

From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – Reform of the Administration of Justice System within the United Nations

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* The authors would like to thank Philipp Bocking und Edward Flaherty for their valuable comments on an earlier draft of this paper.

I. Introduction

Since the 1990s the internal justice system of the United Nations as well as other international organizations, providing for the settlement of disputes between the employer organizations and their staff, has been intensively criticized, by staff associations, legal practitioners and academics.¹ Over the last few years different panels of experts have addressed this issue, identified major weaknesses, and made recommendations for improving the current system, regarding both the informal and the formal system of staff dispute settlement. Already in the late 1990s, reform proposals concerning the ILO Administrative Tribunal (ILOAT)² were high on the agenda,³ however, they did not result in any concrete changes. Ten years later, the debate has reached the United Nations and the reform suggestions put forward by the so-called Re-design Panel in 2006 have led to a follow-up process that is likely to create a completely new system of internal dispute settlement within

¹ See e.g. A. Reinisch/ U. Weber, “In the Shadow of Waite and Kennedy – The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to Courts and Administrative Tribunals as Alternative Means of Dispute Settlement”, *International Organizations Law Review* 1 (2004), 59 et seq.; E.P. Flaherty, “Legal Protection for Staff in International Organisations – a Practitioner’s View”, Paper presented at the Conference “Accountability for Human Rights Violations by International Organizations”, in Brussels 16-17 March 2007; R. Boryslawska/ L. Martinez Lopez/ V. Skoric, “Identifying The Actors Responsible For Human Rights Violations Committed Against Staff Members Of International Organizations: An Impossible Quest for Justice?” *Human Rights & International Legal Discourse* 1 (2007), 381 et seq.

² Statute of the Administrative Tribunal of the International Labour Organization, adopted by the International Labour Conference, 9 October 1946, amended 29 June 1949, 17 June 1986, 19 June 1992 and 16 June 1998, <<http://www.ilo.org/public/english/tribunal/stateng.htm>>.

³ See e.g. London Resolution of the ILO Staff Union, 28 September 2002, <<http://www.ilo.org/public/english/staffun/info/iloat/londonres.htm>>. See also Legal Opinions on ILOAT Reform by Ian Seiderman, <<http://www.ilo.org/public/english/staffun/info/iloat/seiderman.htm>>; as well as Geoffrey Robertson, <<http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm>>, and by Louise Doswald-Beck, “ILO: The Right to a Fair Hearing Interpretation of International Law”, under <<http://www.ilo.org/public/english/staffun/info/iloat/doswald.htm>>.

the United Nations and the specialized agencies that have accepted the statute of the United Nations Administrative Tribunal (UNAT).⁴

This article will start by providing an overview of the deficiencies of the current internal justice system of the United Nations and will then analyze the recommendations for reform and their chances for success.

II. Criticism of the Current System

Discussions about improving the system of administration of justice at the United Nations are not new. Already since the 1970s attempts have been made to reform the system,⁵ which has been established in the late 1940s and is thought not to conform to current international standards in a number of respects. Previous attempts have, however, remained largely unsuccessful. Only minor changes have been made to the original 1949 UNAT Statute.⁶ Due to continuing and increasing criticism the General Assembly established the so-called *Redesign Panel on the United Nations System of Administration of Justice* in 2005.⁷ This group of experts examined and analyzed the current system and issued a report in which it harshly criticized the system as a whole and identified a number of problems that were particularly urgent and in need of reform. In its report⁸ the Panel found, *inter alia*, that,

⁴ Statute of the Administrative Tribunal of the United Nations, as adopted by A/RES/351 A (IV) of 24 November 1949 and amended by A/RES/782 B (VIII) of 9 December 1953, by A/RES/957 (X) of 8 November 1955, by A/RES/50/54 of 11 December 1995, by A/RES/52/166 of 15 December 1997, by A/RES/55/159 of 12 December 2000, by A/RES/58/87 of 9 December 2003, and by A/RES/59/283 of 13 April 2005, <<http://untreaty.un.org/UNAT/Statute.htm>>. Pursuant to article 2 of its statute, UNAT has jurisdiction over employment disputes between United Nations staff and the organization; in addition, staff disputes within IMO, ICAO, and those concerning the staff of the ICJ and the ITLOS Registry and the International Seabed Authority may be heard (article 14 UNAT statute).

⁵ For an overview see Administration of Justice at the United Nations, Report of the Joint Inspection Unit, Doc. JIU/REP/2000/1, Geneva 2000, paras 2-12.

⁶ Statute of the Administrative Tribunal of the United Nations, see note 4.

⁷ A/RES/59/283 of 13 April 2005, paras 47 et seq.

⁸ Report of the Redesign Panel on the United Nations System of Administration of Justice, Doc. A/61/205 of 28 July 2006, para. 5.

“the administration of justice in the United Nations is neither professional nor independent. The system of administration of justice as it currently stands is extremely slow, under resourced, inefficient and, thus, ultimately ineffective. It fails to meet many basic standards of due process established in international human rights instruments. For all these reasons, staff of the Organization have little or no confidence in the system as it currently exists.”

Similarly strong wording was also used in the conclusions of the report, where the Redesign Panel stated that,

“the dysfunctional system of administration of justice that currently exists is outmoded and inconsistent with the principles and aspirations of the United Nations, and needs to be replaced.”⁹

This criticism was also reflected in General Assembly resolutions which recognized,

“that the current system of administration of justice at the United Nations is slow, cumbersome, ineffective and lacking in professionalism, and that the current system of administrative review is flawed.”¹⁰

A functioning internal justice system is, however, particularly important since, due to the jurisdictional immunities enjoyed by the United Nations,¹¹ staff members do not have any recourse to the domestic legal systems of the United Nations Member States.

The current system provides for formal as well as informal settlement of disputes. One major point of criticism, however, is that the in-

⁹ Ibid., para. 150.

¹⁰ Administration of Justice at the United Nations, A/RES/61/261 of 4 April 2007, Preamble.

¹¹ According to Article 105 (1) UN Charter, “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.” Article II Section 2 of the Convention on the Privileges and Immunities of the United Nations, 13 February 1946, GAOR 1st Sess., 1st Part, Resolutions adopted by the General Assembly from 10 January to 14 February 1946, 25 et seq., makes clear that this functional immunity, in fact implies an absolute immunity from suit: “The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.” See in detail A. Reinisch, *International Organizations before National Courts*, 2000, 332 et seq.

formal system is too weak and would need to be strengthened. This deficiency has already been identified by the Joint Inspection Unit (JIU) in its report in 2000,¹² in which it recommended the establishment of the position of an Ombudsman. This suggestion was implemented and led to the creation of a United Nations Ombudsman's Office.¹³ In order to improve the informal means of dispute settlement the Redesign Panel in 2006 suggested structural changes within the Office, in particular the creation of a Mediation Division, which should provide formal mediation services, and the establishment of regional Ombudsmen, who should have jurisdiction over all matters arising in their respective region.¹⁴

In addition, a number of deficiencies can be identified regarding the formal system of dispute settlement. A very significant one is the lack of a possibility for appealing decisions of the UNAT. For a certain period of time, there was a possibility of making a reference to the ICJ for an Advisory Opinion that was available to UNAT and ILOAT.¹⁵ Currently, however, there is no option available for a staff member to appeal to a second instance to have a judgment of the UNAT reviewed. This situation seems unsatisfactory and is thus one of the central points of the current debate on reform. Already in 2000, the JIU recommended that further consideration should be given to a possible establishment of a higher instance for appeal.¹⁶ In its report in 2006 the Redesign Panel emphasized the need for a second instance and suggested the establishment of a two-tier system of administration of justice in the United Nations as one of the cornerstones of the current reform efforts. A *United Nations Dispute Tribunal* (UNDT) should be created and serve as the first instance, whereas the existing UNAT should be re-

¹² Report of the Joint Inspection Unit, see note 5.

¹³ Doc. ST/SGB/2002/12 of 15 October 2002.

¹⁴ See text at note 45 below.

¹⁵ 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. That system was abolished in 1996 by A/RES/50/54 of 11 December 1995. See also P. Sands/ P. Klein, *Bowett's Law of International Institutions*, 5th edition, 2001, 427 et seq.; J. Gomula, "The International Court of Justice and Administrative Tribunals of International Organizations", *Mich. J. Int'l L.* 13 (1991), 83 et seq.

