrarily or denied the author access to justice or a fair trial.’³⁹

With this decision, the Human Rights Committee *de facto* gave a free pass not only to the ADB but to other international organisations with poorly designed and not fully independent and impartial internal justice mechanisms. The Committee might have shied away from taking judicial independence more seriously because it might not have wanted to open the floodgates of individual complaints against such mechanisms. Considering the wide-spread structural deficiencies as to fair trial and judicial independence before international organisations, this might have been a strategic move of an already overburdened Committee (note, as a symptom, that the Committee took six years to decide the case at hand). However, as understandable as this motivation might be from the perspective of the institution, the Committee has missed an opportunity to strengthen the rule of law on the international level. At the very least, it should have engaged in detail with the claimed issues regarding the independence of the ADBAT, not only to provide a proper protection of judicial independence in the case at hand, but also to demonstrate to other international and regional judicial bodies how to protect this crucial value and right effectively. What would have been expected here by the Committee, was to provide a substantive standard as to

³⁹ HRC, *M. L. D. v. Phillipines* (n. 5), para. 9.8.

what is required in terms of independence and impartiality by an internal justice mechanism.

Instead, the Committee did not take its own standards on judicial independence seriously as well as the standards generally accepted in international human rights law in relation to judicial independence. First, it did not engage sufficiently with the institutional requirements that aim at minimising the opportunity for administrative actors – in this case members of the management of the international organisation – to exercise undue influence on judicial actors. The Committee's General Comment No. 32 on Article 14 ICCPR states in this regard:

‘A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation.’⁴⁰

This standard requires that the same actor cannot exercise judicial functions and be part of the executive branch of government in a domestic setting or of the management of the international organisation in an international setting. It demands security of tenure for judges and an appropriate interrelation of length of tenure and potential renewability. It also restricts the appointment and potentially promotion rules with the aim to avoid undue influence of actors that are involved in the appointment/promotion decision.

Against this standard, the issues raised by the applicant in the ADBAT case merited further discussion by the Committee. To start with, the length of tenure of the ADBAT judges is only of a relatively short three years, coupled with the possibility of renewal. A short but renewable tenure is an institutional design that is very inducive to undue influence by actors involved in the appointment and renewal decision. In short intervals, these actors repeatedly have influence on whether a judge remains in office. This institutional feature thus is weak with regard to optimising judicial independence.

Further, the extent to which executive actors are involved in the appointment/renewal/promotion decision is important for judicial independence especially from the perspective of separation of powers. According to General Comment No. 32, Article 14 requires ‘the actual independence of the judiciary from political interference by the executive branch and legislature’.⁴¹ Although some regional human rights courts as well as the Human Rights Committee have decided that a formal appointment by the executive

⁴⁰ HRC, General Comment No. 32, 23 August 2007, CCPR/C/GC/32, para. 19.

⁴¹ HRC, General Comment No. 32 (n. 40), para. 19.

does not constitute per se a violation of judicial independence,⁴² there are limitations to an executive involvement. An executive appointment is only acceptable 'if, once appointed, [those judges] received no pressure or instructions in the performance of their judicial duties'.⁴³ The ECtHR takes into account the appointment procedure and factors such as length of tenure and irremovability to determine whether judges are at risk of pressure or influence from executive actors.⁴⁴ The Human Rights Committee has found a violation of the right to be tried by an independent tribunal in a situation in which the president of a state appointed all judges and 'the functions and competences of the judiciary and the executive [were] not clearly distinguishable' so that the president was 'able to control or direct' the judges.⁴⁵ Other human rights institutions even go further. The UN Special Rapporteur on the Independence of Judges and Lawyers pointed to the fact that '[a]ppointments or nominations by the President can have a strong influence on judges' attitudes and behaviour, particularly concerning representatives of the executive' which can lead to 'undue political pressure'.⁴⁶ The Venice Commission of the Council of Europe has also taken a strong position against the risks of executive appointment procedures.⁴⁷ Further, the African Commission considered that it undermines the independence of the judiciary when the head of state holds all judicial powers including the power to appoint and remove judges.⁴⁸ The Inter-American Commission on Human Rights has also stressed the risks that ensue for judicial independence from appointments by executive actors.⁴⁹

