Seminar aus Völkerrecht
"Rechtsschutz gegenüber Internationalen Organisationen"
ao. Univ.-Prof. MMag.Dr. August Reinisch, LL.M. (NYU)
Sommersemester 2007

PRE-LITIGATION PROCEDURES TO SETTLE EMPLOYMENT DISPUTES IN INTERNATIONAL ORGANIZATIONS

CASE STUDY OF THE UNITED NATIONS SYSTEM

Mag. Julia Hutter
0203761
15 July 2007

CONTENTS

1. Introduction

The settlement of employment disputes within international organizations is not only a highly important and complex issue but also a matter currently attracting major attention in international law as the reform of the United Nations dispute settlement system recently raised numerous controversies and discussions.

The special characteristics of the international civil services compounded with several other factors cause the relations between an international organization and its staff members to be unique in nature and distinguish them from any other kind of employment relationships. Not only is the international civil service excluded from any national legal system[1] but also by being restricted from access to national courts to seek legal assistance[2] is the staff of international organizations in some way dependent on the procedures established in the particular organization. Additionally, the staff of international organizations usually comprises people from various different backgrounds and domestic legal systems[3] what in return requires the institutions to introduce a well-balanced system to avoid discrimination of and misunderstandings amongst its staff members. Besides, there are certain extraordinary threats and dangers such as crime and terrorism the members of the international civil service are confronted with[4] and which need to be taken into consideration in order to prevent uncertainty and insecurity from arising in the international community.

Starting out with a brief introduction to the law and principles governing the international civil service this paper focuses on the various procedures established by

[1] See F. Bouayad-Aghga/H. Hernandez (2000), p. vii "Administration of Justice at the United Nations"
[2] See G. Robertson/R. Clark/O. Kane *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (2006), paragraph 7.
[3] *Idem*, paragraph 9.
[4] *Idem*, paragraph 9.

international organizations in the field of the settlement of staff disputes exemplifying them by exploring the United Nations current dispute settlement system. The final part will later on concentrate on the discussion whether or not there is a need to reform the prevailing procedures and deal with possible models meeting the requirements of fair and appropriate dispute resolution.

2. The Law governing International Civil Service

2.1. The internal law of international organizations – an independent system

By now it is generally accepted that the employment relations of an international organization and its staff members are governed by the internal law of the particular organization, an independent system of law outside the sphere of any member state's national legal system. [5] Awarding the internal law this kind of status is important for a number of reasons. As mentioned in the introduction the staff of international organizations is usually recruited from a large variety of nationalities and is furthermore deployed in numerous different countries each having its own specific legal system. Therefore, in order to preserve equality and to avoid discrimination amongst the staff members it is essential that the personnel on a whole is subject to identical rules governing their employment relations. In addition the independence of the internal law from any other legal system contributes to protecting the members of the international civil service from national pressure which otherwise could easily be imposed on them by the country they are nationals of.[6]

As far as the nature of employment relations is concerned, it has to be differentiated between employment relations based on contracts and such based on statute. The latter, which are definitely outnumbered, are not governed by contract but by legislative acts passed by the administrative bodies of international organizations. However, the notion has prevailed that even if the relations are of contractual nature, they are governed by certain statutory elements, irrespective whether or not they are incorporated in the specific contract.[7]

[5] See C.F. Amerasinghe, *Law of the International Civil Service* (1994) vol. 1, p. 26.
[6] See C.F. Amerasinghe, *Principles of the institutional law of international organizations* (1996), pp. 329f.
[7] *Idem*, pp. 332-335.

2.2. Sources of Law

In order to define the internal law of international organizations it is necessary to determine its sources.

As it has been confirmed by various judgments of international administrative tribunals[8] the contract of appointment – where the employment relationship is statutory in nature the equivalent instrument of appointment – is a primary source of the internal law governing employment relations.[9] Furthermore terms and conditions of employment may be inferred from "surrounding facts and circumstances" as well as from correspondence.[10] Moreover international administrative tribunals frequently referred to constituent treaties such as the UN Charter as a source of law.[11] Additionally, conditions of employment as well as rights and obligations may also be derived from acts passed by organs of international organizations, namely Staff Regulations and Staff Rules.[12] Another source of law are the general principles of law comprising not the general principles of administrative law of the member states but also the case law and decisions of international tribunals.[13] Last but not least the practice of the particular organization if carried out with a reflection of a legal obligation (opinio juris) constitutes a source of the internal law of an international organization.[14]