¹⁶ Report of the Joint Inspection Unit, see note 5, p. ix.

named *United Nations Appeals Tribunal* and have the primary function of hearing appeals of decisions of the UNDT.¹⁷

Furthermore, the current inequality of arms between the organization and its staff members in disputes is problematic. While the United Nations is supported by well trained experts in the legal service department of the organization, staff members can only rely on – frequently not legally qualified – staff counsel. This situation has already been pointed at by the JIU in 2000, which found that staff is at a disadvantage in this respect compared to the administration¹⁸ and recommended that the *Office of the Coordinator of the Panel of Counsel* should be strengthened by appointing a Coordinator, who would have to possess a sound legal background.¹⁹ The Redesign Panel also criticized that the Panel of Counsel was under-resourced and not professionalized²⁰ and that there was no requirement for legal qualifications in order to serve on the Panel of Counsel.²¹ The Redesign Panel thus recommended the creation of a professional *Office of Counsel*, which should consist of persons demonstrating legal qualifications and be adequately resourced.²²

Another procedural issue that has been identified as being in need of reform is the lack of oral hearings. Currently the proceedings are in written form only. This fact has been heavily criticized by staff unions arguing that this violates the right to a fair trial as provided for in human rights treaties.²³ While the JIU suggested that the possibility of

¹⁷ See text at note 55 below.

¹⁸ Report of the Joint Inspection Unit, see note 5, paras 136-143.

¹⁹ *Ibid.*, para. 144.

²⁰ Report of the Redesign Panel, see note 8, para. 100.

²¹ *Ibid.*, para. 105.

²² *Ibid.*, paras 107-111.

²³ 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, and there may be cases where the use of personally sensitive data calls for in camera measures. But to deprive all complainants of a hearing to which they are presumptively entitled cannot be justified. The very fact that ILOAT has adopted a ‘blanket refusal’ policy in respect of hearing applications, thereby contravening the spirit of its statute and rules, demonstrates the need for a new written rule which makes pellucidly clear that any party is entitled to an oral hearing on request, which may only be re-

holding oral hearings should be subject to further study,²⁴ the Redesign Panel emphasized the importance that oral hearings be in fact implemented.²⁵

A further point of criticism is the lack of independence of certain United Nations bodies within the administration of justice system. For example, the Secretariat of UNAT is under the aegis of the Office of Legal Affairs, whereas the Registry of the ILOAT is independent from the organization's legal service, however, staff of both bodies are selected and report to the executive head of the organizations. In most cases these executive heads are parties to the cases heard by the administrative tribunals. There has also been substantial criticism of the process by which members of the tribunals are selected and re-elected.²⁶ This led the JIU to emphasize the importance that *all* bodies concerned with the administration of justice be independent.²⁷ Also the *Administrative Law Unit* has the problematic double function of advising whether a decision should be reviewed and later defending the position taken in an appeal.²⁸ Moreover, the independence of the members of the *Joint Appeals Boards* (JAB) and the *Joint Disciplinary Committees* (JDC) has been questioned due to the increase in fixed-term contracts relative to permanent contracts.²⁹ In order to guarantee a truly independent system of justice the Redesign Panel suggested the establishment of an *Office of Administration of Justice* as well as an *Internal Justice Council*, which should monitor the formal justice system.³⁰

fused in limited and defined circumstances and with a reasoned decision that such circumstances exist." Robertson Opinion, see note 3, para. 13.

²⁴ Report of the Joint Inspection Unit, see note 5, p. ix.

²⁵ Report of the Redesign Panel, see note 8, paras 10 and 92.

²⁶ For criticism in the context of ILOAT see e.g. E.P. Flaherty, "Legal Protection for Staff in International Organisations – a Practitioner's View", Paper presented at the Conference "Accountability for Human Rights Violations by International Organizations", Brussels, 16-17 March 2007.

²⁷ 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, p. vi.

²⁸ Report of the Redesign Panel, see note 8, para. 112.

²⁹ *Ibid.*, para. 64.

³⁰ *Ibid.*, paras 124-127 and also at note 76 below.

III. Current Reform Steps

The Redesign Panel made a number of recommendations for improving and reforming the current system. It took up a number of the points previously made by the JIU and other bodies, emphasized the urgent need for reforms and made concrete system-altering suggestions for improving the *status quo* of the administration of justice at the United Nations.

In fact, the Panel did not simply suggest minor adaptations. Rather, it suggested a complete overhaul of the current system. Aside from maintaining the dual system of informal and formal dispute settlement, not much should remain the same. Significant changes are envisaged within both the informal and formal system. The deficiencies identified above should be remedied through the establishment of new institutions (United Nations Dispute Tribunal, Office of Administration of Justice, Office of Counsel, Internal Justice Council), the transformation of existing ones (United Nations Administrative Tribunal to United Nations Appeals Tribunal), the abolishment of existing institutions (Joint Disciplinary Commission, Joint Appeals Board, Panels on Discrimination and Other Grievances) and the endowment of specific existing institutions (Office of the Ombudsman) with new or increased competences.

In April 2007, the General Assembly acted upon the report of the Redesign Panel by deciding to establish a new internal system for the settlement of disputes with the United Nations as employer along the suggested reform plans.³¹ The resolution also indicated some of the policy rationales and management motivations behind this reform agenda by “[a]ffirming the importance of the United Nations as an exemplary employer”³² and “[r]eiterating that a transparent, impartial, independent and effective system of administration of justice is a necessary condition for ensuring fair and just treatment of United Nations staff and is important for the success of human resources reform in the Organization.”³³ The importance of the latter aspect was underlined in the wording of the operative part of the resolution expressing the General Assembly’s decision to establish a new system of the administration of justice.

³¹ Administration of Justice at the United Nations, A/RES/61/261 of 4 April 2007.

³² Ibid., preambular para. 3.

³³ Ibid., preambular para. 2.

The new system should be “consistent with the relevant rules of international law and the principles of the rule of law and due process.”³⁴ Although neither the Redesign Panel nor the General Assembly made clear which rules were meant, it appears obvious that such fundamental rights as the right to a fair trial, as expressed in article 10 of the Universal Declaration of Human Rights,³⁵ would provide a guideline for the shaping of an adequate mechanism of settling disputes involving the United Nations as a party.³⁶

In February 2008, the General Assembly endorsed the basic framework of the new system of the administration of justice at the United Nations, deciding to establish the proposed two-tiered justice system within the United Nations.³⁷ The General Assembly requested further information on a number of issues from the Secretary-General includ-

³⁴ Ibid., para. 4 (“Decides to establish 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 to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike”).

³⁵ Article 10 of the Universal Declaration of Human Rights (A/RES/217 (III) of 10 December 1948) provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

³⁶ Doswald-Beck suggests that the standards declared by human rights instruments are so similar that they may be presumed to be part of customary international law. Referring to article 14 of the ICCPR, article 6 of the ECHR, article 8 of the ACHR, and arts 7 and 26 of the African (Banjul) Charter, Doswald-Beck states, “[t]hese texts are very similar and, even more significantly, so is the jurisprudence of the treaties’ supervisory bodies. Therefore, we can speak of principles of customary law”, L. Doswald-Beck, “ILO: The Right to a Fair Hearing Interpretation of International Law”, in: L. Doswald-Beck/ R. Kolb, *Judicial Process and Human Rights: United Nations, European, American and African Systems: Text and Summaries of International Case-Law*, 2004, 119 et seq. On the applicable law issue see also A. Reinisch, “Accountability of International Organizations According to National Law”, *NYIL* 36 (2005), 119 et seq.; Reinisch/ Weber, see note 1.

³⁷ Administration of Justice at the United Nations, A/RES/62/228 of 22 December 2007, para. 39 (“Decides to establish a two-tier formal system of administration of justice, comprising a first instance United Nations Dispute Tribunal and an appellate instance United Nations Appeals Tribunal as from 1 January 2009”).

ing the proposal for statutes for the two tribunals to be established. The Secretary-General responded by a note which contained detailed information as to the available dispute settlement possibilities for staff and non-staff against the United Nations and which included Draft Statutes for the proposed tribunals.³⁸

In April 2008, the Secretary-General issued a report which contained the Draft Statutes of both the United Nations Dispute Tribunal and the United Nations Appeals Tribunal.³⁹ It presented the new system “as an integral part of the Secretary-General’s quest for greater accountability in the Organization.”⁴⁰ The Draft Statutes had also been discussed by an *Ad Hoc Committee on the Administration of Justice at the United Nations*, established by the General Assembly in December 2007.⁴¹

The following comments are based on an analysis of the provisions of the Draft Statutes of the two tribunals as contained in the April 2008 report of the Secretary-General.⁴² They also take into account various preliminary materials as well as the considerations of the *Ad Hoc Committee* of April 2008.⁴³ As of June 2008, it is likely that the statutes of the tribunals will be adopted by the General Assembly in autumn 2008 in order to enable the tribunals to commence operation, as planned, in January 2009. However, it is also to be expected that some aspects of the Draft Statutes may be revised before they are adopted. One issue that appears unclear with this approach is how judges will be recruited in time between General Assembly approval and January 2009. This appears to suggest that recruitment of judges and a number of other administrative matters will need to be addressed prior to General Assembly approval. Particularly with regard to the appointment of

³⁸ Administration of Justice: Further Information Requested by the General Assembly, Note by the Secretary-General, Doc. A/62/748 of 14 March 2008.