In the present case, the ADBAT judges were, according to Article IV of the ADBAT Statute, formally appointed by the Board of Directors of the

⁴² E.g. HRC, *Dergachev v. Belarus*, views of 2 April 2002, communication no. 921/2000, para. 6.4

⁴³ ECtHR, *Thiam v. France*, judgment of 18 October 2018, no. 80018/12, para. 59; see also ECtHR, *Flux v. Moldova* (No. 2), judgment of 3 July 2007, no. 31001/03, para. 27.

⁴⁴ E.g. ECtHR, *Campbell and Fell v. UK*, judgment of 28 June 1984, nos 7819/77 and 7878/77, para. 78; ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 November 2010, no. 23614/08, para. 45; ECtHR, *Clarke v. United Kingdom*, judgement of 25 August 2005, no. 23695/02.

⁴⁵ HRC, *Olo Bahamonde v. Equatorial Guinea*, views of 20 October 1993, communication no. 468/1991, para. 9.4.

⁴⁶ Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mission to the Russian Federation (2014), UN Doc. A/HRC/26/32/Add.1, para. 17.

⁴⁷ Report on the Independence of the Judicial System Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

⁴⁸ ACmHPR, *Lawyers for Human Rights v. Swaziland*, May 2005, no. 251/02, paras 56-58.

⁴⁹ IACHR, *Guarantees for the Independence of Justice Operators – Towards Strengthening Access to Justice and the Rule of Law in the Americas* (2013), OEA/Ser.L/V/II., para. 103, available at <<https://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf>>, last access 18 March 2026.

ADB, that is by the Bank's executive actors. They are appointed from 'a list of candidates to be drawn up by the President of the Bank' and 'may be reappointed [...] upon the recommendation of the President' (Art. IV). The Board of Directors and the President thus have, to a considerable extent, control over who to appoint and reappoint. The involvement of an advisory committee 'composed of the General Counsel, the Secretary, the Chair of the Staff Council, and such other members as may be appointed by the President' (Art. IV) on the one hand somewhat seems to mitigate the control by the President but on the other hand emphasises the predominant influence of the ADB executive actors on the appointment procedure, with the Chair of Staff Council being only one of at least five members of the advisory committee. In this setting, the opportunity for undue influence by the executive and in particular by the President on ADBAT judges is thus broad. The President has significant opportunity to choose judges that decide according to his or her preferences and to sanction those who don't by not reappointing them to a subsequent term. In addition, the appointment regime creates an issue of impartiality. This is the case because the President of the ADBAT is the formal respondent in all employment cases against the bank. The respondent of the case is thus at the same time the person that de facto decides which judge to appoint and reappoint. It seems difficult to ignore that this constitutes a significant challenge to the objective impartiality of the judges. In sum, the above points raise serious doubts as to whether the appointment regime of the ADBAT respects the standard of an independent and impartial judge as required by Article 14 International Covenant on Civil and Political Rights (ICCPR) – doubts that the Committee should have thoroughly addressed in its reasoning.

Moreover, the Committee should have taken into account the perception of independence and impartiality of those who bring cases to a court and of the public in general. In its General Comment No. 32, the Committee has recognised that a 'tribunal must also appear to a reasonable observer to be impartial'.⁵⁰ A judicial body must be independent 'in appearance as well as in fact'.⁵¹ Regional human rights courts have also emphasised this aspect. The ECtHR has established as part of its test for judicial independence according to Article 6 European Convention on Human Rights (ECHR) that, in addition to the objective independence of a court, an 'appearance of independence' is required.⁵² This criterion takes into account that, from the perspec-

⁵⁰ HRC, General Comment No. 32 (n. 40), para. 21.