A conflict of sources may not occur often because usually tribunals tend to interpret the written sources in accordance with the general principles of law. However, if a conflict occurs it is assumed that in general the written law is superior hierarchically to the general principles of law. Exempted from this notion are general principles that are of fundamental nature, such as the right to be heard or the principle of equality.[15]

A conflict may also arise between a contract of appointment and the staff regulations in the case that the contract pre-dates the regulation. If so the view has been accepted that the contract prevails over the regulations because already obtained rights cannot be withdrawn by a unilateral act of an organization.[16]

---

[8] For example the Kaplan case (UNAT Judgement No. 19 [1953]); the Lindsey case (ILOAT Judgement No. 61 [1962].
[9] See H.G. Schermers, *International Institutional Law* (2003), p. 362, paragraph 539.
[10] C.F. Amerasinghe, *Principles of the institutional law of international organizations* (1996), p. 337.
[11] *Idem*, p. 338.
[12] *Idem* pp. 338f.; H.G. Schermers, *International Institutional Law* (2003) p. 362, paragraph 539.
[13] See C.F. Amerasinghe, *Principles of the institutional law of international organizations* (1996), pp. 340f.; H.G. Schermers, *International Institutional Law* (2003) p. 362, paragraph 539.
[14] See C.F. Amerasinghe, *Principles of the institutional law of international organizations* (1996), p. 343, M.B. Akehurst, The Law governing employment relations in International Organizations (1967), p. 95.
[15] *Idem*, pp. 347-350.
[16] See H.G. Schermers, *International Institutional Law* (2003), p. 362, paragraph 539.

2.3. Immunity from the jurisdiction of national courts

By now the view that international organizations hold immunity from the jurisdiction of national courts in respect of staff affairs has evolved to become a general principle of institutional law of international organizations and is accepted by almost every domestic legal system. This notion is compounded by judgments of national courts of various nations.[17] In the "International Institute of Agriculture v. Profili" the Italian Court of Cassation stated that "because the Institute was an autonomous union free, as regards its internal affairs, from interference by the sovereign power of the States composing the union except when it consented thereto, in the absence of such consent there was nothing which authorized the intervention of an external jurisdiction".[18]

Only in rare cases have national courts asserted jurisdiction over employment matters involving international organizations, especially where the international organization had not provided for internal bodies to resolve staff disputes. Therefore, the tendency of national courts assuming jurisdiction in cases where there was no internal dispute resolution system has, amongst other reasons, prompted the majority of international organizations to establish such a system in order to prevent national courts from further interference in employment related matters.[19]

3. Settlement of Employment Disputes – Pre-Litigation Procedures

Even if the terms and conditions of employment are well defined and regulated by the various sources of law disputes between staff members and international organizations may arise. In order to deal with them international organizations have established their own internal dispute resolution systems. The following paragraphs of this paper tend to, by picking up the similarities of the systems set up by some of the most important international organizations, give an overview of how, in general, the settlement of staff disputes proceeds.

3.1. Purpose of Pre-Litigation Procedures

Undoubtedly the ultimate motive behind the establishment of pre-litigation procedures was to resolve discrepancies at a rather early stage where the level of

[17] For Example the Broadbent Case (US Court of Appeals [1980] No. 78-1465); the Groll v. Air Traffic Services Agency [1979].
[18] Court of Cassation [1929-1930] Case No. 254p. 413, after Amerasinghe (1994) vol. 1., p. 42.
[19] See C.F. Amerasinghe, *The Law of the International Civil Service* (1994), pp. 45f.

conflict is still low.[20] As clearly pointed out in the *Sergy* judgment the major purpose of giving employees the possibility of seeking assistance through administrative means is "to enable and encourage an amicable settlement of difference which has arisen between officials or servants and the administration".[21] By being targeted on facilitating conciliation before an official appeal to a judicial body is sought pre-litigation may improve the working atmosphere within an international organization and may strengthen the relationship of staff members and the organization they work for.

Furthermore as pre-litigation procedures tend to be rather informal they are usually more cost-effective and less time-consuming than the proceedings initiated before judicial bodies. Therefore, an agreement may be reached requiring a smaller expenditure of cost and time - an advantage not only for the staff member concerned but also for the organization itself. Additionally, if disputes can be settled at such an early level, no further stages need to be consulted what in turn disencumbers the judicial bodies.