³⁹ Administration of Justice, Report of the Secretary-General, Doc. A/62/782 of 3 April 2008, Annex I, Draft Statute of the United Nations Dispute Tribunal, Annex II, Draft Statute of the United Nations Appeals Tribunal.

⁴⁰ Administration of Justice, Report of the Secretary-General, see note 39, para. 98.

⁴¹ General Assembly Decision 62/519 of 6 December 2007.

⁴² Administration of Justice, Report of the Secretary-General, see note 39.

⁴³ Letter dated 29 April 2008 from the President of the General Assembly addressed to the Chairman of the Fifth Committee, 30 April 2008, Doc. A/C.5/62/27, Annex II and Annex III.

judges, it is not clear how any appointments can conform to the statute if selection commences prior to formal agreement, since the qualification and appointment procedures may still change.⁴⁴

1. Recommendations Concerning the Informal System

a. Strengthening the Position of Ombudsmen

According to the Redesign Panel the informal system of dispute settlement already in place should be strengthened. In particular, the Ombudsmen should play a more important role. Currently there are three Ombudsmen, i.e. the United Nations Ombudsman, an Ombudsperson for UNDP, UNICEF, UNFPA and UNOPS (United Nations Office for Project Services), and a UNHCR Mediator.⁴⁵ According to the report of the Redesign Panel, one of the central goals of the system of justice should be to have in place an Ombudsman office that combines a monitoring function, on the one hand, and the mediation of disputes on the other hand.⁴⁶ Therefore, the Panel proposes that the existing Office of the Ombudsman should be reformed insofar as to have two components, the Ombudsmen and a Mediation Division.⁴⁷ Moreover, the office should receive significantly more powers and competences to ensure its independence.

The General Assembly endorsed the Panel's suggestion concerning reforms of the Office of the Ombudsman. As proposed by the Redesign Panel, the General Assembly decided to establish a Mediation Division located at Headquarters within the Office of the Ombudsman.⁴⁸ Its purpose will be to provide formal mediation services for the

⁴⁴ The posts for judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal have recently been advertised. According to the job announcement, "[p]ersons applying to serve as judges of the Tribunals should be of high moral character. In the case of the UNDT, candidates should have at least 10 years, and in the case of UNAT, 15 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.", announcement available under <<http://www.un.org/reform/pdfs/UN%20inviting%20applications%20for%20Judges.pdf>>

⁴⁵ Report of the Redesign Panel, see note 8, para. 40.

⁴⁶ *Ibid.*, para. 44.

⁴⁷ *Ibid.*, para. 49.

⁴⁸ A/RES/61/261 of 4 April 2007, para. 16.

UN Secretariat, funds and programs.⁴⁹ The General Assembly also emphasized again the importance of informal conflict resolution within the United Nations administration of justice system.⁵⁰

b. Abolishment of the Joint Appeals Boards and Joint Disciplinary Committees

A second major change to the existing system that has been suggested by the Redesign Panel is the abolishment of the two advisory bodies, the JAB and the JDC. According to the Panel, these institutions do not function as they were supposed to.⁵¹ It has been criticized that these bodies are composed of staff members, who frequently lack legal qualifications. Moreover, disciplinary proceedings are protracted and due to the fact that both bodies share one secretariat there are significant delays in proceedings of the JABs. The Redesign Panel therefore suggested that these bodies should be dispensed with for the benefit of a true two stage administrative process, with the new to be created United Nations Dispute Tribunal serving as the first instance and the United Nations Appeals Tribunal being the second instance reviewing the judgments of the United Nations Dispute Tribunal.⁵²

The suggestions of the Redesign Panel to abolish the advisory bodies indeed found support within the General Assembly. In 2007 it decided to replace the existing advisory bodies, including the JABs and JDCs, by the United Nations Dispute Tribunal.⁵³ The General Assembly, however, requested the Secretary-General to ensure that the advisory bodies as well as the existing UNAT should continue to function until the new system was operational in order to clear all cases that were currently pending before them.⁵⁴

⁴⁹ Ibid.

⁵⁰ Ibid., para. 11, and A/RES/62/228 of 22 December 2007, para. 22.

⁵¹ Report of the Redesign Panel, see note 8, paras 63-69.

⁵² See text at note 55 below.

⁵³ A/RES/61/261 of 4 April 2007, para. 20.

⁵⁴ Ibid., para. 29.

2. Establishment of a New Formal System of Dispute Resolution

a. United Nations Dispute Tribunal and United Nations Appeals Tribunal

The perhaps most radical change to the existing system will be the establishment of a new two-tiered system of formal justice.

The establishment of a second instance was already considered by the JIU, which in its 2002 report made concrete suggestions as to the composition of an *ad hoc* Panel that should be endowed with this function, as well as on the application criteria for a review of judgments.⁵⁵ The report also included the views of a number of organizations within the United Nations system on this issue. It indicated that not all of them were in favor of such a second instance.⁵⁶

In 2006, the Redesign Panel recommended that a United Nations Dispute Tribunal (UNDT) should be created, which should replace, as mentioned above, the JABs and JDCs. The existing UNAT should be transformed into a United Nations Appeals Tribunal and be competent to hear appeals of decisions rendered by the UNDT. As indicated below,⁵⁷ the jurisdiction of this new tribunal should be significantly broader in scope than that of the UNAT.

A possibility to appeal judgments of administrative tribunals has been requested by many staff representatives supported by human rights groups which argued that the right to appeal formed a standard of the administration of justice of which an organization like the United Nations should not fall short of.⁵⁸

⁵⁵ 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, p. vii.

⁵⁶ *Ibid.*, paras 52-66.

⁵⁷ See below at III. 2. e.

⁵⁸ With regard to the lack of appellate procedures before the ILOAT Ian Seiderman argued: "The fact that a complainant does not have a right to appeal not only impairs his or her direct interests, but also may have adverse implications for the independence of the judiciary. An appellate body serves the function of providing a check on the lower tribunal to make sure it correctly administers the substantive law and adheres to proper procedures. With the knowledge that their decisions are not subject to review,

b. Composition of the New Tribunals – Qualifications for Judges

Traditionally, members of UNAT have often been academics or persons who had served as state representatives to international organizations or worked within such organizations.⁵⁹ The original UNAT statute did not provide for any substantive qualifications for UNAT judges but the prestige that came with this job ensured that there was always enough interest in it. Over the years concerns have been voiced about the judicial and, in particular, the administrative law qualifications of judges serving on administrative tribunals⁶⁰ and also the terms and conditions of service and the manner of their appointment.⁶¹ It has been pointed out that the selection process plays a significant role in order to ensure the appointment of individuals with the highest qualification as well as to safeguard the independence of the judges.⁶²

Within UNAT this led to changes of its statute at a relatively late stage. In 2000, the substantive qualifications were inserted into the statute for the first time which then required from UNAT judges “the requisite qualifications and experience, including, as appropriate, legal qualifications and experience.”⁶³ Through another amendment to the statute in 2003, these requirements were made more precise. In its new version the statute demanded “judicial or other relevant legal experience in the field of administrative law or its equivalent within the member’s national jurisdiction.”⁶⁴ In 2005, another change was made and since

judges may be more prone to abuse their discretion, or at least give the appearance of acting in such a manner.” Seiderman, see note 3.

⁵⁹ See P. Pescatore, “Two Tribunals and One Court – Some Current Problems of International Staff Administration in the Jurisdiction of the ILO and UN Administrative Tribunals and the International Court of Justice”, in: N. Blokker/ S. Muller (eds), *Toward More Effective Supervision by International Organizations*, Vol. 1 (1994), 219 et seq. (220).

⁶⁰ Pescatore, see note 59, 236.

⁶¹ The Judicial Independence of the Administrative Tribunal of the International Labour Organization (ILOAT): Potential for Reform, April 2007, 32-67, <www.suepo.org/rights/public/archive/iloat.independence.ailec.final.02.06.07.pdf>.

⁶² *Ibid.*, 32.

⁶³ Article 3 (1) UNAT statute, see note 4, as amended by A/RES/55/159 of 12 December 2000, para. 1 (a).

⁶⁴ Article 3 (1) UNAT statute, see note 4, as amended by A/RES/58/87 of 9 December 2003.

then the UNAT statute has required “judicial experience in the field of administrative law or its equivalent within their national jurisdiction.”⁶⁵

The proposal for the new internal justice tribunals for the United Nations reaffirms this break with the old tradition by providing for the appointment of professional administrative law judges as members of the two new tribunals. While the Redesign Panel recommended only “relevant professional experience”, the Draft Statutes require ten, respectively 15, years of “judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.”⁶⁶ Though it may not be quite clear what kind of experience will be regarded as “equivalent”, the focus on administrative law judges with considerable experience clearly indicates the intended “target group” of future members of the proposed new tribunals. Despite the improvement that these formal requirements represent, it should nevertheless be remembered that the nature of the cases before such tribunals is more closely related to employment disputes. It would therefore seem restrictive to limit membership to persons with administrative law experience, where employment law would be more appropriate.