⁵¹ HRC, Concluding Observations Concerning a Report Submitted by Sudan Under Article 40 ICCPR, 28 October 1997, CCPR/C/61/CMT/SUD/3, para. 21.

⁵² See e.g. ECtHR, *Campbell and Fell* (n. 44), para. 78; ECtHR, *Findlay v. United Kingdom*, judgment of 25 February 1997, no. 22107/93, para. 73.

tive of the parties to a dispute and of the general public, certain settings can be perceived more critically than by members of the judiciary.⁵³ Referring to how an ‘ordinary citizen’ perceives the judges of a court, the ECtHR has repeatedly held a violation of Article 6 ECHR.⁵⁴ For example, the ECtHR considered the mere presence of a person during court deliberations as a sufficient factor for the perception of potential influence by this person on judges.⁵⁵ A similar approach is taken by the African Commission on Human and Peoples’ Rights according to which one must consider ‘the issue of real or perceived independence: as the saying goes “justice must not only be done: it must be seen to be done”’.⁵⁶ And the African Court for Human and Peoples’ Rights also stressed that, in order for a court or other body to be independent and impartial, they ‘must be perceived as such’.⁵⁷

If the Human Rights Committee had applied this standard to the case at hand, it would have had to engage in particular with the incidents that the applicant had reported in the present decision as to extra-judicial activities and personal contacts between the ADBAT members and the ADB management.⁵⁸ Such contacts were likely to create the impression upon ‘a reasonable observer’ or an ‘ordinary citizen’ that the judges of the court are not impartial but rather ‘in the camp’ of the respondent of the case. By not addressing this issue, the Committee has not only neglected the impartiality requirement but also the crucial element of external perception. Without a perception of independence and impartiality of a judicial body, this body cannot be expected to be trusted by the individual applicants and by the general public. Lacking trust in courts is a significant rule of law issue that should not be taken lightly in the international context neither. Here, the Committee’s lacking engagement with the perception of (im)partiality has undermined this important feature of the rule of law.

In sum, by not addressing thoroughly the several issues of judicial independence and impartiality raised by the applicant in the ADBAT case, the Committee, despite emphasising the ‘prominent place held in all societies’ by

⁵³ See on this requirement of judicial independence, Dana Burchardt, ‘A Behavioural Approach to judicial independence’, *Maastricht J. Eur. & Comp. L.* 32 (2025), 552-579.

⁵⁴ See e.g. ECtHR, *Belilos v. Switzerland*, judgment of 29 April 1988, no. 10328/83, para. 67.

⁵⁵ ECtHR (Grand Chamber), *Martinie v. France*, judgment of 12 April 2006, no. 58675/00, paras 53-55.

⁵⁶ ACmHPR, *Egyptian Initiative for Personal Rights & Interights v. Egypt*, decision of March 2011, no. 334/2006, para. 206.

⁵⁷ ACtHPR, *APDH v. Cote d’Ivoire*, judgment of 18 November 2016, no. 001/2014, paras 123, 133-134.

⁵⁸ HRC, *M. L. D. v. Phillipines* (n. 5), para. 3.2.

judicial independence, did not do justice to this value. Rather, it undermined not only judicial independence but also the rule of law more generally.

VI. Balancing Benefits and Risks of Transnational Procedural Requirements: Concluding Reflections

By way of conclusion, this last section considers whether the approach taken by the Human Rights Committee strikes, at least at its core, that is the adoption of the *Waite and Kennedy* rationale, a convincing balance between the benefits and risks of transnational procedural requirements. Such requirements address rule of law deficits on the international level. As I have outlined elsewhere, transnational procedural requirements describe situations in which the courts of one legal space require institutions of another legal space to grant legal protection to those affected by their actions and set specific procedural standards in conformity with the rule of law.⁵⁹ These requirements are transnational in nature for two reasons. First, the court that establishes the procedural standard belongs to a different legal space than the institutions at which these standards are addressed. The actors involved thus provide a transnational dimension. Second, the standards are, at least prima facie, derived from the court's own legal space, possibly with a comparative law component, and applied to the institution outside of this legal framework. Since the procedural guarantees developed in this way are applied across the borders of legal spaces, they are also in substance of a transnational nature.