Besides, pre-litigation assists international organizations in handling struggles resulting from cultural, linguistic and educational differences between its staff because it enables the administration as well as the servants to choose from various forms of alternative dispute settlement and thereby find the procedure which is the most suitable for the particular situation.[22]

3.2. Types of Pre-Litigation Procedures

As mentioned above there are various different kinds of procedures varying from organization to organization and usually there are more than only one within the system of each international institution. In general, the easiest distinction that may be draw is the one between informal, i.e. dispute resolution without the existence of statutory determined proceedings, and formal pre-litigation procedures.

[20] See C. de Cooker, *Pre-Litigation Procedures in International Organizations,* in de Cooker, *International Administration* (1998), V.6/2.
[21] European Court of Justice, Case 58/75 [1976] ECR 1139.
[22] See Y. Beigbeder, *Management Problems in United Nations Organizations* 114 (1987), after H.G. Schermers, *International Institutional Law* (2003), p. 367, paragraph 545.

3.2.1. Informal Dispute Resolution

Within their internal system international organizations have established numerous types of informal dispute resolution proceedings the staff is given the possibility of choosing from.

The most common one is the informal discussion with superiors. It usually starts out with talks between the staff member concerned and his direct superior moving further on to the superior's own superior the final level usually being reached at the department of human resources.[23]

Another procedure that has become more and more popular recently is the consultation of Ombudsmen. These bodies serve as impartial and independent third parties settling the conflicts through peaceful means such as mediation and conciliation.[24] Although being part of the administrative systems of international organizations Ombudsmen tend to operate on a rather informal basis not following bureaucratic procedures.[25]

In addition, some international organizations have established further specific bodies and offices of informal dispute resolution such as staff committees or staff counselors. They usually consist of staff representatives elected by the members of the civil service in order to represent their interests and to facilitate talks between the staff and the management of the international organization.[26]

3.2.2. Formal Dispute Resolution – Administrative Review

If a staff member is not satisfied with the results achieved through the informal mechanisms of dispute resolution he may request an administrative review of the decision in question. As it applies for the majority of international organizations, having undergone informal proceedings prior to launching a formal complaint is not a prerequisite to initiating formal dispute resolution procedures.[27]

As far as the course of action is concerned, the administrative review process is usually initiated by a staff member's written complaint to the executive head of the international organization that has to be sought within a certain period of time,

---

[23] See C. de Cooker, *Pre-Litigation Procedures in International Organisations,* in de Cooker, *International Administration* (1998), V.6/3.
[24] See http://www.un.org/ombudsman
[25] See C. de Cooker, *Pre-Litigation Procedures in International Organisations,* in de Cooker, *International Administration* (1998), V.6/14-15.
[26] See G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (2006), paragraph 23.
[27] See C. de Cooker, *Pre-Litigation Procedures in International Organisations,* in de Cooker, *International Administration* (1998), V.6/4.

generally specified by the staff regulations. Therein the servant may request the Head of the Organization to either amend or annul a previous administrative decision. Besides, the submission to the joint body of the organization may be inquired. Varying from organization to organization, the executive head may either address the joint body or make up a decision. In the latter case the staff member, if unsatisfied with the result, may submit the case to the joint body.[28] Prior to taking his decision the Head of the Organization may also seek advice from other internal or even from external bodies of both administrative and judicial nature serving either permanently or on an ad hoc basis. He may for example entrust a committee of jurist to submit an advisory opinion on the case.[29]

Although having only an advisory function, the joint bodies[30] – also called appeals board – which have been established by almost every international organization, play an important role in the administrative review process. These boards usually consist of an uneven number of both representatives of the staff as well as representatives of the administration and are headed by a chairman appointed by the Head of the International Organization. Generally the members are people of higher legal knowledge appointed for a certain period of time – although in the system of a few organizations they may also be appointed on a case-to-case basis.[31] In performing their functions the members act independently. Furthermore the joint body is supported by a secretariat, in most cases provided for by a staff member. The main task of joint bodies is not to issue a decision resolving the dispute but to advise the executive head on appeals against administrative decisions launched by staff members. "The administrative head is not bound by their opinion but is free to make up his own mind and take a decision in the process of settling the disputes."[32]