In practice, it remains to be seen whether the new requirements will lead to problems of recruitment. Under the current system, where the tribunals sit in sessions of a relatively short duration, membership in administrative tribunals is manageable for a larger group than will be the case if the tribunals become permanent in character. While the United Nations Appeals Tribunal will continue this tradition,⁶⁷ the new United Nations Dispute Tribunal is intended to function in permanent

⁶⁵ Article 3 (1) UNAT statute, see note 4, as amended by A/RES/59/283 of 13 April 2005, para. 40.

⁶⁶ Article 4 (3)(b) of the proposed UNDT statute, see note 39, provides: “To be eligible for appointment as a judge, a person shall [...] possess at least 10 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.” Similarly, article 3 (3)(b) of the proposed United Nations Appeals Tribunal statute, see note 39, provides: “To be eligible for appointment as a judge, a person shall [...] possess at least 15 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.”

⁶⁷ Cf. article 4 (1) of the proposed United Nations Appeals Tribunal statute, see note 39, provides: “The Appeals Tribunal shall hold ordinary sessions at dates to be fixed by its rules, subject to the determination of the President that there is a sufficient number of cases to justify holding the session.”

session.⁶⁸ The non-renewable term-limits of seven years, coupled with the exclusion from any comparable subsequent posts within the United Nations system,⁶⁹ is unlikely to be attractive for committed mid-career administrative law judges from national jurisdictions, or for academics, since in both cases it would require abandoning their current career. These criteria therefore appear to be focused on late-career judges, or those who have already reached pensionable age.

c. Independence – Appointment Procedure

Criticism has been voiced over the fact that many administrative tribunals enable members to be reappointed for office.⁷⁰ It was argued that this could lead to a pro-organization bias since the decision to be reappointed or to be nominated for re-appointment would be made by the defendant organization or its officers.⁷¹ Thus, there was unanimity that the re-appointment possibility should be eliminated which was combined with a prolongation of the terms of office of individual members of the two new tribunals. The recommendation of the Redesign Panel to appoint members for five year-periods only was slightly modified in

⁶⁸ Article 5 of the proposed UNDT statute, see note 39, provides: “The three full-time judges of the Dispute Tribunal shall normally perform their functions in New York, Geneva and Nairobi, respectively. The Dispute Tribunal may decide to hold sessions in other duty stations, as required by the caseload.”

⁶⁹ Pursuant to article 4 (6) of the proposed UNDT statute, see note 39, “[a] former judge of the Dispute Tribunal shall not be eligible for any subsequent appointment within the United Nations, except another judicial post.”

⁷⁰ Article 3 (2) of the original 1949 UNAT statute simply provided that members “may be re-appointed”.

⁷¹ Cf. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 1996, 455. See also the criticism of Robertson with regard to the re-appointment possibility for ILOAT judges: “the Tribunal members are ‘contract judges’, whose well-remunerated employment is contingent upon the regular approval of the very body which is a defending party to their proceedings. This position is plainly incompatible with the rule that requires the judiciary to be independent, and which is breached by any arrangement which offers an inducement to the judges to decide cases in ways which will not upset the re-appointing body,” Robertson, see note 3, para. 6.

the proposed statutes for a new UNDT and a United Nations Appeals Tribunal to seven year terms of service.⁷²

A related issue regarding the independence of judges concerns the appointment procedure itself. Currently, most statutes of administrative tribunals provide for the election of its judges by the plenary organ of an organization. In this fashion also UNAT judges are currently elected by the General Assembly after nomination by Member States.⁷³ The fact that it is an organ of the organization against which complaints are brought that appoints the judges sitting over such complaints has raised doubts about the formal independence of such judges.⁷⁴ However, it is difficult to envisage an appointment procedure for administrative tribunal judges without any role for the organs of the organization to be served. A relatively high degree of independence may be seen in the case of those international organizations which have accepted the jurisdiction of the ILOAT and UNAT without having had any possibility to influence the composition of these tribunals. Given the concerns about the independence of UNAT judges, which led to the suggestion of non-renewable terms, it was to be expected that also the appointment procedure would aim at a procedure reducing the potential influence of the organization.

It is against this background that parts of the proposal of the Redesign Panel came as a surprise. While United Nations Appeals Tribunal judges will continue to be appointed by the General Assembly, it was suggested that judges on the UNDT would be appointed by the Secretary-General.⁷⁵ Though in both cases the appointments would be made

⁷² Articles 3 (4) of the proposed UNDT/United Nations Appeals Tribunal statutes, see note 39, provides: "A judge of the Dispute/Appeals Tribunal shall be appointed for one non-renewable term of seven years."

⁷³ Article 3 (2) UNAT statute, see note 4, provides: "The members shall be appointed by the General Assembly for four years and may be reappointed once."

⁷⁴ Administration of Justice: Harmonization of the Statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal, Report of the Joint Inspection Unit, Doc. JIU/REP/2004/3, Geneva 2004, 2; G. Robertson/ R. Clark/ O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations*, 2006, para. 51.

⁷⁵ Report of the Redesign Panel, see note 8, para. 128 provides: "The judges of UNAT should be appointed by the General Assembly from the list prepared by the Internal Justice Council and submitted by the Secretary-General. The judges of the United Nations Dispute Tribunal should be ap-

from a list prepared by a newly created Internal Justice Council.⁷⁶ Still the fact that appointments to UNDT were to be made by the Secretary-General who represents the defendant organization in staff disputes remained irritating. This suggestion has been corrected, however, in the Draft Statutes which now provide in both cases for appointment through the General Assembly.⁷⁷ Notwithstanding this correction, the need for both transparency and parity in the appointment of judges should not be underestimated. The elimination of bias is not limited to the body which formally appoints the judges. The nomination procedure of ILOAT judges has been criticised and in particular the virtual monopoly that the executive head of the ILO has in proposing members to the ILO governing body.⁷⁸

d. Three Member Panels or Single Judges

The current UNAT, composed of seven judges, decides individual cases in panels of three members.⁷⁹ This collegiate form of adjudication corresponds to the practice of other administrative tribunals.⁸⁰

Obviously for cost-saving purposes, it has been suggested that UNDT should operate through three individual full-time judges sitting

pointed by the Secretary-General from the list prepared by the Internal Justice Council.”

⁷⁶ The Internal Justice Council, suggested by the Report of the Redesign Panel, see note 8, para. 127, was established by the General Assembly by A/RES/62/228 of 22 December 2007, para. 36. It consists of “a staff representative, a management representative and two distinguished external jurists, one nominated by the staff and one by management, and chaired by a distinguished jurist chosen by consensus by the four other members.”

⁷⁷ Arts 4 (2)/3 (2) of the proposed UNDT/United Nations Appeals Tribunal statutes, see note 39, provide: “The judges (of the Appeals Tribunal) shall be appointed by the General Assembly from a list of candidates compiled by the Internal Justice Council established pursuant to General Assembly resolution 62/228.”

⁷⁸ The Judicial Independence of the Administrative Tribunal of the International Labour Organization (ILOAT): Potential for Reform, April 2007, 41, in particular footnotes 216-218, <www.suepo.org/rights/public/archive/iloat.independence.ailec.final.02.06.07.pdf>.

⁷⁹ Article 3 (1) UNAT statute, see note 4.

⁸⁰ See article III ILOAT statute, arts IV, V statute of the World Bank Administrative Tribunal.

in New York, Geneva and Nairobi assisted by two half-time judges.⁸¹ This suggestion was followed in the Draft UNDT Statute which explicitly provides that “[t]he Dispute Tribunal shall be composed of three full-time judges and two half-time judges.”⁸² The fact that they are supposed to fulfill their duties as single judges can be derived from the mandate that they “shall normally perform their functions in New York, Geneva and Nairobi, respectively”⁸³ and is expressly addressed in article 10 (8) of the Draft UNDT Statute which provides that “[j]udgements by the Dispute Tribunal shall normally be rendered by a single judge.”⁸⁴ Although the same paragraph provides that “[t]he Dispute Tribunal may decide to refer a case to a panel of three judges to render a judgement” it is unclear in which situations panels would be formed. In his report, the Secretary-General suggested, among others,

“cases involving (a) a contested administrative decision relating to appointment, promotion or termination; (b) an allegation of harassment or discriminatory treatment supported by substantiated evidence; or (c) a situation where the potential exists for substantial financial damages for the Organization.”⁸⁵

However, this recommendation did not find its way into the Draft Statute. It thus remains to be seen how practice will evolve.

