

The Internal Dispute Resolution Regime of the United Nations

Has the Creation of the United Nations Dispute Tribunal and United Nations Appeals Tribunal Remedied the Flaws of the United Nations Administrative Tribunal?

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Preface

As the United Nations enjoys jurisdictional immunities in national courts and thus cannot be sued domestically, it has set up an internal justice system to resolve disputes including those that involve disciplinary action.² Until recently, the UN's internal justice system has been

¹ I thank Prof. Niels Blokker and Assistant Prof. Philippa Webb for their invaluable comments on the drafts of this paper which has been adapted from the author's Master Thesis. Of course, all errors are mine.

² For the legal basis of the establishment of UNAT, see the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports 1954, 47 et seq. (57), the immunities of International Organizations lie in the justification that they need to be "protected from undue interference in their own affairs by states. Such protection is afforded by granting them privileges and immunities. In other words ... the *raison d'être* of privileges and immunities of international organizations is their functional necessity: their existence is necessary for the independent exercise of its functions by an international organization", see H.G. Schermers/N.M. Blokker, *International Institutional Law*, 2003, section 324; see also generally, J.L. Kunz, *Privileges and Immunities of International Organizations*, *AJIL* 41 (1947), 828 et seq.; for an excellent analysis of UN immunities see A.J. Miller, "The Privileges and Immunities of the United Nations", *International Organizations Law Review* 6 (2009), 7 et seq.; see also A. Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, Institute for International Law and Justice, Working Paper 2007/11 (Global Administrative Law Series), 3, where the author observes: "more and more national courts are equally looking at the availability and adequacy of alternative dispute settlement mechanisms. Some of them have even concluded that the non-availability of legal protection through an administrative tribunal or the inadequacy of

subject to severe criticism, and pursuant to A/RES/59/283 of 13 April 2005 titled Administration of Justice at the United Nations, the Secretary-General established the *Redesign Panel on the United Nations System of Administration of Justice* (Redesign Panel), which was charged with redesigning the system of the administration of justice at the United Nations. It was created to address the gravity of the issues that arose out of the immense challenges posed by the management of internal disputes.

The Redesign Panel found that the system of internal justice was unprofessional, lacked independence, was ineffective, did not accord staff members their due process rights, and the staff had little or no confidence in it.³ As the United Nations is the body charged with the protection of the global order, it is ironic that its internal justice system was found to be in manifest violation of the rights of its own employees. After years of effort towards reform, a new system of the administration of justice became operational on 1 July 2009.

Judging the success of an internal justice system when it is in its infancy is perhaps unfair. However, it is an apt opportunity to make some initial observations about its workings. The primary purpose in doing so is to determine whether or not the new system of internal justice remedies the flaws of the old regime that was subject to severe condemnation. In order to do this it is critical to understand how the former regime operated, and why it was criticized. Consequently, it is necessary to devote close attention to the working of the old regime before discussing the new one.⁴

Part I. of this article therefore will analyze the old system, which is also referred to as the pre-reform system. The discussion not only will consider the weaknesses of the now abolished *United Nations Administrative Tribunal* (UNAT), but engage in an analysis of the dispute reso-

the level of protection afforded by internal mechanisms justify a withdrawal of immunity in order to avoid a denial of justice.”

³ Established by A/RES/59/283 of 13 April 2005, paras 47 et seq. See further Report of the Redesign Panel on the United Nations System of Administration of Justice, Doc. A/61/205 of 28 July 2006, para. 5. See in this respect also the article by A. Reinisch/ C. 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 et seq.

⁴ In this respect the paper departs from the above mentioned one by Reinisch/ Knahr. The focus there was different.

lution process from the very inception of a dispute in order to conduct a holistic analysis.

Part II. will mirror the path taken in Part I., but in relation to the new dispute resolution machinery. The analysis will include a brief consideration of the new tribunals that have been established, the *United Nations Dispute Tribunal* (UNDT) and the appellate instance the *United Nations Appeals Tribunal* (Appeals Tribunal). A brief discussion is devoted to specific areas in which the new system can be improved further. The main focus of the article will be the formal process of dispute resolution. However, informal dispute resolution will also be briefly discussed.

I. The Pre-Reform Internal Dispute Resolution Mechanism: Its Weakness and its Legacy

1. Introduction

Prior to the establishment of international administrative tribunals, internal disputes of international organizations (IOs) were usually finally settled by the administrative decision of an executive organ with or without an appeal to the legislative or deliberative organ.⁵ As will be shown, even in the present model of dispute resolution, the first remedial step is generally taken by an executive organ. In the UN context, UNAT was at the top of the pyramid of this formal system, and it is essential to briefly look at the internal formal recourse procedures from the very beginning before honing in on the functioning of UNAT to provide context to the kinds of cases, and the circumstances in which that tribunal could exercise its jurisdiction.

⁵ C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2005, 2nd revised edition, 489. See generally *id.*, *The Law of the International Civil Service*, Vol. 1, 1994, 2nd revised edition, 26 et seq.

2. The Pre-Reform System: The Initial Stage of a Dispute

a. Disciplinary Cases

Pursuant to old Staff Regulation 10.(2)⁶ the Secretary-General was empowered to impose disciplinary measures, such as demotion or termination of employment⁷ on staff members whose conduct was found to be unsatisfactory.⁸ Under old Staff Rule 110.(1) unsatisfactory conduct included failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, or to “observe the standards of conduct expected of an international civil servant.”⁹ Examples of unsatisfactory conduct include unlawful acts (e.g. theft, fraud, possession or sale of illegal substances, smuggling) on or off UN premises; misrepresentation; and misuse of UN equipment etc.¹⁰

As regards the stages of disciplinary proceedings, following an investigation, if the facts appeared to indicate that misconduct had occurred, the matter was referred to the now abolished Joint Disciplinary Committees (JDCs) for advice which was non-binding in character.¹¹ Under old Staff Rule 110.(5), standing JDCs were established at Headquarters, and further, comparable standing committees could be established at other prescribed United Nations Offices. The Secretary-General could also establish *ad hoc* JDCs at various duty stations for a particular case.

Pursuant to old Staff Rule 110.(6), JDCs comprised *inter alia*, members appointed by the Secretary-General and there was no requirement

⁶ Staff Regulation 10.1(a) now enshrines the corresponding Staff Regulation currently in effect (some old rules and new rules are similar, so whenever the author refers to an old rule that can be found in the new rules, but which has a different number, the term “corresponding provision” is used). The old Staff Regulations of the United Nations (Staff Rules – 100 Series) are contained in Doc. ST/SGB/2002/1 of 1 January 2002; the current Staff Regulations and Provisional Staff Rules can be found in Doc. ST/SGB/2009/7 of 16 June 2009.

⁷ Old Staff Rule 110.3; for the corresponding provision currently in force, see Provisional Staff Rule 10.2.

⁸ Old Staff Regulation 10.2 empowered the Secretary-General to summarily dismiss for “serious misconduct”.

⁹ For the corresponding provision, see Provisional Staff Rule 10.1(a).

¹⁰ Administrative Instruction Doc. ST/AI/371 of 2 August 1991, para. 2.

¹¹ Old Staff Rule 110.4(b); see also Old Staff Rule 110.7.

as to any legal qualifications for these members. Under old Staff Rule 110.(7)(b), proceedings before them were normally limited to the original written presentation of the case, together with statements and rebuttals, which could be made orally or in writing. If a JDC considered that it required the testimony of the staff member concerned or of other witnesses, “at its sole discretion”, it could obtain such testimony by written deposition or by personal appearance before it.¹² Old Staff Rule 110.(4) enshrined a due process requirement in relation to disciplinary proceedings, and it stated that no disciplinary proceedings may be instituted against a staff member unless he/she has been notified, in writing, of the allegations against him/her, and of the right to seek the assistance of counsel for his/her defense at his/her own expense, and has been given a reasonable opportunity to respond to those allegations. Administrative Instruction Doc. ST/AI/371 of 2 August 1991 described the stages of a disciplinary proceeding. Respecting the due process requirement, it stated *inter alia*,

“The proceedings of the Joint Disciplinary Committee and its rules of procedures shall be consistent with due process, the fundamental requirements of which are that the staff member concerned has the right to know the allegations against him or her; the right to see or hear the evidence against him or her; the right to rebut the allegations and the right to present countervailing evidence and any mitigating factors. If the Committee decides to hear oral testimony, both parties and counsel should be invited to be present.”¹³

The final decision was taken by or on behalf of the Secretary-General following the non-binding advice of the JDC.¹⁴ A staff member could appeal the Secretary-General’s decision respecting disciplinary measures to UNAT.¹⁵ While the regime attempted to enshrine certain due process standards, it lacked certain key features necessary to com-

¹² Old Staff Rule 110.7(b).

¹³ There existed a due process requirement that included informing the concerned staff member about his/her right to a counsel if a case was to be pursued. See, Report of the Secretary-General: Practice of the Secretary-General in Disciplinary Matters and Possible Criminal Behavior of 1 July 2008 to 30 June 2009, Doc. A/64/150, para. 9.

¹⁴ Administrative Instruction Doc. ST/AI/371 of 2 August 1991, para. 22.

¹⁵ Article XI of the Old Staff Regulations that required the Secretary-General to create an appeal mechanism, and pursuant to Old Staff Regulation 11.2, there existed a right of appeal to UNAT arising out of non-observance of the terms of appointment of a staff member, including relevant Regulations and Rules.

ply with a staff member's procedural rights. The absence of certain due process safeguards was widely prevalent in the old system.

b. Non-Disciplinary Cases

aa. Requirement of an Administrative Decision

The Secretary-General was required to "establish administrative machinery with staff participation to advise him or her in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment."¹⁶ Thus, before a staff member could contest an adverse decision via the machinery set-up by the Secretary-General, it was necessary that the relevant decision be classified as an "administrative decision." According to UNAT in *Andronov*,

"an 'administrative decision' is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order ... Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities."¹⁷

This view seemed to have changed as in *Luvai*,¹⁸ while the applicant's case was rejected, the Judge, in relation to the meaning of an administrative decision stated,

"Much as I agree that an administrative decision is one done unilaterally by the Administration, I am not compelled by the reasoning that for a decision or an act to be defined as an administrative decision, it must be of individual application. Where the act of the Administration complained of affects an individual even though not ex-

¹⁶ Old Staff Regulation 11.1.

¹⁷ *Andronov*, UNAT No. 1157 (2004) of 30 January 2004, para. V.

¹⁸ *Luvai v. Secretary-General of the United Nations*, UNDT Judgment No. UNDT/2009/074 of 16 November 2009.

clusively, it is my view that the individual has locus standi and can bring an action.”¹⁹

Similarly, in *Teferra*,²⁰ the Judge endorsed the above, and stated,

“given the nature of the decisions taken by the Administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken.”²¹

With due respect to the above reasoning, an “administrative decision” can and should have a precise meaning to ensure legal certainty in the definition of terms. Legal principles do not operate in a vacuum, and neither will the definition of an “administrative decision”. In the context of administrative decisions, the manner in which a particular definition is applied in the specific circumstances of a case will eventually determine whether or not a particular decision has individual application or not. The *Andronov* reasoning does not exclude the possibility of a decision having individual and communal application simultaneously. As long as the decision has an individual application, the decision is likely to constitute an “administrative decision”. Thus, there was no real need to express dissatisfaction with *Andronov* as it appears to enshrine the definition of an “administrative decision” which seems to be consistent with the reasoning of other tribunals on the issue.²² Several cases at the newly established UNDT have, however, endorsed *Andronov*,²³ and recently, the also newly established Appeals Tribunal ap-

¹⁹ Ibid., para. 36.

²⁰ *Teferra v. Secretary-General of the United Nations*, UNDT Judgment No. UNDT/2009/090 of 17 December 2009.