Usually the appeals board starts out with its function after being concerned either with an appeal of a servant or a submission of the Head of the Organization. In general, the proceedings begin with both parties submitting their arguments and evidence. Moreover, the appeals board may also inspect the relevant documents and call witnesses. After having heard both parties, the joint body meets in private in order to

[28] *Idem* (1998), V.6/7.
[29] See Amerasinghe, *Principles of Institutional Law of International Organizations* (1996), p. 447.
[30] For example the Joint Appeals Board of the UN, the Joint Committee of the ILO, the Claims Committee of NATO.
[31] See C. de Cooker, *Pre-Litigation Procedures in International Organisations*, in de Cooker, *International Administration* (1998), V.6/6.
[32] Amerasinghe, *Principles of Institutional Law of International Organizations* (1996), p. 29.

render its decision that is later on submitted to the Head of the International Organization. He is the one who then issues the final decision.[33]

At this point it is important to point out that even where the executive head obtains an advisory opinion from a judicial body the decision finally taken by him remains of administrative nature. Only in the rare case where the international organization is bound by the decision issued by the consulted body because of a unilateral act his final decision becomes a judicial one. [34]

4. Dispute Settlement in the United Nations System

4.1. The current Internal Dispute Resolution Procedures

4.1.1. Informal Procedures

4.1.1.1. The Ombudsman

Established in 2001[35] the Office of the Ombudsman is one of the main channels of informal dispute resolution in the UN System. Since its installation almost 2000 civil servants have sought its assistance. According to a statistical report of the Secretary-General to the General Assembly concerning the activities of the Office of the Ombudsman 611 new cases have been brought to its attention within a period of only one year. Out of this number 316 have already been closed.[36]

Appointed by the Secretary-General after consultation with the personnel for a not renewable period of five years the Ombudsman has "*authority to consider conflicts of any nature related to employment by the United Nations*."[37] His/her main function is to facilitate the settlement of disputes occurring between the management and a staff member by applying any appropriate means. The avenues available range from mediation to providing general or specific advice and suasion. Although the Ombudsman does not have decision-making powers he/she is given the competence to request an extension of the time limit for submitting an appeal to the Joint Appeals

[33] See C. de Cooker, *Pre-Litigation Procedures in International Organisations*, in de Cooker, *International Administration* (1998), V.6/8.
[34] See Amerasinghe, *Principles of Institutional Law of International Organizations (*1996), p. 448.
[35] The Office of the Ombudsman was established by General Assembly Resolution 55/258 and 56/253. Rules concerning the appointment and the terms of reference of the Ombudsman have been established by the Secretary General' bulletin ST/SGB/2002/12.
[36] See the Report of the Secretary General, *Activities of the Ombudsman*, A/61/524 of October 17 2006.
[37] Secretary-General's Bulletin ST/SGB/2002/12, Section 3.6.

Board.[38] Currently, Patricia Durrant, who used to serve as representative of Jamaica to the United Nations, holds the position of the UN Ombudsman.[39]

In performing his/her responsibilities the Ombudsman has direct access to the Secretary-General as well as to all records concerning the particular case and is guided by the core working principles of "confidentiality", "impartiality" and "neutrality".[40] This means that, unless given permission to do so, the Ombudsman is obligated to preserve strict confidentiality on all facts and issues brought to his/her attention. He/She keeps no records, does not pass on information concerning individual cases and cannot be obliged to testify. Furthermore the Ombudsman does not act as an advocate for neither the administration nor the servant involved in the conflict but remains neutral.

Subsequently to the creation of the Office of the Ombudsman at the United Nations similar bodies have been established serving the United Nations Development Programme, the United Nations Population Fund, the United Nations Office for Project Services and the United Nations Children's Fund on the one hand[41] and the Office of the United Nations High Commissioner for Refugees on the other hand.