The *Waite and Kennedy* jurisprudence of the ECtHR as well as its adoption by the Human Rights Committee constitute transnational procedural requirements. Both the ECtHR and the Human Rights Committee are institutions external to the international organisations that they assess. Even though the judicial bodies and the international organisations are part of the broader international legal space, the judicial bodies are not part of the organisations specific legal space. It is thus the actors of one specific legal space that impose standards on the actors of another. Second, the legal basis for the requirement to provide 'reasonable alternative means' of dispute resolution stems from regional or international human rights law and aims at

⁵⁹ Dana Burchardt, 'Transnational Procedural Guarantees' (n. 32); Dana Burchardt, 'Transnational Procedural Requirements: What Do Regional and Domestic Courts Expect from the Court of Arbitration for Sport?', *International Sports Law Journal* (2025). On the notion of legal space, see Dana Burchardt, 'The Concept of Legal Space – A Topological Approach for Addressing Multiple Legalities', *Global Constitutionalism* 11 (2022), 518- 547.

shaping the institutional law and structure of an international organisation. From this substantive perspective as well, the jurisprudence has an effect that crosses the boundaries of the specific legal spaces concerned, providing a transnational dimension.

Such transnational procedural requirements aim at improving the rule of law and fair trial standards in a legal space that is deficient in this regard. As mentioned above, they address a real need within many international organisations. They thus pursue a normatively desirable purpose. However, such transnational procedural requirements also entail risks for the legal spaces involved. For international organisations, such requirements might affect the functionality of an organisation if the immunity of the organisation is frequently set aside by judicial bodies of another legal space.⁶⁰ Some thus even argue that the functionality of international organisations should prevail vis-à-vis the aim of providing effective legal protection to individuals affected by international organisations, not allowing for any limitations to the immunity of these organisations.⁶¹

Considering the competing values involved, it is crucial for judicial bodies establishing transnational procedural requirements to consider the normative ambivalence of such requirements. This can be done by using certain tools that can contribute to mitigating potential negative effects of such requirements. A first tool in this regard is for courts to use references to regional and international norms and jurisprudence to create a broad foundation for their requirements. They can base their individual decision on the international procedural standards established by the jurisprudence of international judicial bodies that adjudicate on access to justice and fair trial rights. This tool provides a stronger legitimacy basis for such requirements than a more limited legal basis. It also reduces the risk that a judicial body misuses such requirements unilaterally and, for example, undermines international legal obligations or the effectiveness of the acts of the international organisation concerned. In the ADBAT case, the Human Rights Committee uses this tool. It refers (at least to some of) the jurisprudence of regional human rights courts and other international bodies as a foundation of the standards that it applies. It thus does not only refer to the ICCPR and its

⁶⁰ Decisions of domestic courts that sets aside the immunity of an international organisation due to access to justice deficits include, e. g., Belgian Labour Court Brussels, *Siedler v. Western European Union*, judgment of 17 September 2003, JT 2004, 617, ILDC 53 (BE 2003); Austrian Constitutional Court, judgment of 29 September 2022, no. SV 1/2021-23; Court d'Appel de Paris, judgment of 16 January 16 2024, no. 20/17725.

⁶¹ See e. g. Okeke, *Jurisdictional Immunities* (n. 26), 231-242; Pieter H. F. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Brill 1994).

own jurisprudence but broadens the legal basis for what it requires of international organisations. Even if the references used are not exhaustive, the Committee shows that it is aware of the mitigation effect of this tool – rather than applying exclusively the legal norms of the Committee's own legal space.