²¹ Ibid., para. 9.

²² See e.g. *re Horsman and Ors v. Eurocontrol Agency*, ILOAT No. 1203 of 15 July 1992, para. 2, here it was stated: “a decision is any act by the defendant organisation that has an effect on an official’s rights and obligations”; an administrative decision is a decision by the administration concerning a staff member’s terms of appointment, including all pertinent regulations and rules, which must be communicated to the staff member in writing and which must apply personally to him or her, thus causing imminent and actual effects on the staff member’s terms of appointment. See Doc. JIU/REP/2000/1, Administration of Justice at the United Nations, para. 42.

²³ See for example *Hocking, Jarvis, McIntyre*, UNDT Judgment No. UNDT/2009/077 of 20 November 2009, *Planas*, UNDT Judgment No. UNDT/2009/086 of 10 December 2009, see also cases cited in the second

pears to have endorsed *Andronov* as well.²⁴ The above is a critical issue as it bears direct relevance to receivability. Future jurisprudence is likely to further clarify the extent to which, if any, the newly established UNDT and Appeals Tribunal depart from the definition of an “administrative decision” as expounded in *Andronov*.²⁵

bb. Initial Steps in Contesting an Administrative Decision

The first step in the contestation of an administrative decision involved lodging a request for an administrative review by writing a note addressed to the Secretary-General setting out the reasons why the decision was wrong, and the decision-maker could provide comments if he/she chose to maintain the decision.²⁶ If a collaborative resolution or settlement between the concerned staff member and the administration did not resolve the dispute, or the concerned staff member did not receive a response within the specified time-limit, the staff member was entitled to file an appeal at a Joint Appeals Board (JAB).²⁷ Old Staff Rule 111.(1) dealt with the JAB. JABs were established in New York, Geneva, Vienna, Nairobi and could be established at designated duty stations as well. A JAB comprised *inter alia*, members appointed by the Secretary-General, and there was no requirement that JAB members possess legal qualifications. A staff member could “arrange to have his or her appeal presented to the [JAB] panel on his or her behalf by another serving or retired staff member.”²⁸ The JAB, at its discretion, was empowered to invite the official who took the contested decision to ex-

activity report of the Office of Administration of Justice, 1 July 2009 – 30 June 2010, 77, <<http://www.un.org/en/oaj/unjs/resource.shtml#ActivityReports>>.

²⁴ *Tabari v. Commissioner General of the UN Relief and Works Agency for Palestine Refugees*, UN Appeals Tribunal-030 of 30 March 2010, 18.

²⁵ The UN Appeals Tribunal did not address the issue of receivability and stated: “Because in this case the result is the same either way, we save for another day the question of whether the original application was receivable. We neither affirm nor reverse UNDT’s finding on that issue. But we caution that someone who did not even apply for a position has a heavy burden to contest the result of the process.” See also *Luvai v. Secretary-General of the United Nations*, UN Appeals Tribunal-014 of 30 March 2010.

²⁶ Information Circular Doc. ST/IC/2004/4 of 23 January 2004, para. 22.

²⁷ Old Staff Rule 111.2(a)(ii) and (d).

²⁸ Old Staff Rule 111.2(i).

plain it at a hearing, and the JAB considered the case and made non-binding recommendations to the Secretary-General.²⁹ Allegedly, as a matter of practice, unanimous recommendations were normally accepted, unless there was a compelling reason in law or policy not to do so.³⁰ The concerned staff member could appeal the final decision to UNAT,³¹ and the tribunal's judgment on the case was final.³²

c. Problems with the Initial Remedial Methods of Formal Review in the Pre-Reform Regime

As will be discussed later on in detail, the initial steps to seek review have now been completely transformed. For example, in disciplinary matters, the Secretary-General may impose a sanction without any advice. The concerned staff member may appeal the decision directly to the newly established UNDT.³³ In relation to the administrative review, now, a staff member is required to seek a management evaluation as a first step. Both the JABs as well as the JDCs have been abolished.³⁴ Given the complete overhaul of the old system only the most fundamental problems with the initial steps that were required in seeking review will be noted here.

The critical problem with the pre-reform system related to the absence of due process safeguards in relation to many aspects of that regime. The rule of law, in the context of administrative law, gives rise to a set of due process principles which include the right to be heard by or make representations to an impartial adjudicator; the right to appeal; and the right to a reasoned decision.³⁵ The old system was deficient in providing the above-mentioned due process guarantees. A major difficulty with the initial stages of review related to the character of the advisory bodies, namely, the JDCs and the JABs. As has been shown, neither of those bodies was empowered to take binding decisions. Those

²⁹ Old Staff Rule 111.2(p).

³⁰ Information Circular, see note 26, para. 23.

³¹ Old Staff Regulation 11.2.

³² Information Circular, see note 26, para. 24.

³³ Secretary-General's Bulletin Doc. ST/SGB/2009/11 of 24 June 2009, Transitional Measures related to the Introduction of the New System of Administration of Justice, para. 3.

³⁴ *Ibid.*, para. 2.

³⁵ C. Harlow, "Global Administrative Law: The Quest for Principles and Values", *EJIL* 17 (2006), 190 et seq.

bodies could only make recommendations and consequently could not determine the rights or obligations of the persons concerned.³⁶ As a result, the old UNAT regime was rendered as a one-tier justice system with no right to appeal. But the right to an appeal constitutes a fundamental aspect of due process.³⁷

Furthermore, the members of the JABs and the JDCs were appointed by the Secretary-General who was often a respondent in the proceedings as an embodiment of the United Nations. Due to the fact that the JABs and JDCs were composed of staff members acting in an advisory capacity to the Secretary-General, and were volunteers who performed that role in addition to their other responsibilities,³⁸ they cannot be said to be objectively independent. It is a fundamental right that a person has access to an impartial court or tribunal to seek the protection of his/her fundamental rights.³⁹ The JABs and JDCs objectively did not constitute an impartial and competent tribunal and this

³⁶ It was considered contrary to the Charter to render JDCs and JABs recommendations binding as pursuant to the terms of Article 97 of the UN Charter. Further, as early as 1994, there were suggestions that the JABs should be transformed into a semi-judicial body with arbitrators as members. However, the suggestion failed for several reasons, see Report of the Secretary-General: Administration of Justice at the United Nations, Doc. A/56/800 of 13 February 2002, para. 15.

³⁷ See e.g., article 7 of the African Charter on Human and Peoples' Rights that states *inter alia*: "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions ... (d) the right to be tried within a reasonable time by an impartial court or tribunal."; the Redesign Panel stated at para. 10: "When 'in the determination of ... his rights and obligations in a suit at law' an individual is deprived of the right to appeal, this severely weakens the fairness of the procedure. International standards establish the right to 'an effective remedy', 'the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal' and 'the right to an appeal'". For a discussion of the right to appeal see generally L. O'Neill/G. Sluiter, "The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia", *Melbourne Journal of International Law* 10 (2009), 596.

³⁸ Redesign Panel, see note 3, para. 63.

³⁹ Article 25 of the American Convention on Human Rights states *inter alia*: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights ...".

was especially relevant as there existed only one layer of judicial appeal after the Secretary-General made an adverse finding.

The issue of delay also adversely affected the efficient functioning of the internal justice system. Generally, it took more than a year to implement disciplinary measures, and as the advisory bodies had a common secretariat and priority was given to disciplinary matters, there were inordinate delays in the proceedings. It took an average of three years e.g. to conclude a case at a JAB.⁴⁰ Furthermore, as discussed earlier, the rules did not provide for a requirement of legal qualifications for JAB and JDC members, and as a result, their reports were often of poor quality, and were frequently rejected.⁴¹ This gave staff members the perception that the system worked against them.⁴² As was noted by the Redesign Panel, “That the administration of justice in the United Nations lags so far behind international human rights standards is a matter of urgent concern requiring immediate, adequate and effective remedial action.”⁴³

Moreover, while in theory a staff member could seek legal assistance from the Panel of Counsel at various stages of the dispute, in practice, the system did not work. A significant number of staff members could not access legal representation and their due process right to the right of equality of arms was compromised.⁴⁴ At field duty stations, staff members were unaware of the existence of the Panel of Counsel which in theory provided legal services, and the distances and logistics involved in any case made it impracticable to seek such advice.⁴⁵ In relation to the presentation of claims, and equality of arms, the Redesign Panel said that to guarantee due process and to facilitate decisions, and to guarantee equality before courts and tribunals, “access to lawyers and legal services is crucial.”⁴⁶

⁴⁰ Redesign Panel, see note 3, para. 67.

⁴¹ Information Circular, see note 26, para. 23.

⁴² Redesign Panel, see note 3, para. 68.

⁴³ *Ibid.*, para. 11.

⁴⁴ *Ibid.*, para. 10.

⁴⁵ *Ibid.*, para. 23.

⁴⁶ *Ibid.*, para. 10.

3. The United Nations Administrative Tribunal – UNAT

a. Outline of the UNAT Regime

aa. A Brief History

The question of the establishment of an Administrative Tribunal for the United Nations was considered as early as 1945 by the Preparatory Commission of the United Nations.⁴⁷ The Preparatory Commission, in 1945, recommended that an Administrative Tribunal be created.⁴⁸ The issue was considered by various committees during the second and third session of the General Assembly,⁴⁹ and on 21 September 1949, at the fourth session, the Secretary-General submitted his Report on the Establishment of the United Nations Administrative Tribunal⁵⁰ which contained *inter alia*, a Draft Statute of that tribunal. On 8 November 1949, following the consideration of the Draft Statute, the Fifth Committee approved the draft and recommended it for adoption to the General Assembly.⁵¹ The General Assembly considered the Report, and pursuant to its Resolution 351 (IV) of 24 November 1949, the United Nations Administrative Tribunal came into existence.⁵² The reasons for the creation are best captured in the statement, “The United Nations is not suable in any national court without its consent; nor can it be sued

⁴⁷ For a summary of the process of the creation of UNAT, see Amerasinghe, see note 5, *The Law of the ...*, 54-57; for the early work of the Executive Committee see Doc. PC/EX/113/Rev.1 of 12 November 1945, 83.

⁴⁸ “An Administrative Tribunal should be established at an early date. It should be competent to adjudicate on any dispute arising in connection with the fulfillment of an official’s contract. The Secretary-General should be authorized to appoint a small advisory committee, possibly including representatives of the staff, to draft for submission to the Assembly a statute for this Tribunal. The Tribunal might include an expert on relations between employers and employees in addition to legal experts.”, Doc. PC/20, para. 74, cited in Amerasinghe, see note 5, *The Law of the ...*, 54.

⁴⁹ See Doc. cited in Amerasinghe, see note 5, *The Law of the ...*, 55 nn. 33 and 34.

⁵⁰ See Report of the Secretary General, Doc. A/986 of 21 September 1949, 146-156.

⁵¹ See the Report of the Fifth Committee, Doc. A/1127 of 22 November 1949 and Corr. 1, Official Records of the General Assembly, Fourth Sess., Plenary Mtgs, Annex, 167-172, Rapporteur: Miss Witteveen (Netherlands).

⁵² 25th Plenary Mtg of 24 November 1949, Official Records of the General Assembly, Fourth Sess., Plenary Mtgs, 360-362.

by an official in the International Court of Justice. By creating a tribunal to serve as a jurisdiction open to its many officials of various nationalities, the United Nations will be acting not only in the interest of efficient administration, but also in the cause of justice.”⁵³

bb. Jurisdiction and Receivability

Pursuant to article 2 (1) of its Statute, UNAT was “competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members.” The Statute also established that it would be open “to any other person who can show that he or she is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.”⁵⁴ While one interpretation of the wording of that provision suggests, that the tribunal was potentially open to persons other than staff members, the phrase “staff regulations and rules upon which the staff member could have relied” led to a restrictive interpretation as to who constituted a staff member.⁵⁵ UNAT’s jurisprudence and UN practice established that persons employed on special service agreements and individual contractors did not constitute staff members, and thus, those persons could not access the internal justice mechanisms.⁵⁶ That was one point of critique later on by the Redesign Panel.⁵⁷

Furthermore, in accordance with article 7, UNAT could not receive a case unless the person concerned had previously accessed a JDC or a JAB, except where the Secretary-General and the applicant had agreed to submit the application directly to UNAT. In the event that the recommendations made by the joint body and accepted by the Secretary-General were unfavorable to the applicant, the application was receiv-

⁵³ *Effect of Awards*, see note 2, Oral Statements, 294.