4.1.1.2. Staff Counselor and Staff Representatives

On the one hand Staff Counselors have been installed at various duty stations and can be addressed by civil servants on a broad variety of employment-related matters. One of their main responsibilities is to provide "*counseling, information and assistance to staff and their families on issues that may have impact on their welfare and productivity, such as education, visas […] as well as stress management and conflict resolution.*"[42] They provide staff members with assistance ranging from simple referral to other bodies or information on procedural methods available to them to mediation in dispute situations.[43]

Staff Regulation 8.1, on the other hand, entrusts the Secretary-General "*to establish and maintain continuous contact and communication with the staff in order to ensure the effective participation of the staff in identifying, examining and resolving issues relating to staff welfare, including conditions of work, general conditions of life and*

[38] See Secretary-General's Bulletin ST/SGB/2002/12, Section 3.10..
[39] For more details on Patricia Durrant see http://www.un.org/ombudsman/who.html.
[40] See the webpage of the Office of the Ombudsman http://www.un.org/ombudsman/confidentiality.html (23.5.2007).
[41] For more details, terms of reference and annual reports of this body see http://ombudsperson.undp.org/ (23.5.2007).
[42] Secretary-General's Bulletin of June 1 1998, ST/SGB/1998.
[43] See Information Curricular of the Under-Secretary-General for Management of January 23 2004. ST/IC/2004/4, p. 5.

other personnel policies."[44] This task is performed through the creation of Staff Representatives. These bodies usually do not deal with specific conflicts arising out of employment relations between civil servants and the management. On the contrary, Staff Representatives rather engage in issues affecting the organization's personnel on a whole. Only occasionally, civil servants seek the assistance and advice of staff representatives on individual cases. [45]

4.1.1.3. The Panel on Discrimination and Other Grievances

In compliance with General Assembly Resolution 31/26[46] the Panel on Discrimination and Other Grievances was installed first at the United Nations Headquarters in New York[47] and in the course of time additional panels were established at several other duty stations. These panels, usually consisting of seven members, are competent to handle and solve all kinds of grievances between staff members and the organization related to employment-matters. This is either done by informal means of dispute settlement or, where the conflict resolution turns out to be impossible, by submitting recommendations on further proceedings to the Secretary-General.[48]

4.1.2. Formal Dispute Resolution by Administrative Organs

If no agreement is reached through amicable means of dispute resolution or the staff member concerned decides to abstain from solving the conflict through these channels he may turn to the Secretary-General in order to seek administrative settlement.

From the legal viewpoint the following facts need to be pointed out: Although there is no provision in the UN Charter expressively empowering the Secretary-General to adjudicate upon employment disputes, an implication of his authorization to do so can by found in the provisions contained in Art 97 and Art 101.[49] As determined by Art 97 *"the Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization."* Subsequently, the provisions of Art 101 of the Charter specify his position with reference to employment-matter. Paragraph 1 states that *"The staff*

[44] Untied Nations Staff Regulations ST/SGB/2003/5, Regulation 8.1.
[45] See F. Bouayad-Agha/H. Hernandez, *Administration of Justice at the United Nations* (2000), p. 4.
[46] See General Assembly Resolution of November 29 1976, A/RES/31/26.
[47] The Panel was established by Administrative Instruction ST/AI/246 of July 28 1977.
[48] For more details on their composition and terms of reference see Administrative Instruction of the Assistant Secretary-General for Personnel Service of November 25 1983, ST/AI/308/Rev.1.
[49] See the advisory opinion of the ICJ in the *Effects of Awards of Compensation Case*, ICJ Report (1954), p. 47.

shall be appointed by the Secretary-General under regulations established by the General Assembly." Moreover, paragraph 3 assess that *"The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."*

A more detailed provision entitling the Secretary General to set up an intern system of administration of justice can be found in the Staff Regulations of the United Nations. Art XI, Regulation 11.1 of the UN Staff Regulations assigns the Secretary-General 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 term of appointment, including all pertinent regulations and rules."*[50]

Pursuant to the terms and conditions set out in the Staff Regulations the Staff Rules issued by the Secretary-General define the administrative review and the prerequisites of initiating such a process in greater detail. Chapter XI Rule 111.2 determines that *"a staff member wishing to appeal an administrative decision pursuant to staff regulations 11.1 shall, as first step, address a letter to the Secretary-General requesting that the administrative decision be review; such a letter must be sent within two months from the date the staff member received notification of the decision in writing."*[51]

Considering the provisions mentioned in the sections above it becomes evident that the existence of an administrative decision is a prerequisite of initiating an administrative review process. The question arising in this context is "What exactly are the characteristics constituting an administrative decision?" Because no official definition is contained in the documents of the UN it is necessary in order to determine the precise meaning of the term to take a closer look at the Staff Regulations and Rules as well as the case law of the United Nations Administrative Tribunal.[52] According to Staff Regulation 11.1 the decision must concern the servants "terms of appointment". Furthermore it has to be submitted to the staff member concerned in written form.[53] Moreover the case law of the UNAT indicates that in