The appointment of administrative law judges from diverse national jurisdictions who will decide cases as individual judges sitting in geographically distant places carries with it the danger of a fragmentation of the case-law of the UNDT. Any international dispute settlement body that functions as a collegiate body is more likely to develop a coherent case-law than single judges. Given the fact that the Redesign Panel lamented the partially incoherent case law of the UNAT,⁸⁶ it ap-

⁸¹ Report of the Redesign Panel, see note 8, para. 76: “New York, Geneva and Nairobi should each have a full-time judge, while Santiago and Bangkok should each have a half-time judge. There should be regular monthly sittings at each of the three headquarters registries and every two months in Santiago and Bangkok.”

⁸² Article 4 (1) of the proposed UNDT statute, see note 39.

⁸³ Article 5 of the proposed UNDT statute, see note 39.

⁸⁴ Article 10 (8) of the proposed UNDT statute, see note 39.

⁸⁵ Administration of Justice, Report of the Secretary-General, Doc. A/62/782 of 3 April 2008, para. 66.

⁸⁶ Report of the Redesign Panel, see note 8, para. 72: “The decisions of UNAT are not always consistent, and its jurisprudence is not well developed.”

pears particularly ironic that the new design of the UNDT may actually increase such incoherence.

It remains to be seen whether the United Nations Appeals Tribunal, which will “continue” to function as a collegiate body,⁸⁷ will be able to fulfill its harmonizing function.

e. Scope of Jurisdiction *ratione materiae*

Administrative tribunals are regularly competent to decide upon alleged violations of employment contracts or terms of appointment of staff members of international organizations.⁸⁸ The latter regularly include their internal staff rules and regulations. This is also true with regard to the UNAT. Since its establishment the UNAT statute has provided,

“The Tribunal shall be 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 words ‘contracts’ and ‘terms of appointment’ include all pertinent regulations and rules in force at the time of alleged non observance, including the staff pension regulations.”⁸⁹

This limited subject-matter jurisdiction has been criticized as creating *lacunae*.⁹⁰ The restrictive interpretation of administrative tribunals, taken together with the general practice of international organizations not to waive immunity, and national courts reluctance to hear cases, raises a number of questions with regard to the ability of staff members to effectively defend their rights.⁹¹

Among others, the restriction to the individual employment contracts and terms of appointment as well as internal staff rules and regulations precludes any findings of accountability for issues such as har-

⁸⁷ Article 10 (1) of the proposed UNDT statute, see note 39, provides: “Cases before the Appeals Tribunal shall normally be reviewed by a panel of three judges and decided by a majority vote.”

⁸⁸ C.F. Amerasinghe, *The Law of the International Civil Service*, Vol. I (1994), 72.

⁸⁹ Article 2 (1) UNAT statute, see note 4.

⁹⁰ Boryslawska/ Martinez Lopez/ Skoric, see note 1.

⁹¹ See also Reinisch, see note 36 “Accountability”.

assessment, discrimination, health and safety or more fundamentally claims of violation of basic human rights.⁹²

Thus, the Redesign Panel suggested in its report to include the power of the new tribunals to hear allegations concerning not only violations of internal administrative rules, but also, among others, “of the duty of care, the duty to act in good faith or the duty to respect the dignity of staff members, that infringes their rights, including the right to equality.”⁹³

The Draft Statute of the new UNDT has not incorporated this suggestion. Rather, it limits the tribunal’s competence to hearing appeals against administrative decisions alleged to be in non-compliance with the “terms of appointment” or the “conditions of employment.”⁹⁴ This omission would be harmless if the suggested obligations were included. However, it is questionable whether the suggested obligations such as a “duty of care” or a “duty to respect the dignity of staff members” are regarded as implicit obligations of an international organization by administrative tribunals.⁹⁵

In addition, the insertion of the words “to appeal administrative decisions” may lead to a further restriction of the rights of staff members and other potential claimants to bring their grievances to the new inter-

⁹² K.J. Webb/ A. van Neck, “The Non-compliance of the International Labour Organisation Administrative Tribunal with the Requirements of Article 6 ECHR”, 3 August 2005, <http://www.suepo.org/rights/public/archiv_e/ailec-suepo_article6_echrandiloat.pdf>.

⁹³ Report of the Redesign Panel, see note 8, Annex I: “The Tribunal shall be competent to hear and to pass final and binding judgement in the following matters: [...] (iii) Alleging prejudicial or injurious conduct that does not conform to the Staff Rules and Regulations or administrative instructions, that involves a breach of the duty of care, the duty to act in good faith or the duty to respect the dignity of staff members, that infringes their rights, including the right to equality, or was engaged in for an improper purpose, including reprisal for seeking the assistance of the Ombudsman’s Office or for bringing action before the Tribunal.”

⁹⁴ Article 2 (1) of the proposed UNDT statute, see note 39, provides: “The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided in article 3(1) of the present statute, against the United Nations, including separately administered United Nations funds and programmes: (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the conditions of employment.”

⁹⁵ See text at note 117 below.

nal justice system. A literal reading of this jurisdictional requirement implies that complainants will no longer be able to bring claims before the UNDT where no formal administrative decision has been taken. Thus, *de facto* violations of terms of appointment or the conditions of employment through acts or omissions of the United Nations may be outside the scope of UNDT's jurisdiction.⁹⁶

f. Persons Entitled to Access the New Internal Justice System

Traditionally access to administrative tribunals of international organizations was limited to staff members. Only very reluctantly, some administrative tribunals have cautiously broadened the scope of personal jurisdiction by including single cases of non-staff members where such persons would not have had any legal recourse against the defendant organization elsewhere.⁹⁷

The Redesign Panel suggested a new, much wider range of persons who should be able to access the internal justice system of the United Nations by providing a new definition of the "staff" of the organization. According to the Panel, staff should include, in addition to real staff and "former staff and persons making claims in the name of deceased staff members",

"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, volunteers, interns or persons performing work in conjunction with the supply of goods or services extending beyond

⁹⁶ The issue of unwritten decisions was addressed by the UNAT in its *Andronov* judgment, where it found that not only express, but also implied administrative decisions could be appealed to the UNAT; see *Andronov v. Secretary-General of the United Nations*, UNAT, 30 January 2004, Judgment No. 1157. It remains to be seen how the UNDT will deal with this question.

⁹⁷ See *Teixera v. Secretary-General of the United Nations*, UNAT, 14 October 1977, Judgment No. 230; *Irani v. Secretary-General of the United Nations*, UNAT, 6 October 1971, Judgment No. 150; *Zafari v. UNRWA*, UNAT, 10 November 1990, Judgment No. 461. See also, in more detail, A. Reinisch, "The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals", *Chinese Journal of International Law* 7 (2008), 285-306.

their own personal service or pursuant to a contract entered into with a supplier, contractor or a consulting firm.”⁹⁸

This suggestion has been taken up by the Secretariat. In the Draft Statute of the UNDT, the group of persons who will have access to the new tribunal is significantly enlarged. In addition to staff members, former staff members as well as persons making claims in the name of an incapacitated or deceased staff member article 3 (1)(d) includes,

“Any person performing work by way of his or her own personal service for the United Nations Secretariat or separately administered United Nations funds and programmes, no matter the type of contract by which he or she is engaged, with the exception of persons in the following categories:

- (i) Military or police personnel in peacekeeping operations;
- (ii) Volunteers (other than United Nations Volunteers);
- (iii) Interns;
- (iv) Type II gratis personnel (personnel provided to the United Nations by a Government or other entity responsible for the remuneration of the services of such personnel and who do not serve under any other established regime); or
- (v) Persons performing work in conjunction with the supply of goods or services extending beyond their own personal service or pursuant to a contract entered into with a supplier, contractor or consulting firm.”⁹⁹

The expansion of the scope of jurisdiction of the new tribunal is certainly remarkable. If implemented, this would constitute a significant enlargement in particular in comparison to the jurisdiction *ratione personae* of the present UNAT, which does not have jurisdiction over those working for the United Nations on a purely contractual basis. The new language would cover a significant number of employees of the United Nations who are not permanent staff but usually work for the organization for a certain period of time on a contractual basis. It will include consultants and individual contractors, United Nations

⁹⁸ Report of the Redesign Panel, see note 8, Annex I.