⁵⁴ Article 2 (2)(b) UNAT Statute.

⁵⁵ Redesign Panel, see note 3, paras 16-18.

⁵⁶ *Ibid.*, para. 15.

⁵⁷ *Ibid.*, para. 20. It suggested that the system of justice should be extended both to any person appointed by the Secretary-General, the General Assembly or any principal organ to a remunerated post in the organization and to any other person performing personal services under contract with the United Nations, including consultants and locally recruited personnel of peacekeeping missions; see also A/RES/59/283 of 13 April 2005 where it established guidelines for a more comprehensive coverage.

able, unless the joint body unanimously considered that it is frivolous.⁵⁸ Consequently the relevant joint appeals body could produce a result where the concerned member did not have access to an independent tribunal.

cc. Appointment of Judges

Article 3 of UNAT's Statute stated *inter alia*, there would be seven members at UNAT, all of whom must be of different nationalities, and each of them was required to possess administrative law experience in their respective jurisdiction.⁵⁹ Pursuant to article 3 (2) of its Statute, judges were appointed by the General Assembly.⁶⁰ This often raised the issue of political influence in appointments and issues concerning the independence of the judges.⁶¹ Pursuant to article 3 (5), no member of the tribunal could be dismissed by the General Assembly unless the other members were of the unanimous opinion that he/she was unsuited for further service.

dd. Other Provisions Relevant to Due Process Issues

Pursuant to article 15 of the Rules of Procedure of UNAT, the holding of oral proceedings was subject to the discretion of the presiding member. It appears that in the vast majority of cases, the tribunal decided cases on the basis of the documentation before it.⁶² As regards the rules on legal representation before the tribunal, article 13 of the Rules provided that a staff member may present his case before the tribunal,

⁵⁸ See article 7 (3) of the UNAT Statute.

⁵⁹ Article 3 has been subject to various amendments. Among others, it was amended by the General Assembly in its resolution A/RES/55/159 of 12 December 2000 that required that UNAT members possess requisite qualifications, and as appropriate, legal experience. Article 3 was last amended by A/RES/58/87 of 9 December 2003.

⁶⁰ See information available in Doc. A/56/800, see note 36, para. 40.

⁶¹ See generally, M. Vicien-Milburn, "The Independence of the UN Administrative Tribunal and its Legacy", in: K. Papanikolaou/ M. Hiskaki (eds), *International Administrative Tribunals in a Changing World: United Nations Administrative Tribunal Conference: Organized under the Auspices of the Executive Office of the Secretary-General, New York, 9 November 2007*, 2008, 105.

⁶² See the information extracted on UNAT's website <<http://untreaty.un.org/unat/faq.htm>>.

“in person, in either the written or oral proceedings. ... he may designate a staff member of the United Nations or one of the specialized agencies to represent him, or may be represented by counsel authorized to practice in any country a member of the organization concerned. The President or, when the Tribunal is in session, the Tribunal may permit an applicant to be represented by a retired staff member of the United Nations or one of the specialized agencies.”

Article 11 (2) of the Statute stated that “the judgements of the Tribunal shall be final and without appeal.”⁶³ Consequently, the affected staff member was unable to exercise his/her right to an appeal.

ee. Remedies at UNAT

Pursuant to article 10 (1) of the Statute, the tribunal was empowered to order the rescinding of the decision contested or the specific performance of the obligation invoked. However, as it was considered on occasions inappropriate to force the Secretary-General to reinstate the employment of a staff member whose employment had been terminated, the Secretary-General could compensate the concerned staff member instead.⁶⁴

b. Analysis of the UNAT Regime

The challenges for litigants at the top of the pyramid of the formal justice system were similar in character to the issues confronted by the litigants before the advisory bodies. It appears from the above outline of the key provisions of UNAT’s Statute that several basic due process guarantees were absent. The key problematic issues faced by the UNAT regime, and the pre-reform internal justice system not only related to a lack of due process, but as shown above, the systems were extraordinarily slow, and simple matters took years to be resolved. Furthermore, there was a lack of knowledge of the recourse options available amongst staff members, and general disenchantment prevailed since the staff believed that justice was unequal and was influenced by position and nationality.⁶⁵ The faults and various suggestions for improvement of the

⁶³ Article 12 of the UNAT Statute that created a facility to seek corrections and/or clarifications of decisions where a new fact was discovered which was unknown to the parties.

⁶⁴ See Article 10 of the UNAT Statute; see also Redesign Panel, see note 3.

⁶⁵ See Redesign Panel, see note 3, para. 28.

administration of justice at the United Nations are contained in numerous reports and documentation prepared by it.⁶⁶ It is impracticable to discuss all the shortcomings of the pre-reform system in detail, and the following just seeks to capture the main shortcomings in terms of due process issues.

aa. Right to Appeal

As has already been stated, a staff member could not appeal an adverse finding by UNAT, and thus, his/her right to appeal was infringed.⁶⁷ For a certain period of time, there existed a possibility of making a reference to the ICJ for an Advisory Opinion that was available to UNAT.⁶⁸ That procedure was abolished by the General Assembly in its resolution A/RES/50/54 of 11 December 1995 on the grounds that it was not a useful element respecting the adjudication of staff disputes within the organization.⁶⁹

⁶⁶ For further information on the weaknesses of the pre-reform system, historical perspectives and the changes proposed, see Redesign Panel, see note 3; Administration of Justice at the United Nations, Report of the Joint Inspection Unit, Doc. JIU/REP/2000/1 of 12 June 2000; Reform of the Administration of Justice in the United Nations System: Options for Higher Recourse Instances, Report of the Joint Inspection Unit, Doc. JIU/REP/2002/5 of 1 January 2002; see also the numerous reports prepared by the Secretary-General and the Fifth Committee on the issue of the Administration of Justice at the United Nations.

⁶⁷ A right to appeal is critical as it gives an appellant court an opportunity to correct a decision tainted with error. In the absence of such a right, the lower courts may on occasions act arbitrarily, cf. I. Seiderman, *International Council of Jurists*, 12 November 2002, ILOAT Reform – Staff Union Website <www.ilo.org/public/english/staffun/info/iloat/seiderman.htm>.

⁶⁸ In 1955, the UNAT statute was amended by A/RES/957 (X) of 8 November 1955, making provision in its new article 11 for a limited review of UNAT judgments through the power of a special committee to request Advisory Opinions from the ICJ. For an analysis of the process, J. Gomula, “The International Court of Justice and Administrative Tribunals of International Organizations”, *Mich. J. Int’l L.* 13 (1991), 83 et seq.

⁶⁹ During the period the review mechanism was present, a Member State, the Secretary-General, or the concerned staff member could request the Committee on Applications for Review of Judgments of the Administrative Tribunal of the United Nations to request an Advisory Opinion from the ICJ on the relevant judgment. That procedure was abolished by the General Assembly in its resolution A/RES/50/54 of 11 December 1995 on the

In 2000, the Joint Inspection Unit (JIU) recommended that consideration be given to a possible establishment of a higher instance for appeal,⁷⁰ and in its Report, the Redesign Panel emphasized the need for a second instance and suggested the establishment of a two-tier system of administration of justice as one of the cornerstones of the reform efforts. It was suggested that a new tribunal, the United Nations Dispute Tribunal should be created and serve as the first instance, whereas the existing UNAT should be renamed United Nations Appeals Tribunal and have the primary function of hearing appeals from the UNDT.⁷¹

bb. The Issue of Oral Hearings

UNAT often decided cases in written form, and as discussed earlier, the concerned staff member did not have a right to an oral hearing. The Redesign Panel stated that, “to guarantee due process and to facilitate decisions, oral hearings should be promoted and accepted.”⁷² The fact that proceedings were predominantly in written form was subject to heavy criticism by staff unions arguing that this violates the right to a fair trial as provided for in human rights treaties.⁷³ While the JIU suggested that the possibility of holding oral hearings should be subject to further

grounds that it was not a useful element respecting the adjudication of staff disputes within the organization.

⁷⁰ Administration of Justice at the United Nations, Report of 12 June 2000, see note 66, ix.

⁷¹ Redesign Panel, see note 3, para. 74; for earlier attempts to establish mechanisms of review, see Doc. JIU/REP/2002/5, vii, see note 66. That report also sheds light on the following debate on moves to harmonize the statutes of UNAT and the ILOAT.

⁷² Redesign Panel, see note 3, para. 10.

⁷³ London Resolution of the ILO Staff Union, 28 September 2002, <www.ilo.org/public/english/staffun/info/iloat/londonres.htm>, with regard to the ILOAT practice of denying oral hearings it has been remarked that “all human rights treaties require a ‘fair and public hearing’ for disputes concerning civil obligations: a fortiori they are breached by a Tribunal which offers no hearings at all. There may be cases where the facts are not in dispute and the legal issues can be satisfactorily adumbrated on paper ... to deprive all complainants of a hearing to which they are presumptively entitled cannot be justified ... [ILOAT must adopt a rule that] makes pellucidly clear that any party is entitled to an oral hearing on request, which may only be refused in limited and defined circumstances and with a reasoned decision that such circumstances exist.”

study,⁷⁴ the Redesign Panel emphasized the importance of oral hearings generally, and found them to be a requirement where there existed disputed issues of fact.⁷⁵ However, one must consider the difficulties in always holding oral hearings in the context of the United Nations, where distances are often vast. Disciplinary proceedings should involve oral hearings, but in cases largely concerning administrative matters, if factual issues are not in contest, then for reasons of expediency, cases could be decided in written form. Moreover, technology is, and will undoubtedly enhance the process of holding a hearing even when parties are in different locations.

cc. Access to Legal Representation

To guarantee equality before courts and tribunals, access to lawyers and legal services is crucial. In the pre-reform system, staff members had, theoretically, the right to a lawyer of their choice, but, in practice, access was not effective and equal.⁷⁶

Under the pre-reform system, the UN administration had the support of well-trained lawyers of the Office of Legal Affairs, whereas staff members often relied on staff counsel with no legal qualifications. Already in 2000, the JIU pointed out that staff members are at a disadvantage in this respect⁷⁷ and recommended that the Panel of Counsel be strengthened.⁷⁸ The Redesign Panel later on also criticized the Panel of Counsel as under-resourced (it had only two full-time staff members as of 2006) and unprofessional⁷⁹ in that there was no requirement for legal qualifications in order to serve on it.⁸⁰ The pre-reform regime in that respect was highly unsatisfactory. The Redesign Panel thus recommended the creation of a professional Office of Counsel, staffed by persons with legal qualifications.⁸¹

⁷⁴ Report of the Joint Inspection Unit: Note by the Secretary-General, Doc. A/55/57/Add.1 (2000) of 16 August 2000, 6.

⁷⁵ Redesign Panel, see note 3, paras 10 and 92.

⁷⁶ *Ibid.*, para. 10.

⁷⁷ Doc. JIU/REP/2000/1, see note 66, 7.

⁷⁸ *Ibid.*, 7.

⁷⁹ Redesign Panel, see note 3, paras 100 and 102.

⁸⁰ *Ibid.*, para. 105.