[50] United Nations Staff Regulations, ST/SGB/2003/5.
[51] United Nations Staff Rules Chapter XI – 100 Series, ST/SGB/2003/1 and ST/SGB/2003/8.
[52] See F. Bouayad-Agha/H. Hernandez, *Administration of Justice at the United Nations* (2000), p. 6.
[53] See United Nations Staff Rule 111.2, ST/SGB/2003/1 and ST/SGB/2003/8.

order for a decision to be challengeable it needs not only to apply personally to the servant but also in doing so it must impose an imminent or actual injury.[54] Taking all these characteristics into consideration an administrative decision can be defined as "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."[55]

If a decision fulfills all the requirements listed above the servant concerned may turn to the Secretary-General requesting the decision to be reviewed. Irrespective of where the office the servant works for is located the request has to be submitted to the UN Headquarters in New York. Having received to request the Secretary-General has to respond to it within a time period of two months.[56]

4.1.2.1. The Joint Appeals Board

If the servant finds himself to be unsatisfied with the decision taken by the Secretary-General or the Secretary-General does not reply to the request within the given time period, the staff member is given the possibility of filing an appeal with the Joint Appeals Board.

Such joint bodies have been established in New York, Vienna, Geneva and Nairobi. They are composed of three members – a Chairperson appointed by the Secretary-General from a register of people agree upon by both the staff as well as the management, a member appointed by the Secretary-General solely and a member elected by staff. Furthermore a panel secretary[57] supports each panel. This is a staff member with higher legal competence and experience whose function is to assist the board and to give legal advice, however, without participating in the decision-making process.

Optionally, when submitting the appeal to the JAB, the staff member may attach a request of suspension of action. Thereupon a panel has to be convened immediately, in order to determine if the implementation of the contested decision would cause irreparable harm to the appellant. Subsequently, the panel has to submit its

[54] See F. Bouayad-Agha/H. Hernandez, *Administration of Justice at the United Nations* (2000), pp. 6-7.
[55] *Idem*, p. 7.
[56] G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on reforming Internal Justice at the United Nations* (2006), paragraph 26.
[57] For more details on the terms and functions of the JAB Secretary see the Rules of Procedure and Guidelines of the Joint Appeals Board at the Headquarters (2004), http://www.un.org/jab/procedure.html

recommendation whether or not a suspension should be granted to the Secretary-General, who, in turn, has to take a final, not challengeable decision.[58]

As far as the procedure before the JAB is concerned the "Rules of Procedure and Guidelines of the Joint Appeals Board at Headquarters"[59] provides for the following course of action: The servant unsatisfied with the Secretary-General's decision files an appeal with the JAB. Therefore he may seek assistance from either a (retired) staff member or the Panel of Counsel in Disciplinary and Appeals Cases, which is composed of members of the civil service and provides information and advice to staff members initiating appellate proceedings before the JAB.[60] Having received the servant's appeal the Joint Appeals Board first of all reassesses whether the appellant has adhered to all procedural requirements set up. If the request is formally acceptable a copy is submitted to the Administrative Law Unit, a subunit of the United Nations Office of Human Resources Management whose core function it is to represent the Secretary-General in the proceedings before the JAB.[61] The Administrative Law Unit on behalf of the Secretary-General in turn addresses a reply to the Joint Appeals Board. Subsequently, a copy of this reply is sent to the appellant who is then given the possibility of submitting a comment on it – a so-called "observation", which in turn may be countered by an observation of the Administrative Law Unit. Each observation has to be submitted to the JAB within a time period of one month. After completion of correspondence the Joint Appeals Body convenes in private in order to make up its recommendation. This can either be done unanimously or by majority but has to be carried out within a time limit of one month starting with the completion of the review process. Subsequently, the JAB Panel Secretary sets up a statement including each party's viewpoint and results reached by the Joint Appeals Board, which is then signed by each member of the panel and submitted to the Under-Secretary-General of Management. He, on behalf of the Secretary-General, takes the final decision within one month from the receipt of the recommendation.