⁹⁹ Administration of Justice: Further Information Requested by the General Assembly, Note by the Secretary-General, Doc. A/62/748 of 14 March 2008, Annex I, Draft Statute of the United Nations Dispute Tribunal, article 3 (1)(d).

volunteers,¹⁰⁰ as well as officials other than Secretariat officials, such as members of the JIU.¹⁰¹ Experts on mission who do not receive remuneration, such as members of the ILC, are not considered to hold a remunerated post and will thus not be able to access the new UNDT.¹⁰² Such experts on mission holding consultant contracts may avail themselves of the dispute settlement clause provided for in the respective contract. Otherwise, there are no known established or specified recourse mechanisms or procedures applicable to experts on mission.¹⁰³

The proposed enlargement of the personal jurisdiction of the United Nation's internal justice system is to be welcomed. It closes a lack of legal protection for some of those persons who did not have access to the UNAT and who often just had a theoretical possibility to demand arbitration against the United Nations. Contracts with the United Nations routinely provide for arbitration pursuant to the UNCITRAL Arbitration Rules,¹⁰⁴ but such method of dispute settlement is often prohibitively costly and lacks due regard for the special character of employment disputes. Thus, the ability of non-staff members to have access to the United Nation's internal justice system will not only contribute to the effective redress of their grievances but also assist the United Nations in effectively fulfilling its duty under the Convention on the Privileges and Immunities of the United Nations to,

“make provisions for appropriate modes of settlement of [...] disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.”¹⁰⁵

It should, however, be noted that there remain some persons who will continue to be denied access to the United Nation's dispute resolu-

¹⁰⁰ Administration of Justice, Report of the Secretary-General, Doc. A/62/782 of 3 April 2008, para. 22: “United Nations Volunteers are individuals who work with United Nations agencies and governmental and non-governmental organizations on a voluntary and short-term basis.”

¹⁰¹ *Ibid.*, paras 8-42.

¹⁰² *Ibid.*, para. 33.

¹⁰³ *Ibid.* para. 34. Military observers and civilian police personnel in peace-keeping missions are also considered being such experts on mission, *ibid.*, para. 32.

¹⁰⁴ UNCITRAL Arbitration Rules, approved by the General Assembly on 15 December 1976, GAOR, 31st Sess., Suppl. No. 17, Chap. V, Sec. C, Doc. A/31/17, 1976, *ILM* 15 (1976), 701 et seq.

¹⁰⁵ Article VIII Section 29(a) of the Convention on the Privileges and Immunities of the United Nations, see note 11.

tion mechanisms; most notably these are United Nations job applicants and other third parties who neither have an employment relationship, nor a contract with the United Nations.¹⁰⁶

g. Standing for Staff Associations

Staff associations play an important role in protecting the interests of staff members of international organizations. The Redesign Panel's suggestion to expressly include a *jus standi* of staff associations before the new tribunals¹⁰⁷ has been endorsed by the Secretariat in its Draft Statutes.¹⁰⁸ The Draft UNDT Statute as formulated by the Secretariat,

¹⁰⁶ See *Darricades v. United Nations Educational, Scientific and Cultural Organization (UNESCO)*, Judgment ILO Administrative Tribunal No. 67, 26 October 1962, dismissing a complaint upon a finding that the complainant was only a "casual employee" of the United Nations Educational, Scientific and Cultural Organization and that it therefore lacked jurisdiction under the ILOAT statute to hear her complaint; *Liaci v. EPO*, Judgment No. 1964, 12 July 2000, and *Klausecker v. EPO*, Judgment No. 2657, 11 July 2007, (both cases were job applicants which were provided no access to a tribunal). The decisions can be downloaded under <www.ilo.org/public/english/tribunal/fulltext>.

¹⁰⁷ Report of the Redesign Panel, see note 8, Annex I: "The Tribunal shall be competent to hear and to pass final and binding judgement in the following matters: [...] (b) Applications by a staff association against the Organization or its funds and programmes: (i) To enforce the Staff Rules and Regulations or associated administrative instructions; (ii) On behalf of a particular class of its members affected by a particular administrative decision."

¹⁰⁸ Article 2 (3) of the proposed UNDT statute, see note 39, provides: "The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by a staff association, as provided in article 3(3) of the present statute, against the United Nations or separately administered United Nations funds and programmes:

(a) To enforce the rights of staff associations, as recognized under the Staff Regulations and Rules;

(b) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the conditions of employment, on behalf of a group of named staff members who are entitled to file such application under article 2(1) of the present statute and who are affected by the same administrative decision arising out of the same facts; or

(c) To support an application filed by one or more staff members who are entitled to appeal the same administrative decision under article 2(1)(a) of the present statute, by means of the submission of a friend-of-the-court brief or by intervention."

however, not only refined but also limited the scope of cases potentially brought by staff associations. Whereas the Redesign Panel suggested endowing staff associations with a right to bring a complaint “to enforce the Staff Rules and Regulations or associated administrative instructions”, the Draft Statute merely provides for standing to “enforce the rights of staff associations, as recognized under the Staff Regulations and Rules.”¹⁰⁹

Further, the Redesign Panel clearly envisaged situations where individual staff members are reluctant to bring complaints in their own name.¹¹⁰ Through the suggested broad power to file applications “to enforce the Staff Rules and Regulations” staff associations would have had the power to act on behalf of individual applicants. This appears no longer possible under the Draft Statute which limits the right of staff associations to enforce “their own rights”, to bring complaints on behalf of a “group of staff members” and to file *amicus curiae* briefs in cases brought by staff members. Though this latter aspect embodies a modest expansion of the Redesign Panel’s suggestions it seems clear that the Draft Statute does not allow staff associations to act on behalf of individual members.

The possibility for staff associations to file *amicus curiae* briefs has existed at the ILOAT since 2005 where a number of staff associations were permitted to file observations related to cases.¹¹¹ However, in

¹⁰⁹ Article 2 (3)(a) of the proposed UNDT statute, see note 39.

¹¹⁰ Report of the Redesign Panel, see note 8, para. 82: “Because staff members are sometimes reluctant to enter the formal justice system for fear of reprisals, it is considered necessary to give staff associations an independent right to bring action to enforce the Staff Rules and Regulations.”

¹¹¹ In 2005 the ILOAT began to accept *amicus curiae* briefs from staff associations. *Burchi et al v. FAO*, Judgment No 2420, 2005 (Consideration 7. “The Association of Professional Staff has submitted an *amicus curiae* brief. Although the possibility of gathering the observations of an association or union representing staff interests is not envisaged under its Statute, the Tribunal considers that it can only be beneficial to extend that possibility, as do other international administrative tribunals, to associations and unions wishing to defend the rights of the staff members whom they represent in the context of disputes concerning decisions affecting the staff as a whole or a specific category of staff members. Indeed, the Organization has raised no objection to the Tribunal’s examination of the submissions in question, which are not, however, to be equated with the brief of an intervener, and which are simply intended to clarify certain points raised by the complaints with the Tribunal”). See also *Bebron and Lodesani v. FAO*, Judgement No.

practical terms the possibility to do so is limited since all ILOAT cases remain private until the judgment is pronounced. It also appears strange that staff associations will not receive the right to file a case which is consistent with such staff associations having a legal personality. This legal personality has been recognized as a fundamental right under the freedom of association.¹¹² The failure to recognize this right and provide appropriate access to administrative tribunals would appear problematic, since the organization's immunity prevents other forms of redress.

h. Legal Advice to and Representation of Applicants

A further significant problem that has been identified is the current inequality of arms between staff members and the organization in a dispute. Already the JIU recommended providing for adequate legal representation for staff in disputes with the organization.¹¹³ This point has also been raised by the Redesign Panel and seems particularly important to staff unions. The latter have emphasized the need for adequate representation of staff also by external counsel and rejected the argument that this has not been implemented since external lawyers would have difficulty navigating through United Nations reports and circulars.¹¹⁴ It is certainly problematic that while the organization is repre-

2421, 2005; *Connolly and Russell v. IAEA*, Judgment No. 2422, 2005; *Dexter And Koretski v. WMO*, Judgment No. 2423, 2005; *Plaisier v. FAO*, Judgment No. 2590, 2007; *Giorgi (NO.4)*, *Lacsamana and Perera v. WIPO*, Judgment No 2672. 2008. All judgments can be downloaded under <www.ilo.org/public/english/tribunal/guidefj.htm>.

¹¹² ILO Convention No. C87 – Freedom of Association and Protection of the Right to Organise (1948), UNTS Vol. 68 No. 881, article 7, “The acquisition of legal personality by workers’ and employers’ organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.” ILO Convention No. C151 Labour Relations (Public Service) Convention, UNTS Vol. 1218 No. 19653, article 9, “Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.”

¹¹³ 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, p. viii.