⁸¹ *Ibid.*, para. 107.

dd. Independence of the Judicial Institution

The Secretariat of UNAT was under the auspices of the Office of Legal Affairs. The staff were selected by and had to report to the executive head of the organizations.⁸² Such a system leads to a situation of objective bias. As was stated earlier, the manner in which members of UNAT were appointed gave rise to suggestions that appointments were politically motivated, and the JIU emphasized the importance that all bodies concerned with the administration of justice be independent.⁸³ The Redesign Panel suggested therefore the establishment of an Office of Administration of Justice as well as an Internal Justice Council, in order to monitor the formal justice system.⁸⁴ Such an office has now been established and is operational.

c. UNAT's Legacy

While the old system was subject to substantial criticism, it nevertheless left an important legacy. The jurisprudence of UNAT undoubtedly constitutes a legacy not only for the newly established UNDT and Appeals Tribunal, but for international administrative law in general.⁸⁵ Its jurisprudence on the concept of acquired rights,⁸⁶ the independence of the international civil service and its jurisprudence on due process are

⁸² Reinisch/ Knahr, see note 3, 453.

⁸³ Doc. JIU/REP/2002/5, vi., see note 66.

⁸⁴ Redesign Panel, see note 3, paras 124-127, "The Internal Justice Council [is] responsible for monitoring the formal justice system and also for compiling a list of ... persons eligible to be appointed to each judicial position.", at para. 127.

⁸⁵ See generally, Vicien-Milburn, see note 61; cf. also C.F. Amerasinghe, "Judging with and Legal Advising in International Organizations", *Chi. J. Int'l L.* 2 (2001), 283 et seq.

⁸⁶ The concept of acquired rights is contained in old Staff Regulation 12.(1). Respect for acquired rights means that "the complex of benefits and advantages to which a staff member is entitled for services rendered before the entry into force of a new rule cannot be impaired", see *Copio*, UNAT No. 266 (1980) of 20 November 1980, para. VIII. See also *Mortished*, UNAT No. 273 (1981) of 15 May 1981 which was eventually considered by the ICJ pursuant to a procedure for the review of UNAT's judgments that were then in force. In *Mortished*, the ICJ upheld UNAT's decision, cf. Advisory Opinion, *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, ICJ Reports 1982, 325 et seq. (365 et seq., para. 79).

some of the key areas in which UNAT made its greatest contributions. The tribunal rendered numerous judgments where it reaffirmed the principles of the independence of the international civil service as enshrined in Article 100 para. 1 of the Charter. UNAT expanded upon the safeguards necessary to ensure the independence of an international civil servant from the government of a staff member's state of nationality and other institutions, and when required, delivered bold decisions that forced a change in the Secretary-General's practice.⁸⁷

Due process and fairness constitute the most important way in which an international civil servant can protect his/her rights. In the *Sokoloff* case⁸⁸ UNAT emphasized the application of the general principle of due process and stated,

“First, [UNAT] wishes to underline the importance that procedure has, an importance which has been emphasized in recent years throughout developed legal systems, under the title of due process ... the Tribunal is of the opinion that the assurances of due process and fairness, as outlined by the General Assembly ... mean that, as soon as a person is identified, or reasonably concludes that he has been identified, as a possible wrongdoer in any investigation procedure and at any stage, he has the right to invoke due process with everything that this guarantees.”⁸⁹

While several of the due process guarantees were often not realized in the way in which the old system operated,⁹⁰ UNAT did play a role in building a body of jurisprudence that provided for, and expanded the

⁸⁷ Vicien-Milburn, see note 61, 108; see the cases relating to employees on secondment where undue pressure seemed to be exerted on the UN by certain states following adverse decisions which were made in relation to those employees. UNAT decided in favor of those employees. In doing so, the Tribunal ensured the independence of UN staff and the Secretary-General had to reconsider the entitlements of several staff members: see, *Yakimetz*, UNAT No. 333 (1984) of 8 June 1984 and *Qiu Zhou and Yao*, UNAT No. 482 (1990) of 25 May 1990. Mr Yakimetz applied for a review of UNAT's judgment, however, the ICJ upheld the tribunal's findings, see *Application for Review of Judgment*, see note 86, 72 para. 97.

⁸⁸ *Sokoloff*, UNAT No. 1246 (2005) of 22 July 2005.

⁸⁹ *Ibid.*, paras IV-V.

⁹⁰ See Redesign Panel, see note 3, para. 72: “[t]here is a widespread view, which is largely correct, that the formal justice system affords little, if any, protection of individual rights, such as the right to a safe and secure workplace or the right to be treated fairly and without discrimination.”

meaning of the various due process rights.⁹¹ It was finally abolished as of 31 December 2009,⁹² as well as the JDCs and JABs.⁹³

4. Conclusion

It is unsurprising that the Redesign Panel stated that the dysfunctional system of administration of justice, which existed at the United Nations, was inconsistent with the principles and aspirations of the organization, and needed to be replaced.⁹⁴ But it is important to give UNAT credit for the legacy in terms of the rich body of jurisprudence that it has left behind. UNAT dealt with complex and sensitive issues, especially due to the variety of functions that the United Nations performs, and according to some estimates approximately 50-60 per cent of the cases were decided in favor of staff members.⁹⁵ This suggests that UNAT did play a role in enhancing the rights of staff members. However, as has been shown, the process of internal dispute resolution was slow, ineffective and lacked certain core aspects of due process, and a radical transformation of the system was long overdue. The system is now in fact replaced, and the next Part will outline the fundamental aspects of this new system.

II. The New System of Internal Dispute Resolution at the United Nations

1. Introduction

This Part outlines the key characteristics of the new internal dispute resolution system. As the new internal justice mechanism has been operational for a short time it might be too early to judge its success. However, based upon the initial signals, it is useful to consider whether the new system is moving in the direction that is consistent with the in-

⁹¹ For UNAT's contribution on the jurisprudence of due process, see K. Baxter/ S. Flogaitis, "What Process is Due: The Sokoloff Case", in: Papanikolaou/ Hiskaki, see note 61, 129-140.

⁹² A/RES/63/253 of 24 December 2008, para. 43.

⁹³ *Ibid.*, para. 38.

⁹⁴ Redesign Panel, see note 3, para. 150.

⁹⁵ Amerasinghe, see note 85, 292.

tention behind its creation. Thus, following the consideration of the new recourse options available to UN staff, in the following certain judgments rendered by UNDT so far, will be considered in order to analyze the manner in which the new system appears to be operating. Further some preliminary indications about the nature of the transformation that is being brought about in the internal working of the United Nations as a result of the overhaul of the internal justice regime will be provided.

2. The Introduction of the New System

While the new system at the UN was established in 2007, it was only in 2009 that it became operational.⁹⁶ By A/RES/61/261 of 4 April 2007, the General Assembly had established the new system to handle employment-related disputes that aimed at creating “a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process.”⁹⁷ In adopting that Resolution, the General Assembly was acting pursuant to the Secretary-General’s proposals concerning the administration of justice, which were derived from the recommendations made by the Redesign Panel, and from the extensive consultations with staff through the Staff-Management Coordination Committee.⁹⁸

The General Assembly established a new Office of Administration of Justice (OAJ), which possesses the overall responsibility for the coordination of the UN internal dispute resolution system.⁹⁹ The OAJ is an independent office that *inter alia*, provides support to UNDT and the Appeals Tribunal through their Registries.¹⁰⁰

Furthermore, both the formal and the informal systems have undergone a comprehensive transformation. As regards the formal system, in

⁹⁶ A/RES/63/253 of 24 December 2008.

⁹⁷ A/RES/61/261 of 4 April 2007, para. 4, later reaffirmed by A/RES/62/228 of 22 December 2007.

⁹⁸ Report of the Secretary-General, Doc. A/61/294 of 23 August 2007.

⁹⁹ A/RES/62/228 of 22 December 2007, para. 10. Further details on the role, structure and working of the OAJ in the present system are contained in Secretary-General’s Bulletin, Organization and Terms of Reference of the Office of Administration of Justice, Doc. ST/SGB/2010/3 of 7 April 2010.

¹⁰⁰ Doc. ST/SGB/2010/3, see note 99, para. 21.

line with the recommendation of the Redesign Panel, the formal system of the administration of justice now comprises, as already mentioned, two tiers. A decentralized first instance judicial body, the UNDT, and an appellate instance tribunal, the United Nations Appeals Tribunal, both tribunals are empowered to render binding decisions and ordering appropriate remedies.¹⁰¹ Furthermore, the General Assembly, in accordance with the suggestions of the Redesign Panel, decided to create a single integrated and decentralized Office of the Ombudsman for the UN Secretariat, funds and programs.¹⁰² It emphasized the crucial role that mediation has to play in the new system, and formally established a Mediation Division within the Office of the United Nations Ombudsman to provide formal mediation services.¹⁰³ To promote the equality of arms, the General Assembly established the Office of Staff Legal Assistance which was to succeed the Panel of Counsel in order to facilitate the provision of professional legal assistance to staff members.¹⁰⁴ In the new system, this office is one of the organizational units of the Office of Administration of Justice.¹⁰⁵ A five-member Internal Justice Council consisting of a staff representative, a management representative, two distinguished external jurists and chaired by a distinguished jurist chosen by consensus by the four other members was also established.¹⁰⁶ Its major roles are to source suitable candidates to serve as members of the newly established tribunals, and make recommendations to the General Assembly regarding the selection of judges.¹⁰⁷

After several decades of efforts to reform the internal justice system,¹⁰⁸ by Resolution A/RES/63/253 dated 24 December 2008, the General Assembly, *inter alia*, adopted the Statute of the UNDT

¹⁰¹ A/RES/61/261 of 4 April 2007, para. 19.

¹⁰² *Ibid.*, para. 12.

¹⁰³ *Ibid.*, para. 15.

¹⁰⁴ A/RES/62/228 of 22 December 2007, para. 13.

¹⁰⁵ Doc. ST/SGB/2010/3, see note 99, para. 7.1.

¹⁰⁶ A/RES/62/228 of 22 December 2007, para. 36.

¹⁰⁷ *Ibid.*, para. 37.

¹⁰⁸ For examples on UN efforts to reform the internal justice system in the last three decades, see Report of the Secretary-General on the Establishment of an Office of Ombudsman in the Secretariat and the Streamlining of the Appeals Procedures, Doc. A/C.5/42/28 of 3 November 1987; see also Reform of the Internal System of Justice in the United Nations Secretariat, Doc. A/C.5/50/2/Add.1 of 17 November 1995; Reform of the Internal System of Justice in the United Nations Secretariat, Doc. A/C.5/50/2 of 27 September 1995.

(UNDT's Statute) and the Statute of the Appeals Tribunal (Appeals Tribunal's Statute).¹⁰⁹

3. The Formal Regime of Internal Justice

a. Disciplinary Matters: Does the New Regime Remedy the Flaws of the Old System?

The new regime concerning disciplinary matters is enshrined in Chapters X and XI of the Staff Regulations and Provisional Staff Rules. It should be recalled that, in the old system, the Secretary-General needed to receive the advice of the JDCs before imposing a disciplinary measure on a staff member.¹¹⁰ As of 1 July 2009, given that the JDCs are now abolished, the Secretary-General or a decision-maker on whom discretionary authority to impose disciplinary measures is bestowed, may impose disciplinary measures for misconduct¹¹¹ without receiving such advice, and the concerned staff member may appeal that decision to impose disciplinary measure/s (within 90 days of that decision) directly to UNDT.¹¹² A staff member may further appeal a decision of UNDT to the Appeals Tribunal.¹¹³

Provisional Staff Rule 10.(3)(a) enshrines the due process requirement respecting the conduct of disciplinary proceedings. It states,

“[N]o disciplinary measure ... may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the charges against him or her, and has been given the opportunity to respond to those charges. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.”