A second mitigating tool in the context of transnational procedural requirements is to limit the admissibility of cases. This includes rejecting the admissibility of claims that are directly addressed against an international organisation, directly challenging an act of this organisation. In the ADBAT case, the Human Rights Committee did not have to decide explicitly on whether such applications would be admissible as the applicant challenged the host state of the organisation. By holding this application admissible, the Committee established an indirect way to challenge an organisation's acts and structures. This indirect way is in fact a tool to at least formally mitigate the de facto review of the organisation. This approach differs from a case decided by the Committee in 1987, that is before the *Waite and Kennedy* decision of the ECtHR. In this 1987 case, the Committee had rejected the admissibility of the application regarding a claim in relation to the European Patent Office.⁶² It stated that

‘it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant. The author's grievances, however, concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto.’⁶³

In the ADBAT case, the Committee does not refer to this case. Instead, in line with the argumentation of the applicant, it focuses on the claims against the Philippines as a host state, thus adopting the formally mitigating approach to the admissibility of cases that in substance concern an international organisation.

Yet the Committee does not adopt a further mitigating tool: limiting the review to structural deficiencies only. As outlined above in section IV, the Committee does not refer to the term structural deficits and does not restrain its review in this manner – despite the applicant referring to this standard and the related jurisprudence of the ECtHR on the matter. Instead, the Committee reviewed the individual procedure before the ADBAT in the same manner as it would do in relation to a domestic court. This type of

⁶² HRC, *H. v. d. P. v. the Netherlands*, views of 8 April 1987, no. 217/1986.

⁶³ HRC, *H. v. d. P. v. the Netherlands* (n. 62), para. 3.2.

review presents a considerably higher risk of encroachment on the competences and the functioning of the international organisation than would be the case for a mere 'structural deficit review'. In this regard, the Committee prioritises the aim of strengthening the rule of law and establishes a more far-reaching review over international organisations than a 'structural deficit review' would entail.

Similarly, the Committee did not adopt a mitigating approach based on a (rebuttable) presumption in favour of the international organisation. This is a tool that the ECtHR has prominently used in its *Bosphorus* decision. In this decision, it established that 'as long as the relevant organisation is considered to protect fundamental rights [...] in a manner which can be considered at least equivalent to that for which the Convention provides [...] the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation'.⁶⁴ The Human Rights Committee does not refer to this jurisprudence and does not adopt any similar presumption. Here again, the Committee gives more weight to rule of law values than to potential risks for the functionality of international organisations.

Finally, as section V has demonstrated, the Committee did not make the review standard explicit and predictable for further cases. The more than vague standard that the Committee applies and the superficial way of applying it especially with regard to judicial independence make it difficult not only for potential applicants to know what deficits can be successfully challenged before the Committee but also puts the international organisations in a situation of uncertainty. With a decision such as the one in the ADBAT case, international organisations are left in the dark as to what is concretely expected from them. This uncertainty affects both the rule of law and the functionality of the international organisations – a significantly negative effect that could have been avoided by the Committee.

In sum, when establishing the general fair trial review in the context of international organisations, the Human Rights Committee has given considerable weight to the aim of strengthening the rule of law. It did not go to great length to mitigate the risk of its transnational procedural requirements on the legal space of the international organisations. In fact, the way in which the decision is drafted raises the question as to whether the Committee was fully aware of the potentially far-reaching consequences of its approach and the normative ambivalence of transnational procedural requirements. In contrast, with regard to operationalising this review, the Committee's decision

⁶⁴ ECtHR, *Bosphorus* (n. 34), paras 155-156.

neither strengthens the rule of law nor does it benefit the functionality of international organisations. In particular, it fails to sufficiently protect judicial independence on the international level. In this regard, it regrettably undermines the idea of a transnational review of access to justice and fair trial standards.