¹¹⁴ G. Robertson/ R. Clark/ O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations*, 2006, paras 56-58.

mented by the legal advisors office, staff members can only rely on the support of frequently not highly qualified staff counsel in the form of the Panel of Counsel comprised of volunteers.¹¹⁵

In the current situation, representation through external counsel is problematic since many organizations do not permit such representation during informal stages. The right of appropriate representation is part of fundamental rights.¹¹⁶ The bi-lingual nature of administrative tribunals and the multi-lingual nature of the international organizations themselves raise issues as to how the right of representation can be achieved. The current proposals do not appear to address this, in particular the needs of translation and interpretation.

i. Applicable Law – In Particular Fundamental Rights

In the past, administrative tribunals have been criticized¹¹⁷ for the way how they reasoned their awards and what they considered to form the legal basis of their decisions, i.e. the applicable law. Administrative tribunals often limited their reasoning to the terms of employment contracts as well as the applicable staff rules and regulations without taking into account fundamental rights guarantees.

Although some administrative tribunal decisions have come close to recognizing the relevance of fundamental rights as general principles of law to be respected by them,¹¹⁸ the case-law of most of them makes

¹¹⁵ Report of the Redesign Panel, see note 8, para. 100: “The Panel of Counsel, which was formally established in 1984 and which has the responsibility to provide legal assistance and representation to United Nations staff members in proceedings within the internal justice system, is extremely under-resourced and is not professionalized. [...] As a result, the current structure of and resources available to the Panel are fundamentally inconsistent with the goal of an efficient and effective administration of justice in the United Nations.”

¹¹⁶ See note 36.

¹¹⁷ See notes 36, 78, 90, 92.

¹¹⁸ See *Wagborn v. ILO* [1957] ILOAT Judgment No. 28, holding that it is “bound [...] by general principles of law.” See also *Franks v. EPO*, [1994] ILOAT Judgment No. 1333, in which the ILOAT included alongside “general principles of law” also “basic human rights.” Similarly, the World Bank Administrative Tribunal held that sexual discrimination or harassment violated “general principles of law”, *Mendaro v. IBRD*, World Bank Administrative Tribunal Reports, Judgment No. 26 [1981] at 9.

clear that they are not formally bound by any human rights instruments.¹¹⁹

This lack of protection of individual rights was also acknowledged by the Redesign Panel.¹²⁰ However, the Redesign Panel failed to expressly call for the inclusion of an applicable law provision which would have included fundamental rights among the obligatory rules for the United Nations. Also the proposed Draft Statutes for the new tribunals fail to specifically identify the applicable law. In many other statutes of international courts and tribunals applicable law clauses are standard features. Given the past controversy over the applicability of human rights law¹²¹ and the express intention to improve the international justice system it is remarkable that no rules on the applicable law have been included. As can be seen from other contexts the United Nations is bound by customary international law including principles of human rights law.¹²²

j. Remedies – The Issue of Specific Performance

Compared to the ILOAT, the potential remedies available from UNAT are limited.¹²³ Although the present UNAT statute provides for the tribunal's power to order specific performance, this power is severely limited in practice by the fact that it also has to fix the amount of compensation to a maximum of two years' net base salary and that the Secretary-General may choose to grant compensation only.¹²⁴ In practice, the

¹¹⁹ G. Hafner, "The Rule of Law and International Organizations", in: K. Dicke et al. (eds), *Weltinnenrecht. Liber Amicorum Jost Delbrück*, 2005, 307 et seq. (310); A. Pellet, "La Grève des Fonctionnaires Internationaux", *RGDIP* 79 (1975), 932 et seq.

¹²⁰ Report of the Redesign Panel, see note 8, para. 72: "Thus, there 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."

¹²¹ Reinisch, see note 36, 156; Reinisch/ Weber, see note 1.

¹²² See A. Reinisch, "Developing a Human Rights and Humanitarian Law Accountability of the UN Security Council for the Imposition of Economic Sanctions", *AJIL* 95 (2001), 851 et seq.

¹²³ Amerasinghe, see note 88, 480.

¹²⁴ Article 10 (1) of the UNAT statute, see note 4, provides: "If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation in-

Secretary-General almost always opts for compensation instead of changing the (wrongful) decision. According to a 2004 report of the JIU, the fact that it is *de facto* the Secretary-General and not UNAT who decides whether specific performance will be required or damages will be paid “undermines staff confidence in the Tribunal and raises questions regarding the independence and fairness of the process.”¹²⁵ This contrasts clearly with the case of ILOAT which decides itself whether rescission or specific performance “is not possible or advisable”,¹²⁶ in which case it awards monetary compensation. According to UNAT itself, this discrepancy “represents a glaring example of injustice and discrimination between the two categories of staff members working under the United Nations system.”¹²⁷

It has been argued that the two years limitation may often amount to inadequate compensation.¹²⁸ Also the Redesign Panel has been highly critical of this situation¹²⁹ and recommended that the new

voked. At the same time, the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his or her case, provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.”

¹²⁵ Administration of Justice: Harmonization of the Statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal, Report of the Joint Inspection Unit, Doc. JIU/REP/2004/3, Geneva 2004, 2.

¹²⁶ See article VIII ILOAT statute: “In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him.”

¹²⁷ Letter dated 8 November 2002 from the President of the United Nations Administrative Tribunal addressed to the Chairman of the Fifth Committee, Doc. A/C.5/57/25 of 20 November 2002, Annex II, para. 2.

¹²⁸ Robertson/ Clark/ Kane, see note 74, para. 53; Administration of Justice: Harmonization of the Statutes of the United Nations, see note 125, 3, 4.

¹²⁹ Report of the Redesign Panel, see note 8, para. 71: “The power of the Secretary-General to choose between specific performance and the payment of limited compensation can, and sometimes does, result in inadequate com-

UNDT have far-reaching powers to order specific performance.¹³⁰ The Draft Statute of the new UNDT is much more reserved. Since the subject matter jurisdiction is limited to challenges to administrative decisions¹³¹ the primary remedy envisaged is the rescission of such decisions.¹³² However, the Draft Statute retains the organization's right to choose compensation rather than specific performance, and again this is limited in general to two years' net base salary.¹³³

Also the Redesign Panel's suggestion to allow for punitive damages in exceptional cases¹³⁴ was expressly rejected in the Draft Statute of the new UNDT.¹³⁵ This rejection is remarkable when considering that the possibility to award punitive damages already forms part of the case law of the ILOAT.¹³⁶

pensation, particularly in cases of wrongful termination or non-renewal of contract.”

¹³⁰ Report of the Redesign Panel, see note 8, para. 83: “The United Nations Dispute Tribunal should have power to grant final and binding relief by way of: (a) Specific performance, injunction and declaratory decree, including the order that an appointment be set aside; [...]”

¹³¹ See note 94.

¹³² Article 10 (4) of the proposed UNDT statute, see note 39, provides: “Where the Dispute Tribunal determines that an application is well founded, it may order one or more 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 respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered;

(b) Compensation, which shall not normally exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, order the payment of a higher indemnity in exceptional cases and shall provide the reasons for that decision; [...]”

¹³³ Article 10 (4)(b) of the proposed UNDT statute, see note 39.

¹³⁴ Report of the Redesign Panel, see note 8, para. 83: “The United Nations Dispute Tribunal should have power to grant final and binding relief by way of: [...] (b) Compensation and damages, including, in exceptional circumstances, exemplary or punitive damages”.

¹³⁵ Article 10 (6) of the proposed UNDT statute, see note 39, provides: “The Dispute Tribunal may not award exemplary or punitive damages.”

¹³⁶ *D.J.G. v. ITU*, Judgement No. 2540, 12 July 2006, (Damages: 10,000.- SFR, Moral Damages: 25,000.- SFR, Punitive Damages: 25,000.- SFR, Costs: 10,000.- SFR); *Magrizos and Skelly (NO.3) v. EPO*, Judgement No. 2418, 9

k. Transparency: Amicus Curiae Briefs, Oral Hearings and the Publication of Judgments

As with other international courts and tribunals there are a number of possibilities how to increase transparency. One is the option for judicial bodies to admit so-called *amici curiae* as non-parties to file briefs that may inform the decision makers on the legal issues involved.

This possibility is by now well established practice, e.g. in the context of the WTO and in international investment arbitration. Although the option for non-disputing parties to make written submissions is not expressly provided for in the WTO Dispute Settlement Understanding (DSU),¹³⁷ the Appellate Body established early on that panels as well as the Appellate Body itself had the power to accept and consider unsolicited *amicus curiae* briefs from NGOs or other non-state actors.¹³⁸ In the context of investment arbitration calls for increased transparency have equally become louder in recent years and did not remain without consequence. In 2004 the NAFTA Free Trade Commission clarified that it was permissible for non-disputing parties to file written submissions with a tribunal.¹³⁹ In 2006 the ICSID Arbitration Rules were amended to provide, among others, for the possibility for non-disputing parties to make written submissions to arbitral tribunals.¹⁴⁰

October 2003, (Damages: 2,000.- Euro, Punitive Damages: 5,000.-Euro, Costs: 2,000.- Euro). Both judgments are available at <<http://www.ilo.org/public/english/tribunal/guidefj.htm>>.