The weaknesses of the old system concerning disciplinary proceedings that were noted in Part I included: (1) the poor quality of the reports of the respective JDC, a body that objectively lacked independence, possessed no power to make binding decisions, was presided over

¹⁰⁹ A/RES/63/253 of 24 December 2008, para. 26.

¹¹⁰ Provisional Staff Rule 10.2 contains a list of potential disciplinary measures.

¹¹¹ “Misconduct” is defined in Provisional Staff Rule 10.1.

¹¹² See arts 2(1)(b) and 8 (1)(d)(ii) of UNDT's Statute, Annex I; also see Provisional Staff Rules 10.3(c), 11.2(b) and 11.4(b).

¹¹³ Arts 2 and 7 of the Appeals Tribunal Statute, Annex II.

by persons with no legal qualifications, and which was effectively the first stage of review against a disciplinary measure; (2) the extensive delays in the imposition of disciplinary measures; and (3) problems faced by concerned staff members in obtaining legal representation, especially in field duty stations where staff were often unaware of the existence of the Panel of Counsel. Following the imposition of a disciplinary measure, a staff member can now seek review at UNDT. As a result, the issue of the lack of access to an independent tribunal to seek review of an adverse decision is now remedied. Furthermore, the fact that a staff member can appeal UNDT's decision to the Appeals Tribunal ensures that UN staff can now exercise their right to an appeal.

Concerning the issue of delay, proceedings at the JDCs usually took 6-8 months, and its recommendations had to be considered at Headquarters in New York before any disciplinary measures could be taken,¹¹⁴ making the overall process lengthy and complex. Furthermore, often a staff member was summarily dismissed when the misconduct in question should have attracted a weaker measure, as management could not impose less stringent measures until the respective JDC made its recommendations.¹¹⁵ To address the protracted delays concerning disciplinary matters prevalent in the old centralized system, the Redesign Panel recommended delegating authority to executive heads of missions and offices away from Headquarters. They should have power to impose whatever disciplinary measure is considered appropriate and staff members should have an immediate right to challenge the decision before UNDT.¹¹⁶

The issue of the imposition of stringent measures when weaker disciplinary measures could be more appropriate, seems to be remedied by the terms of Provisional Staff Rule 10.(3)(b), which states "Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct." However, it might be beneficial to have criteria which provide decision-makers with guidance as to which disciplinary measure to impose for particular misconduct to ensure consistency. It does not appear that the current Staff Regulations and Rules in force, or the relevant Administrative Instructions provide

¹¹⁴ Redesign Panel, see note 3, para. 65.

¹¹⁵ *Ibid.*, para. 79.

¹¹⁶ *Ibid.*, para. 80; for a discussion of the views of the Secretary-General on the recommendations of the Redesign Panel, see Report of the Secretary-General: Administration of Justice at the United Nations, Doc. A/63/314 of 20 August 2008.

such guidance.¹¹⁷ Under the current rules, recommendations for the imposition of disciplinary measures are taken by the Under-Secretary-General for Management, and the Office of Legal Affairs is required to review recommendations that relate to the dismissal of staff.¹¹⁸ However, as a concerned staff member can now directly appeal against a disciplinary measure to UNDT within 90 days of the notification of the relevant decision, the delays caused by the inefficiency of the JDCs and JABs have been eliminated. It appears that the administration is in the process of creating an efficient model of imposing disciplinary measures.

Regarding legal representation, in the new system an adversely affected staff member must be notified of his/her right to seek the assistance of counsel in his or her defense through the Office of Staff Legal Assistance and must be offered information on how to obtain such assistance.¹¹⁹ Furthermore, pursuant to Provisional Staff Rule 11.(4)(d) “A staff member shall have the assistance of counsel through the Office of Staff Legal Assistance if he or she so wishes, or may obtain outside counsel at his or her expense, in the presentation of his or her case before the United Nations Dispute Tribunal.” Thus, the defect in the old system whereby staff members were often unaware of the existence of the Panel of Counsel, and could not access professional legal advice seems, at least in theory, to have been remedied. Consequently, a staff member does have a right to legal representation if he/she chooses to exercise it, and the new system seems to promote the right to equality of arms. This issue will be revisited as it is relevant to several segments of the discussion that is yet to follow.

¹¹⁷ *Ibid.*, paras 25 and 49: the Secretary-General considered that a number of safeguards need to be put in place to ensure that the imposition of disciplinary measures at the various duty stations are consistent, and due process rights are protected.

¹¹⁸ Administrative Instruction Doc. ST/AI/371 of 2 August 1991, para. 6, which contains the changes to the manner in which disciplinary proceedings are to be conducted as enshrined in Administrative Instruction Doc. ST/AI/371/Amend.1 of 11 May 2010.

¹¹⁹ *Ibid.*, para. 5.

b. Non-Disciplinary Matters

aa. Management Evaluation

The first formal step in the new system to contest an adverse administrative decision involves a request for a management evaluation to the newly created Management Evaluation Unit which is an independent organization unit within the Department of Management and charged with carrying out evaluations, via information to the Under-Secretary-General for Management,¹²⁰ with a copy to the head of department/office where the concerned staff member is based.¹²¹ A request for a management evaluation must be made within 60 days of the notification of the relevant decision to the adversely affected staff member.¹²² Staff members requesting a management evaluation are “strongly encouraged to seek advice and assistance of counsel, either with OSLA or private counsel, in order to become fully acquainted with their rights.”¹²³ There exist strict time limits within which the management evaluation must take place. Following a request for management evaluation, a staff member is to receive a reasoned response within 30 days (if he/she is based at Headquarters), and within 45 days (for staff based away from Headquarters).¹²⁴ A staff member may file an appeal at the UNDT against the outcome of the management evaluation within 90 days of receiving the evaluation,¹²⁵ and if no response is received within the specified time-limits, then, the staff member may proceed with his/her appeal against the decision within 90 days of the date within which the concerned staff member should have received a response on

¹²⁰ In the Secretariat, management evaluations are to be carried out by a new Management Evaluation Unit in the Office of the Under-Secretary-General for Management, see Secretary-General’s Bulletin Doc. ST/SGB/2009/11 of 24 June 2009, Transitional Measures Related to the Introduction of the New System of Administration of Justice, para. 13.

¹²¹ Provisional Staff Rule 11.2(a).

¹²² Provisional Staff Rule 11.2(c).

¹²³ See the website of the OAJ for a step by step guide provided to staff members in seeking review of adverse decisions, <www.un.org/en/oaj/unjs/stepbystep.shtml>.

¹²⁴ Provisional Staff Rule 11.(2)(d) and article 8 of UNDT’s Statute. The deadlines are subject to extensions that may be granted to reach a resolution by using informal means of dispute resolution.

¹²⁵ Article 8 of UNDT’s Statute deals with receivability.

his/her request for a management evaluation.¹²⁶ A concerned staff member may file an appeal against the decision of the UNDT at the Appeals Tribunal within 45 days of the decision of the UNDT.¹²⁷

bb. Non-Disciplinary Matters: Does the New Regime Remedy the Flaws of the Old System?

It should be recalled that in the old system the administrative review model provided the administration with a final opportunity to review a contested decision before the complaint proceeded to a JAB for consideration.¹²⁸ The Redesign Panel recommended that the system of administrative review before action should be abolished.¹²⁹

The newly established management evaluation regime primarily seeks to provide an “independent, third-party review of whether a decision complies with organizational rules, policies and procedures.”¹³⁰ As is shown in the legal regime governing management evaluations, there are strict time limits and requirements as to reasoned responses that reflect the basis for the evaluation. Therefore, an earnest effort has been made to ensure that staff receive prompt and reasoned responses for the decisions of management. The evaluations are carried out by the above mentioned Management Evaluation Unit. The aim is to eliminate the perception of bias that arose in the old system under which the evaluation was carried out by the under-resourced Administrative Law Unit of the Office of Human Resources Management, which was also responsible for defending the administrative decision if the case proceeded to a JAB.¹³¹ This development should be welcomed as the perception of a system free from objective bias is necessary to secure a harmonious work environment.

The issues of legal representation and oral hearings will now be discussed whilst an analysis of the functioning of the new tribunals is undertaken.

¹²⁶ Provisional Staff Rule 11.4(a).

¹²⁷ Provisional Staff Rule 11.5(b).

¹²⁸ Report of the Secretary-General: Administration of Justice at the United Nations, Doc. A/62/294 of 23 August 2007, para. 75.

¹²⁹ Redesign Panel, see note 3, para. 87.

¹³⁰ Doc. A/62/294, see note 128, para. 86.

¹³¹ *Ibid.*, see also Redesign Panel, see note 3, para. 112.

4. The New Judicial Institutions at the United Nations

In-depth references to certain provisions of UNDT's Statute and the Appeals Tribunal's Statute have been made above. The following section will briefly highlight the fundamental characteristics of the new judicial institutions.

a. UNDT's Statute

Pursuant to article 1 of its Statute, UNDT is the first instance of the two-tier formal system of administration of justice at the United Nations. The Registries of UNDT have been established in New York, Geneva and Nairobi.¹³² In accordance with article 2 (1)(a) and (b) of the Statute, it is competent "to hear and pass judgment on an application filed by an individual ... against the Secretary-General as Chief Administrative Officer of the United Nations: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment ... (b) and to appeal an administrative decision imposing a disciplinary measure."¹³³ Article 8 of UNDT's Statute deals with the receivability of an application and provides for strict time-limits. According to article 8 (4), an application is not receivable if it is filed more than three years after the applicant's receipt of the contested administrative decision. Pursuant to article 3 (1) of the Statute, UNDT may be accessed by any staff member of the Secretariat, including former staff members, and by any person who has succeeded to the staff member's rights upon his /her death. The notable exception in relation to access in the new regime is the provision contained in article 2 (2)(b) of UNAT's Statute. That provision stated that UNAT was open, "To any other person who can show that he or she is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied." The corresponding text of which does not appear in the new UNDT Statute. It should be recalled that UNAT gave a narrow interpretation as to who is a "staff member". Discussions on

¹³² Article 6 (2) UNDT's Statute.

¹³³ Article 2 (1)(a) and (b) UNDT's Statute; article 2 (3) empowers UNDT "to permit or deny leave to an application to file a friend-of-the-court brief by a staff association."

who may access the internal justice mechanisms at the United Nations are still underway.¹³⁴

Judicial independence was a fundamental aspect of the reform. In that regard, article 4 states,

“1. The Dispute Tribunal shall be composed of three full-time judges and two half-time judges.¹³⁵

2. The judges shall be appointed by the General Assembly on the recommendation of the Internal Justice Council ... No two judges shall be of the same nationality ...

3. To be eligible for appointment as a judge, a person shall:

(a) Be of high moral character; and

(b) Possess at least 10 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.

4. A judge of the Dispute Tribunal shall be appointed for one non renewable term of seven years. ...

8. A judge of the Dispute Tribunal shall serve in his or her personal capacity and enjoy full independence.

10. A judge of the Dispute Tribunal may only be removed by the General Assembly in case of misconduct or incapacity.”

In Part I., issues regarding the independence of judges were noted in terms of the manner of their appointment. As was highlighted, in the old regime, the General Assembly appointed the judges of UNAT following nominations made by States Parties.¹³⁶ In that regard, the formal independence of the judges was *prima facie* compromised given that they were appointed by an organ of the organization against which complaints were brought. The promotion of formal independence of the judiciary would naturally involve developing procedures that reduce the role of the organization in the appointment of judges. How-

¹³⁴ See in this respect already Reinisch/ Knahr, see note 3, 468.

¹³⁵ See also article 5 of UNDT’s Statute. The three full-time judges of the UNDT are to exercise their functions in New York, Geneva and Nairobi, respectively. However, UNDT is empowered to decide to hold sessions at other duty stations, as required by its caseload.

¹³⁶ For an example of how judges were appointed in the pre-reform system, see e.g. Report of the Fifth Committee: Appointments to Fill Vacancies in Subsidiary Organs and other Appointments: Appointment of Members of the United Nations Administrative Tribunal, Doc. A/62/532 of 6 November 2007.

ever, the Redesign Panel suggested originally that the judges of UNDT should be appointed by the Secretary-General from the list prepared by the Internal Justice Council. According to article 4 (2) of UNDT's Statute the judges now are appointed by the General Assembly on the recommendation of the Internal Justice Council. On 2 March 2009, three full-time and two half-time judges were appointed to the UNDT. Subsequently, the Assembly elected three *ad litem* judges for a period of one year to assist in handling the cases inherited from the former JABs and JDCs as well.¹³⁷

The United Nations has taken further significant steps to ensure independence of the judiciary by granting judges a non-renewable term of seven years, by only granting the General Assembly the power to remove judges, and expressly stating that the members of UNDT operate in their personal capacity and enjoy full independence.

In relation to remedies, it does not appear that the new regime departs from the old system where, in certain cases, the Secretary-General could pay compensation instead of ordering specific performance. That is the case despite the Redesign Panel's view that the power of the Secretary-General to choose between "specific performance and the payment of limited compensation can, and sometimes does, result in inadequate compensation, particularly in cases of wrongful termination or non-renewal of contract. A system that cannot guarantee adequate compensation or other appropriate remedy is fundamentally flawed. More significantly, a system that does not have authority to finally determine rights and appropriate remedies is inconsistent with the rule of law."¹³⁸

The new regime on remedies nevertheless contains some additional aspects which are important to mention. Pursuant to article 10 the UNDT is empowered to *inter alia*,

"3. At any time during the deliberations ... refer the case to mediation. ...

5. As part of its judgement ... order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the re-

¹³⁷ Report of the Secretary-General: Administration of Justice at the United Nations, Doc. A/65/373 of 16 September 2010.

¹³⁸ Redesign Panel, see note 3, para. 71.

spondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation ...

6. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

7. The Dispute Tribunal shall not award exemplary or punitive damages."

The provision on the award of legal costs should be welcomed as it is likely to reduce potential vexatious claims, and the power to refer a case to mediation is just one example of the new regime's aim to make every possible effort to resolve a dispute via informal methods. Further, the United Nations seems to have retained the facility whereby in cases of termination, the Secretary-General may choose to pay compensation to an adversely affected staff member instead of reinstating the person. That is despite the Redesign Panel's criticism that a lack of power to render binding judgments and remedies is contrary to the rule of law. However, one can agree with the UN's approach on this issue. It might be inappropriate to restore the employment of certain persons following their dismissal as it might create on occasions a hostile work environment. Concerning the extent of compensation, the tribunal does possess discretion to award compensation higher than two years' salary, and time will tell whether the compensation regime is proving to be satisfactory.

Pursuant to article 11 (3), the judgments of UNDT are binding upon the parties, but are subject to appeal to the Appeals Tribunal, and in the absence of such appeal, they shall be executable. Furthermore, under article 12 (3), there exists a facility to apply for an interpretation of the meaning or the scope of the final judgment, which is similar in terms to the corresponding provision of UNAT, provided that it is not under consideration by the Appeals Tribunal.

b. The Appeals Tribunal's Statute

The following is a brief outline of the key aspects that are unique to the Appeals Tribunal.

Pursuant to article 1 of its Statute, the Appeals Tribunal is to be the second instance of the two-tier formal system of administration of justice at the United Nations. The Registry of the Appeals Tribunal has been established in New York.¹³⁹ It is competent to hear an appeal against a judgment rendered by UNDT in cases where it is asserted that UNDT exceeded its jurisdiction or competence; failed to exercise jurisdiction vested in it; erred on a question of law; committed an error in procedure, such as to affect the decision of the case; or erred on a question of fact, resulting in a manifestly unreasonable decision.¹⁴⁰ An appeal may be filed by either party to a judgment of UNDT,¹⁴¹ in accordance with the time-limits prescribed in article 7 of the Appeals Tribunal's Statute. Pursuant to article 7 (4), the Appeals Tribunal cannot hear a case if the appeal is filed more than one year after the judgment of the UNDT.

The Appeals Tribunal is composed of seven judges.¹⁴² In order to be a judge at the Appeals Tribunal, a person shall be of high moral character and possess at least 15 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.¹⁴³ The rest of the provisions relating to judicial appointments and guarantees of judicial independence mirror that of the UNDT. Pursuant to article 10 (6) of its Statute, the judgments of the Appeals Tribunal shall be final and without appeal, subject to the provisions of article 11 of its Statute.

¹³⁹ Article 5 (2) Statute of the Appeals Tribunal.

¹⁴⁰ *Ibid.*, article 2 (1).

¹⁴¹ *Ibid.*, article 2 (2).

¹⁴² *Ibid.*, article 3 (1). On 2 March 2009, the General Assembly elected the following seven judges to the UN Appeals Tribunal: Inés Weinberg de Roca (Argentina); Jean Courtial (France); Sophia Adinyira (Ghana); Mark P. Painter (United States of America); Kamaljit Singh Garewal (India); Rose Boyko (Canada); Luis Maria Simón (Uruguay).

¹⁴³ *Ibid.*, article 3 (3) (a)(b).

5. Some Observations on the Statutes of UNDT and the Appeals Tribunal

a. Access to the New Tribunals

As was noted in Part I., different categories of non staff personnel could not seek access to UNAT. That remains the case in the new system despite the Redesign Panel's view that "[t]he scope and jurisdiction of the informal and formal internal justice system should include all persons employed by the United Nations in a remunerated post or performing personal services under contract with the Organization."¹⁴⁴ The Draft Statute of UNDT in fact incorporated this suggestion of the Redesign Panel.¹⁴⁵ But according to article 3 of UNDT's Statute non staff personnel are still excluded.

Presently persons on individual contracts and persons on special service agreements only have access to the Ombudsman who may assist in the resolution of the dispute.¹⁴⁶ Concerning formal procedures, there only exists the possibility of arbitration in order to resolve a dispute that cannot be resolved otherwise.¹⁴⁷ Access to arbitration bears little practical benefits to persons who cannot access the internal dispute resolution mechanisms given that such a method of dispute settlement

¹⁴⁴ See Redesign Panel, see note 3, para. 156; A/RES/59/283 of 13 April 2005 where it established guidelines for a more comprehensive coverage; according to the Redesign Panel, Annex I, staff could be defined as: "Staff" includes former staff and persons making claims in the name of deceased staff members and means all persons who perform work by way of their own personal service for the Organization, no matter the type of contract by which they are engaged or the body or organ by whom they are appointed but not including military or police personnel in peacekeeping operations ..."

¹⁴⁵ Article 3 of the Draft Statute of UNDT in: Report of the Secretary-General: Administration of Justice at the United Nations, Doc. A/62/782 of 3 April 2008, Annex I. In the same report, the Secretary-General stated that providing non-staff personnel access to the formal system could present difficulties, particularly with regard to the ability of the formal system to address the various contractual terms and conditions of service relating to non-staff personnel. "Therefore, separate formal dispute resolution mechanisms might be needed to deal effectively with the various bodies of law applicable to staff members and non-staff personnel.", para. 51.

¹⁴⁶ Doc. A/62/782, see above.

¹⁴⁷ *Ibid.*, para. 14.

is often “prohibitively costly and lacks due regard for the special character of employment disputes.” In its Resolution A/RES/64/233 of 22 December 2009 the General Assembly has requested the Secretary-General to provide “[a]n update concerning the exact number of persons other than staff personnel working for the United Nations and the funds and programmes under different types of contracts, including individual contractors, consultants, personnel under service contracts, personnel under special service agreements and daily paid workers” in order “to analyse and compare the respective advantages and disadvantages, including the financial implications, ... bearing in mind the status quo concerning dispute settlement mechanisms for non-staff personnel”, including possibilities of allowing access to UNDT and the Appeals Tribunal. This is a critical issue because “there have been instances where consultants and individual contractors have filed law suits directly with national courts. Where such cases are filed in consultation with the office of legal Affairs, the Organization requests that the local authorities assert the immunity of the Organization to have such cases dismissed”¹⁴⁸ Consequently, such persons are left without an effective remedy, or are resigned to an outcome that they believe to be unjust. Thus, the Statutes should be amended in line with the view of the Redesign Panel which would allow persons on special service agreements and individual contractors to access UNDT.

b. Judicial Experience

Judges of international administrative tribunals apply a composite body of law that governs the employment relationship between an International Organization and its staff. These areas of law include international administrative law,¹⁴⁹ contract law,¹⁵⁰ public international law,¹⁵¹ and international institutional law. The law applied by United Nations decision makers and the United Nations internal justice system is a true hybrid of sources, both in the range of documentation which contains the internal law of the United Nations, and the areas of law that govern the employer-employee relationship. While the contract of employment is of key importance, the Staff Regulations and Rules, together with

¹⁴⁸ Doc. A/62/782, see note 145, para. 15.

¹⁴⁹ C.F. Amerasinghe, *Principals of the Institutional Law of International Organizations*, 2nd revised edition, 2005.

¹⁵⁰ See e.g. *Kaplan*, UNAT No. 19 (1953) of 21 August 1953.

¹⁵¹ *Stepczynski*, UNAT No. 64 (1956) of 1 September 1956, paras 22-23.

other statutory sources combine to generate the legal regime that governs the relationship between the United Nations and its employees. The internal law of an International Organization can be described “as being situated in and derived from the system of public international law and therefore being a part of public international law, while at the same time having a special character as a system akin to municipal law, particularly because it operates in an area in which municipal law has been traditionally known to operate.”¹⁵² Thus, a judge not only should be experienced in domestic administrative law, but also must have experience in other areas of law, such as public international law to be best equipped to deal with the sometimes complex issues that may arise in international administrative tribunals.¹⁵³ While the emphasis on judicial independence in the new regime should be welcomed, the requirement that a judge shall possess judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions is not likely to create a bench with the necessary background in order to produce a jurisprudence of the highest quality.¹⁵⁴ Thus, it could prove

¹⁵² Amerasinghe, *The Law of ...* Vol. 1, see note 5, 21-23.

¹⁵³ Amerasinghe stated that “most common law judges on IATs have problems with all these features, unless, perhaps, they happen to be public international lawyers, which enables them to develop a broader, so to speak, civil law and international organizational orientation. Often, the purely common law judges have tried to apply principles from the common law which are not relevant. This is a drawback to the smooth and proper functioning of international administrative tribunals.”, cf. Amerasinghe, see note 85, 293; Amerasinghe, *Principles of ...*, see note 5, 243.