¹³⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, *ILM* 33 (1994), 1226 et seq.

¹³⁸ See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (12 October 1998); *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R (12 March 2001). See, in more detail, C. Knahr, *Participation of Non-State Actors in the Dispute Settlement System of the WTO – Benefit or Burden?*, 2007.

¹³⁹ NAFTA Free Trade Commission: Statement of the Free Trade Commission on Non-Disputing Party Participation, *ILM* 44 (2005), 796 et seq.

¹⁴⁰ Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 April 2006, <http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf>. See, in more detail, C. Knahr, “Transparency, Third Party Participation and Access to Documents in International Investment Arbitration”, *Arbitration International* 23 (2007), 327 et seq.

Though the Redesign Panel recommended the possibility of *amicus curiae* briefs,¹⁴¹ it was not expressly incorporated into the Draft Statutes of UNDT or the United Nations Appeals Tribunal. While the statutes provide for the tribunals' powers to regulate interventions by non-parties "whose rights may be affected by the judgement"¹⁴² such intervention is unlikely to include *amici curiae* who are – by definition – not affected by the outcome of litigation.

One of the most heavily criticized practices of almost all administrative tribunals, including UNAT, was the *de facto* absence of any oral hearings¹⁴³ although their statutes regularly provide for oral proceedings to be held in public as the general rule.¹⁴⁴

This practice has been strongly attacked by staff unions and outside counsels representing staff members.¹⁴⁵ They argue that the lack of any direct personal impression of the judges, in particular with regard to factual disputes, would make a proper administration of justice very difficult and that, as a result, tribunals often unquestioningly assumed the correctness of the findings made by the organization during the internal stage of dispute settlement, despite the fact that these internal means are advisory in character and do not meet minimum guarantees of impartiality and independence required of a tribunal.¹⁴⁶

The Redesign Panel thus emphasized that the newly to be created UNDT should hold oral hearings "in any case involving disputed issues

¹⁴¹ Report of the Redesign Panel, see note 8, para. 84: "It should also have power to make its own rules, including with respect to interveners and *amici curiae* (friends of the court)."

¹⁴² Article 7 (2)(d) of the proposed UNDT statute, see note 39, provides that the rules of procedure, to be adopted by UNDT, should include provisions concerning: "Intervention by persons not party to the case whose rights may be affected by the judgement."

¹⁴³ See Amerasinghe, see note 88, 608; Robertson/ Clark/ Kane, see note 74, para. 52; K. Wellens, *Remedies against International Organisations*, 1992, 83; E.P. Flaherty, "Legal Protection for Staff in International Organisations – a Practitioner's View", Paper presented at the Conference "Accountability for Human Rights Violations by International Organizations" in Brussels, 16-17 March 2007; see also Reinisch/ Weber, see note 1, 108.

¹⁴⁴ Article 8 of the UNAT statute, see note 4, provided since 1949: "The oral proceedings of the Tribunal shall be held in public unless the Tribunal decides that exceptional circumstances require that they be held in private."

¹⁴⁵ See text at note 23.

¹⁴⁶ See note 92.

of fact.”¹⁴⁷ However, this clear mandate in favor of oral hearings was not expressly incorporated into the Draft Statutes. Although the statutes provide that oral hearings should in principle be held in public,¹⁴⁸ that the tribunals may require the personal appearance of the applicant¹⁴⁹ and envisage more detailed provisions concerning oral hearings in the respective rules of procedure of the two tribunals,¹⁵⁰ there is no express rule that would require them to hold oral hearings. It will thus remain within the discretion of the two new tribunals whether or not to do so. Given the practice of the current administrative tribunals not to hold oral hearings¹⁵¹ it is difficult to see how sufficient guarantees of applicants’ rights¹⁵² will be provided.

Public scrutiny is an important element of creating confidence in any judicial system. This requires access to sufficient information to form a reasonable opinion that justice is being served. Such information includes not only the judgments but also information as to the details of the cases, and how the court deals with these matters. Currently, the UNAT statute only provides for the communication of judgments to the parties in the case and that copies may be made available to “interested persons” upon request.¹⁵³ In practice, UNAT has created a web-

¹⁴⁷ Report of the Redesign Panel, see note 8, para. 92: “The proposed United Nations Dispute Tribunal must have power to hold oral hearings and should be required to do so in any case involving disputed issues of fact. The hearings should be public, including by videoconference if necessary.”

¹⁴⁸ Article 9 (3) of the proposed UNDT statute, see note 39: “The oral proceedings of the Dispute Tribunal shall be held in public unless the Dispute Tribunal decides, at its own initiative or at the request of either party, that circumstances require the proceedings to be closed.” Equally, article 8 (4) Draft Statute of the United Nations Appeals Tribunal.

¹⁴⁹ Article 9 (2) of the proposed UNDT statute, see note 39: “The Dispute Tribunal shall decide whether the personal appearance of the applicant is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance.” See also article 8 (2) Draft Statute of the United Nations Appeals Tribunal.

¹⁵⁰ Article 7 (2)(e) of the proposed UNDT statute, see note 39. Equally, article 6 (2) Draft Statute of the United Nations Appeals Tribunal.

¹⁵¹ See notes 90, 92.

¹⁵² See note 36.

¹⁵³ Article 11 (5) of the UNAT statute, see note 4, provides: “A copy of the judgement shall be communicated to each of the parties in the case. Copies shall also be made available on request to interested persons.”

site on which all its judgments dating back to 1950 are publicly available.¹⁵⁴

Such an increased level of transparency has also been recommended by the Redesign Panel. It suggested that judgments of the dispute and the appeals tribunal should be delivered in public and published on the internet in English and in French.¹⁵⁵ The Draft Statutes of the new tribunals, while not expressly referring to the internet, codify the existing practice and provide for the publication of their judgments.¹⁵⁶ This will ensure more openness of the system and access of interested individuals or the public at large to information about the proceedings.

I. Grounds for Appellate Review

The central element of a two-tier formal system of administration of justice within the United Nations is the scope of review possible by the second instance tribunal. There are various models current in international and national judicial practice, from restricted types of review limited to questions of law to full reassessments of both law and facts. The Redesign Panel recommended broad appellate powers for the United Nations Appeals Tribunal.¹⁵⁷ The Draft Statute of the United Nations Appeals Tribunal provides as follows:

“The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal, in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Committed a fundamental error in procedure that has occasioned a failure of justice;
- (d) Erred on a question of law; or

¹⁵⁴ See UNAT website <http://untreaty.un.org/UNAT/main_page.htm>.

¹⁵⁵ Report of the Redesign Panel, see note 8, para. 94.

¹⁵⁶ Article 11 (6) of the proposed UNDT statute, see note 39: “The judgements of the Dispute Tribunal shall be published and made generally available by the Registry of the Tribunal.” See also article 10 (9) Draft Statute of the United Nations Appeals Tribunal.

¹⁵⁷ Report of the Redesign Panel, see note 8, para. 96: “As UNAT will have power to make orders that should have been made by the Dispute Tribunal, there will be no limitation on its appellate powers.”

(e) Erred on a question of material fact.”¹⁵⁸

The issue of whether the United Nations Appeals Tribunal should also be competent to hear appeals on facts has been controversial during the negotiations. Fear exists that such an expansion of the powers of the envisaged tribunal would significantly increase the number of appeals and possibly overstretch the tribunal’s capacity.

IV. Conclusion

An examination of the proposed changes to the currently existing administration of justice system of the United Nations shows that what is suggested is far more than minor adaptations; it is a completely new system. One of the most significant reform steps is certainly the establishment of a two-tier system of administrative justice with the creation of the United Nations Dispute Tribunal as the first instance and the United Nations Appeals Tribunal as the second instance. A number of other reforms are targeted at improving the administrative proceedings, among them providing adequate representation for staff or ensuring proper qualification and independence of the judges. Further, the reform efforts aim at strengthening the options for informal dispute settlement.

If implemented as planned, the new system seems to benefit staff members as well as the organization. United Nations staff will most likely welcome the new possibilities for appealing first instance decisions and other procedural improvements flowing from the reform.

In light of the radical nature of the proposed changes and the considerable additional costs of the new system, however, one can expect hesitance or even reluctance on the part of some United Nations members to actually implement the changes as they are currently on the table. Further, even if the measures are not opposed, it seems doubtful that the present time-schedule can be maintained and the new system will be fully up and running as planned by January 2009.

While some issues already seem to have been solved satisfactorily through this reform, the devil lies in the detail and a number of questions, particularly regarding the statutes of the two tribunals, has remained open and still needs to be looked at more closely. Nonetheless

¹⁵⁸ Article 2 (1) of the Draft Statute of the United Nations Appeals Tribunal, see note 39.

the decision taken by the General Assembly to put in place this new system of administration of justice at the United Nations certainly reflects a major reform step.