¹⁵⁴ *Ibid.*, it was also said: “unless a judge has had good exposure to public international law, administrative law in the civil system, or perhaps labor law in the common law system, it is difficult for him[her] fully to appreciate the issues and subtleties of the law applied by IATs. This was exemplified when in a recent UNDT case, when a UNDT judge seemed to be confused as to the law that applies between an IO and its officials. The judge seems to have concluded that the only source of legal obligations operational between the UN and its employees is the contract of employment, and he seems to create a complex link between administrative law and contractual law which is difficult to comprehend. He stated that ‘the relationship between a staff member and the UN is governed entirely by the contract of employment which incorporates the various legal instruments concerning the Organization’s operations in so far as they impinge upon the staff member’s position as employee, together with such rights and obligations which are implied by virtue of the contract and by virtue of the contract alone’, and goes on to state that ‘a breach of administrative law principle in decision-making amounts to a breach of the contract.’”, *Wasserstrom v.*

useful if the Statutes of the newly created tribunals are amended to incorporate a broader range of experience. The Redesign Panel made a recommendation that, if adopted, would have avoided the issues created by the present Statutes.¹⁵⁵ Furthermore, a requirement that candidates for appointment at the tribunals have “judicial experience” eliminates several qualified candidates who might be experts and could be well-qualified to serve as judges of international administrative tribunals.¹⁵⁶ UNDT and the Appeals Tribunal could greatly benefit if some of its members are experts in the area of international administrative law and other relevant areas of law, and may not necessarily have judicial experience. In line with the views of the Redesign Panel, the Statutes should be amended by incorporating flexible guidelines that aim to attract the most suitable candidates to serve as judges.

c. Some Due Process Issues

aa. Oral Proceedings

As discussed in Part I., UNAT often decided cases in written form, and the concerned staff member did not have a right to an oral hearing. The fact that proceedings were predominantly in written form was subject to significant criticism. Thus, the Redesign Panel emphasized the importance of oral hearings generally, and stated that they should be a requirement where there existed disputed issues of fact.¹⁵⁷ Pursuant to article 7 (2)(e) of UNDT’s Statute, it is empowered to establish its rules of procedures in relation to oral hearings,¹⁵⁸ and accordingly article 16 of the Rules of Procedure of UNDT¹⁵⁹ states *inter alia*,

Secretary-General of the United Nations, UNDT Order No. 19 (NY/2010) of 3 February 2010, paras 27 and 29.

¹⁵⁵ The Redesign Panel made a recommendation that, if adopted, would have avoided the issues created by the present Statutes, para. 129.

¹⁵⁶ D.S. Wijewardane, “Some Organizational Issues”, in: Papanikolaou/ Hisakaki, see note 61, 122: “it is always best to avoid absolute requirements – and it may well serve to derogate from the richness and of experience and expertise from which the system could benefit, especially in the development of a jurisprudence which cannot be described as the staple diet of any one national system.”

¹⁵⁷ Redesign Panel, see note 3, para. 10.

¹⁵⁸ See article 6 (2)(h) of the Appeals Tribunal’s Statute for the corresponding provision.

¹⁵⁹ A/RES/64/119 of 16 December 2009.

- “1. The judge hearing a case may hold oral hearings.
2. *A hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.*
4. The parties or their duly designated representatives must be present at the hearing either in person or, where unavailable, by video link, telephone or other electronic means.
5. If the Dispute Tribunal requires the physical presence of a party or any other person at the hearing, the necessary costs associated with the travel and accommodation of the party or other person shall be borne by the Organization.” (emphasis added)

In relation to the Appeals Tribunal’s approach on oral hearings, article 18 of the Rules of Procedure of that Tribunal states “The judges hearing a case may hold oral hearings on the written application of a party or on their own initiative if such hearings would assist in the expeditious and fair disposal of the case.”

A few notable decisions have recently been rendered in relation to the issue of public hearings. For example, in *Dumornay*,¹⁶⁰ it was stated that “the principle of open justice was a fundamental principle of the tribunal’s exercise of its jurisdiction”, and a hearing was required unless there were good reasons for not holding one.¹⁶¹ The United Nations has made a significant improvement in ensuring that staff members may access their right to an oral hearing, especially where there are disputed issues of fact, and specifically in disciplinary cases. Further, due to the fact that the organization will now bear travel costs when UNDT requires an oral hearing, and has adopted technology as a means of conducting oral hearings, there is little reason for judges to refuse to conduct hearings when necessary and appropriate. While the above is a welcome step, the adoption of technology requires considerable funds, and the present levels of funding are not sufficient to facilitate hearings via this means.¹⁶² It will be critical that the issue of funding be redressed speedily.

¹⁶⁰ *Dumornay v. Secretary-General of the United Nations*, UNDT No. 2010/004 of 13 January 2010.

¹⁶¹ *Lesar v. Secretary-General of the United Nations*, UNDT No. 2010/023 of 5 February 2010, para. 21.

¹⁶² Doc. A/65/373, see note 137, para. 34.

bb. Legal Representation

The issue of a lack of legal representation for staff members has arisen throughout the course of this article. One must not underestimate the importance of the equality of arms, and it is important to note the often vulnerable state of an employee in the old system in a dispute with the United Nations, especially in a situation where the United Nations is armed with professional lawyers, and the employee did not possess any effective access to professional and prompt legal advice. The Office of Staff Legal Assistance has been established with the aim of providing professional and prompt advice to staff, but is the scheme working effectively in practice? Pursuant to article 12 of the Rules of Procedure of the UNDT, a party may present his or her case in person or may designate counsel from the Office of Staff Legal Assistance or private counsel. A party may also be represented by a staff member or a former staff member of the United Nations or one of the specialized agencies.¹⁶³ The rules on legal representation in the new system have not really changed since the pre-reform days. The real issue relates to the practical manner in which staff members may seek such representation.

The Office of Staff Legal Assistance is responsible for the proper functioning of the program of legal assistance to staff members in the internal justice system, including in administrative, disciplinary and appellate proceedings before UNDT and the Appeals Tribunal.¹⁶⁴ Its staff are located in Addis Ababa, Beirut, Geneva, Nairobi and New York.¹⁶⁵ Its counsel may only decline to act if *inter alia*, the client persistently fails to cooperate with counsel, or engages outside counsel to handle his/her legal representation.¹⁶⁶ Thus, the machinery to ensure the equality of arms has been significantly improved. But the pertinent question is whether the Office has had a positive impact in practice?

During the period 1 July 2009 until 1 December 2009, 29 per cent of staff members were not represented by legal counsel before the UNDT. The Office provided legal assistance in 35 per cent of cases before the tribunal, 19 per cent of staff chose to be represented by private counsel

¹⁶³ Article 13 of the Rules of Procedure of the Appeals Tribunal for the corresponding rule.

¹⁶⁴ Doc. ST/SGB/2010/3, see note 99, para. 7.1.

¹⁶⁵ Guiding Principles of Conduct for Office of Staff Legal Assistance, March 2010, para. 7.3, <www.un.org/en/oaj/legalassist>.

¹⁶⁶ *Ibid.*, Principles 10-11.

and 17 per cent of staff were represented by volunteers who were either current or former staff members of the organization.¹⁶⁷

The Office currently acts in 72 per cent of cases before the UNDT in New York; 54 per cent of cases in Geneva; and in approximately 65 per cent of cases in Nairobi.¹⁶⁸ The reasons why a significant number of staff were not represented by the Office do not seem to be available at this stage. During the last reporting period, the Office handled a total of 938 cases. It has resolved 510 of those cases, and as at 30 June 2010, it had 428 active cases. There is an increasing trend for staff to approach the Office for the resolution of both formal and informal disputes, which will undoubtedly lead to an increase in its staffing levels.¹⁶⁹

It must be mentioned though that the Office is suffering from a human resources gap as a whole,¹⁷⁰ which has to be filled if success is to be achieved. A recent positive development is that the Office established the Trust Fund for Staff Legal Assistance to gain additional resources for its activities.¹⁷¹ Given that the Office is still in its infancy, it has to be seen how it will develop.

6. Some Final Remarks on the New System of Internal Justice

In its first year of operation, UNDT has rendered some significant judgments in relation to the various kinds of internal disputes that arose in the United Nations.¹⁷² Furthermore, within a short period of operation, UNDT has received a total of 510 cases, of which 169 were transferred from the abolished JABs and JDCs; 143 were transferred from UNAT; and 198 were new cases filed between 1 July 2009 and 30 June 2010. In that reporting period, UNDT has rendered 213 judgments. As at 30 June 2010, approximately 290 cases were pending, including 37 cases that were transferred from the old advisory bodies; 131 cases from

¹⁶⁷ A. Terekhov, *Activity Report of the Administration of Justice, 1 July-31 December 2009 issued on 12 May 2010*, para. 27; for the latest statistics, the OAJ website <www.un.org/en/oaj/unjs/statistics.shtml>.

¹⁶⁸ Doc. A/65/373, see note 137, para. 55.

¹⁶⁹ *Ibid.*, para. 51.

¹⁷⁰ Second Activity Report of the Office of Administration of Justice, 1 July 2009 – 30 June 2010, 56, <<http://www.un.org/en/oaj/unjs/resource.shtml>>.

¹⁷¹ *Ibid.*, 57.

¹⁷² See the cases cited in Appendix I of Terekhov, see note 167.

UNAT; and 122 newly filed cases.¹⁷³ The three Registries of the Dispute Tribunal provided substantive, administrative and technical support to the tribunal,¹⁷⁴ and facilitated the vast amount of decisions that have been made. The above statistic is remarkable given that UNAT only delivered approximately 25 judgments per year since its inception.¹⁷⁵

Furthermore, the Appeals Tribunal appears to be performing a critical role in the internal justice regime. The experience thus far has evidenced that concerned parties are frequently accessing the Appeals Tribunal. Remarkably, the number of cases filed before the Appeals Tribunal during the present reporting period is comparable to the number of cases filed at the Administrative Tribunal of the ILO.¹⁷⁶

However, there have arisen certain problems respecting compliance with UNDT orders, sparking strong reactions.¹⁷⁷ Compliance issues go to the core of the regime of dispute resolution. In a few notable cases, the Secretary-General refused to comply with the orders made by UNDT.¹⁷⁸ Concerning the administration's non-compliance with orders, in a recent case, the applicant sought the disclosure of certain documents concerning his non-selection to a particular post as he suspected the decision was made by having regard to irrelevant considerations.¹⁷⁹ Judge Adams made an order requiring the administration to produce certain documents and was troubled by the fact that certain misleading statements appeared to have been made by the Administrative Law Unit to the applicant, where the applicant first sought administrative review.¹⁸⁰ However, the administration plainly refused to produce the documents on the basis of *inter alia*, confidentiality.¹⁸¹ This

¹⁷³ Doc. A/65/373, see note 137, para. 16.

¹⁷⁴ Activity Report of the Administration of Justice, see note 170, para. 3.

¹⁷⁵ See a list of all UNAT's judgments delivered in English (it is not apparent if all French judgments were translated) <http://untreaty.un.org/unat/Juggements_Englis_By_Number.htm>.

¹⁷⁶ Doc. A/65/373, see note 137, paras 26 and 47.

¹⁷⁷ See e.g., M. Lee, "Ban's UN Refuses Summons in Bertucci Case. Of Contempt and Rule of Law", <www.innercitypress.com/undt1bertu031110.html>.

¹⁷⁸ See e.g. *Wasserstrom*, see note 154.

¹⁷⁹ *Bertucci v. Secretary-General of the United Nations*, UNDT Order No. 40 (NY/2010) of 3 March 2010, para. 6.

¹⁸⁰ *Bertucci*, Order No. 40, see note 179, paras 4 and 46.

¹⁸¹ *Bertucci*, UNDT Order No. 42 (NY/2010) of 8 March 2010, for the administration's reasons submissions as to why the applicant's case should fail

was despite UNDT stating that the confidential aspects from the relevant documents could be redacted.¹⁸² In another order relating to the same case, it was stated that non-compliance is a “direct attack on the rule of law.”¹⁸³

Complying with the independent judgments and orders of independent tribunals that the United Nations has itself created is an inherent aspect of operating within the rule of law. It is all well and good to create tribunals that are compliant with due process standards, but if the administration later on refuses to comply with the judgments and orders, the scheme is rendered meaningless.

There do exist certain other cases where the administration breached the applicant’s due process rights. In *Kasmani*,¹⁸⁴ notwithstanding article 10 (8) of the Appeals Tribunal’s Statute stating “The applicant shall receive a copy in the language in which the appeal was submitted unless he or she requests a copy in another official language of the United Nations”, the applicant received a judgment in French while his application was submitted in English. Then, despite the fact that the applicant could not understand the judgment, he was immediately sent a notice of separation. This was manifestly contrary to the applicant’s due process rights. In that regard, UNDT stated,

“It is with grave concern that the Tribunal feels compelled to note that the conduct of the Respondent does not bode well for a ‘decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process.’”¹⁸⁵

The above issue was perhaps caused due to the lack of translation services as opposed to any malicious intent. This issue of the adequacy of translation services presently available has surfaced. Thus, the Secretary-General recently suggested that “adequate funds be made available to allow for the translation of all judgments in both working languages

see *Bertucci*, Order No. 40, see note 179, paras 11 and 46. The administration also argued that that appointments to an Assistant Secretary-General post were not justiciable for certain reasons, however, that argument was correctly rejected.

¹⁸² *Ibid.*, para. 47.

¹⁸³ *Bertucci*, UNDT Order No. 59 (NY/2010) of 26 March 2010, para. 9.

¹⁸⁴ *Kasmani v. Secretary-General of the United Nations*, UNDT Order No. 75 (NBI/2010) of 7 May 2010.

¹⁸⁵ *Ibid.*, para. 15.

of the United Nations and into the official language in which the original application was submitted.”¹⁸⁶

It is in the interest of the United Nations to respect the judicial character of the newly created tribunals. While significant improvements in the internal justice system of the United Nations have been made, to win the confidence of staff in the new system, it is critical that it fully and fairly participates in the newly created internal dispute resolution mechanisms.

Before concluding, the task will remain incomplete if the informal mechanisms of dispute resolution are not discussed briefly given their central role in the new system.

7. The Informal Dispute Resolution System

Informal means of dispute settlement both have the potential of resolving a conflict at a very early stage with relatively little expense and also greatly enhance the potential of positive outcomes.¹⁸⁷ It has been stated,

“Staff members who are involved in conflict situations are encouraged first to seek an informal solution. They may find informal means to be preferable in that they may yield results more quickly than formal ones, or may even lead to a positive negotiated outcome that could, for various reasons, not be achieved through a formal process.”¹⁸⁸

Informal dispute resolution as a method of settling staff disputes is thus of great importance as a vast proportion of disputes are resolved via informal means, and informal means facilitate the resolution of disputes at an early stage with relatively less anxiety for the concerned staff member. There existed several problems with the pre-reform informal system.

¹⁸⁶ Doc. A/65/373, see note 137, para. 241.

¹⁸⁷ It has been said that resolving disputes through negotiation, mediation and other alternative means is usually quicker, and often proves to be a less stressful and less cumbersome process than litigation. *A Guide to Resolving Disputes, Administration of Justice in the United Nations*, 2009 available at <<http://www.un.org/en/oaj/unjs/resource.shtml>>.

¹⁸⁸ Information Circular, see note 26, para. 6.

a. The Pre-Reform Informal Dispute Resolution System

In Information Circular Doc. ST/IC/2004/4 dated 23 January 2004 titled “Conflict resolution in the United Nations Secretariat”, the scheme for dispute resolution was neatly encapsulated. Some key pre-reform informal procedures included:

- mediation (by supervisors or other relevant persons);¹⁸⁹
- recourse to the Ombudsman;¹⁹⁰
- access to the Panels on Discrimination and Other Grievances;¹⁹¹
- access to Staff Counsellors;¹⁹²
- access to the Panel of Counsel (pre-litigation role);¹⁹³
- role of the Staff Representative Bodies; and
- Joint Appeals Board as facilitators of conciliation.¹⁹⁴

The above mechanisms were subjected to valid criticisms. There existed numerous bodies that allegedly sought to resolve disputes informally, and it is only natural that a staff member would face immense confusion over to whom to turn in a given situation. The Redesign Panel noted that supervisors, human resources officers and executive officers, staff counsellors, staff representative bodies, the Panel of Counsel in its pre-litigation consultative role, and the departmental focal points for women did not constitute independent third parties that could reconcile disputes, but they rather provided preliminary advice or counsel to staff members about their problems.¹⁹⁵ While the above

¹⁸⁹ Ibid., para 9.

¹⁹⁰ The Ombudsman’s office was established in 2002. See Secretary-General’s Bulletin Doc. ST/SGB/2002/12 of 15 October 2002. The Ombudsman has the authority to consider conflicts of any nature related to employment by the United Nations that are brought to his or her attention by staff members. The Ombudsman does not have decision-making powers in a conflict, but facilitates conflict resolution, using any appropriate means, including advising the parties and making suggestions or recommendations on actions to settle conflicts, Information Circular, see note 26, paras 10-12.

¹⁹¹ Information Circular, see note 26, para. 13.

¹⁹² The Office of the Staff Counsellor is required to provide counseling, information and assistance to staff on issues concerning conflict resolution, see Doc. ST/SGB/1998/12 of 18 June 1998, 6.

¹⁹³ See Information Circular, see note 26, paras 15-16.

¹⁹⁴ Ibid., para. 20.

¹⁹⁵ Redesign Panel, see note 3, para. 37.

played a useful role, they did not constitute an alternative, or play a complementing role to the formal justice system. Thus, the regime left much to be desired.

b. The Post-Reform Informal Dispute Resolution System

In the reformed system, there has been a strengthening of the Ombudsman's office,¹⁹⁶ and greater emphasis is now placed on the Ombudsman and Mediation Services. The Ombudsman's office has been placed at the center of internal dispute resolution in order to streamline the informal dispute resolution process.¹⁹⁷ Mediation is also acquiring an increasingly important role. In a recent case, UNDT sent a case to mediation, and in doing so, said that the case at hand was one that was suitable for mediation as the mediation process would give the parties an opportunity to reach a satisfactory solution in what appeared to be a case of error and misunderstanding.¹⁹⁸ While it is not the intention of this article to deal comprehensively with the informal system, it is relevant to briefly highlight the critical role it is now playing in dispute resolution. In approximately the first half of 2010, there was a 33 per cent increase in the use of the overall services of the Office of the United Nations Ombudsman and Mediation Services. Further, in the second half of 2009, 79 per cent of the cases received did not proceed to UNDT.¹⁹⁹ As there has been a comprehensive reform of the system, most of the pre-reform methods of informal dispute resolution are no

¹⁹⁶ Provisional Staff Rule 11.1(a) states: "A staff member who considers that his or her contract of employment or terms of appointment have been violated is encouraged to attempt to have the matter resolved informally."

¹⁹⁷ For further information, see Report of the Secretary-General: Towards an Accountability System in the United Nations Secretariat, Doc. A/64/640 of 29 January 2010, paras 78-82: "Although informal dispute resolution is not new to the United Nations, greater emphasis and resources are now being dedicated to fostering a culture of informal settlement. The new focus on informal dispute resolution attempts to solve problems at an early stage, thus reducing the number of cases going to the formal system. The United Nations Ombudsman and Mediation Services, including the Mediation Division which has mediation resources in many regions, is at the centre of the informal system."

¹⁹⁸ *Adrian v. Secretary General of the United Nations*, UNDT Judgment No. UNDT/2009/053 of 22 October 2009.

¹⁹⁹ Report of the Secretary-General: Activities of the Office of the United Nations Ombudsman and Mediation Services, Doc. A/65/303 of 16 August 2010, 1.

longer of relevance, as many bodies, such as the JABs, the Panel of Counsel and the much criticized Panels on Discrimination and Other Grievances, no longer exist. As a final comment, a dispute is best dealt with at its inception. The new emphasis on the informal settlement of disputes should be welcomed as informal means of dispute resolution deal with disputes at an early stage, thereby saving costs and the stress of formal litigation.

III. Conclusion

The pre-reform internal justice regime at the United Nations was extraordinarily slow, unprofessional and did not accord concerned staff members the most basic due process rights as enshrined in the various human rights treaties. Therefore, there existed an absence of the rule of law in respect of the management of internal disputes at the United Nations. According staff members of an international organization their due process rights in cases of internal disputes is necessary in order to ensure that an international organization operates within the rule of law. In the context of administrative law, the rule of law manifests itself in the form of due process, which is a set of principles that includes giving adversely affected parties an opportunity to seek review of an adverse decision at an independent and impartial tribunal; a right to an appeal; a right to a reasoned judgment; and a right to legal representation. Furthermore, given the inability of staff members to seek justice in municipal courts due to the immunity enjoyed by the United Nations, it is of supreme importance that the internal dispute resolution mechanisms within the United Nations constitute a reasonable alternative means of resolving internal disputes.

Part I. concerned the pre-reform regime. It was shown that the entire dispute resolution process was plagued with faults. Simple cases took years to resolve and there was a manifest breach of the due process rights of staff members involved in the dispute resolution process. The JDCs and JABs, where a staff member could present his/her case before accessing UNAT, did not constitute an independent and impartial body that could make binding decisions; there existed a one tier justice system which violated the right to an appeal; often staff members could not access professional lawyers; and oral hearings were not held frequently enough. These are just some of the flaws of the old system. The United Nations itself was in manifest breach of the due process rights of its own staff. A fundamental reform of its internal justice system was

long overdue. The United Nations has now fundamentally transformed the manner in which internal disputes are resolved, and Part II. discussed the features of the new system.

Undoubtedly, the reform of the internal justice system of the United Nations is a genuine attempt to ensure that justice rendered within the United Nations is efficient and consistent with international standards of justice. Several of the shortcomings of the old system appear to have been remedied by the establishment of a two-tier, independent and impartial system of justice. The establishment of the Office of Administration of Justice as an independent office is a significant step towards improving the efficiency of the system and granting a degree of institutional independence to the justice system. Furthermore, the establishment of the Office of Staff Legal Assistance is likely to substantially enhance the extent to which staff members can seek legal representation.

The UNDT is an independent and impartial tribunal that is empowered to make binding decisions. Its Statute grants it the power to hold oral hearings and make binding orders. A truly judicial first instance body with Registries in three locations has been established. The Appeals Tribunal hears appeals against the decisions of UNDT, and hence, staff members can now appeal to an independent and impartial court. This is a model that appears sound, and that could act as a model for other regimes.

While it is apparent that much has been done, staffing issues remain a challenge for the internal justice system generally.

In this respect the General Assembly,

“Notes that the current terms of the ad litem judges are about to expire, while the backlog remains to be cleared; Notes with appreciation that the two half-time judges already appointed have facilitated the constitution of three-judge panels that will conduct hearings on important matters; Recalls paragraphs 48 and 49 of its resolution 63/253, and requests the United Nations Dispute Tribunal to ensure that the best possible use is made of the three ad litem judges in order to reduce the existing backlog of cases before the United Nations Dispute Tribunal; Requests the Secretary-General, in order to attract a pool of outstanding candidates reflecting appropriate language and geographical diversity, different legal systems and gender balance, to advertise Tribunal vacancies widely in appropriate journals in both English and French, and to disseminate information relating to the judicial vacancies to Chief Justices and to relevant asso-

ciations, such as judges' professional associations, if possible, before those vacancies arise.²⁰⁰

Furthermore, the issue of access still has not been resolved, and it is important that persons of all types of contracts with the United Nations should be able to seek recourse to the internal justice system. Moreover, as was discussed in Part II., the qualifications required before a person is eligible to be a judge of the newly established tribunals should be reconsidered. The comprehensive reforms made within the United Nations must be welcomed. It is still too early to reach conclusions about its success. However, it appears that there is now present the machinery that is likely to facilitate effective delivery of justice that is in compliance with international standards. For that system to work effectively it is essential to have its decisions respected, otherwise, it will deliver much less than it promised, and than was expected.²⁰¹

²⁰⁰ Report of the Fifth Committee, Administration of Justice at the United Nations, Doc. A/65/650/ of 29 December 2010, paras 42 et seq.

²⁰¹ It is in line with this findings that the General Assembly stated, "Decides to defer until its sixty-sixth session a review of the statutes of the Tribunals, in the light of experience gained, including on the efficiency of the overall functioning of the Tribunals, in particular regarding the number of judges and the panels of the United Nations Dispute Tribunal," *ibid.*, para. 46.