4.1.2.2. The Joint Disciplinary Board

Pursuant to Regulation 10.2 of the United Nations Staff Regulations the Secretary-General may impose disciplinary sanctions on civil servants in the case of

[58] See United Nations Staff Rule 111.2 (ii), ST/SGB/2003/1 and ST/SGB/2003/8.
[59] Rules of Procedure and Guidelines of the Joint Appeals Board at Headquaters, New York, November 2004/Rev.4.
[60] See http://www.undp.kz/img/docs/en/510.htm (24.5.2007).
[61] See F. Bouayad-Agha/H. Hernandez, *Administration of Justice at the United Nations* (2000), p. 7.

unsatisfactory conduct or misconduct.[62] Rule 110.1 of the Staff Rules defines unsatisfactory conduct as "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".[63]

In order to handle disciplinary cases Regulation 10.1 of the Staff Regulations assigns the Secretary-General to "establish administrative machinery with staff participation which will be able to advise him or her". For this reason the Joint Disciplinary Board has been installed. It is composed of both, members appointed by the Secretary-General and members elected by the personnel and is headed by a Chairperson, chosen of both the staff and the Secretary-General by mutual agreement.[64]

According to the provisions contained in Rule 110.4 staff members must not only be notified and given the option of responding to the allegations before disciplinary proceedings are initiated against them. The Secretary-General is also bound to seek advice from the JDC before imposing a disciplinary measure on a staff member.[65]

As far as the procedure in disciplinary matters is concerned the following pattern of action can be identified: After an unsatisfactory conduct or misconduct has been detected the Secretary-General refers the case is to the JDC, which then invites the servant concerned to submit his/her explanations and observations in writing and thereupon initiates investigations. The panel therefore may call witnesses or arrange hearings of the parties. Taking in to consideration all the facts found throughout this process the members of the panel convene to make their recommendation that is later on submitted to the Secretary-General, who, similar to appeal cases, makes the final decision.[66]

4.1.2.3. Specialized Proceedings

Within the United Nations system certain narrowly defined types of conflicts are excluded from the competence of the regular appellate bodies. If a staff member finds

[62] See United Nations Staff Regulations, ST/SGB/2003/5.
[63] See United Nations Staff Rules Chapter XI – 100 Series, ST/SGB/2003/1 and ST/SGB/2003/8.
[64] See F. Bouayad-Agha/H. Hernandez, *Administration of Justice at the United Nations* (2000), p. 8.
[65] See United Nations Staff Rules Chapter XI – 100 Series, ST/SGB/2003/1 and ST/SGB/2003/8.
[66] For more details on the procedure before the JDC see *Rules of Procedure and Guidelines of the Joint Disciplinary Committee at Headquarters*, New York, February 25 2005, http://www.un.org/staff/panelofcounsel/pocimages/jdcrules.pdf (2.6.2007).

him-/herself confronted with one of the issues listed in the following section, he/she has to undergo specialized procedures of recourse.[67]

i. Appeals against decisions of organs of the Pension Fund have to be submitted to the Joint Staff Pension Fund Appeals Board.

ii. Appeals related to the unfair exclusion from competitive examination for recruitment have to be referred to the Central Examination Board.

iii. In the case of death, injury or illness related to the performance of official duties civil servants are entitled to claim compensation on behalf of the organization.[68] These claims have to be referred to the Advisory Board on Compensation Claims.

iv. Claims of compensation for loss of damage to personal effects resulting from the performance of official duties have to be submitted to the Claims Board.

v. Disputes concerning the eligibility of sick leave of servants due to disability to perform their functions because of reasons of injury of illness have to be referred to either a medical board or an independent medical practitioner, acceptable to the servant as well as to the organization.

vi. A staff member alleging a wrong classification due to the incorrect application of classification standards may submit an appeal against the decision to the Classification Appeals and Review Committee.

4.2. Reform of the UN System?

During the last decade a lot of attention has been paid to discussions on a possible reform of the United Nations' current internal dispute settlement system. By now it has become a generally accepted belief that the majority of procedures applied to settle employment disputes are outdated and inadequate to meet the requirements of due process. A number of panels and commissions[69] established to detect inefficiencies within the system and to prepare recommendations for a prospective redesign have found the current scheme of Administration of Justice to be not only extremely slow and under-resourced but also ineffective and incapable to meet the

[67] A listing of the specialized procedures can be found in the Information Curricular of the Under-Secretary-General for Management, *Conflict Resolution in the United Nations Secretariat*, ST/IC/2004/4* of January 23 2004, p. 9-11; F. Bouayad-Agha/H. Hernandez, *Administration of Justice at the United Nations* (2000), p. 12; G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on reforming Internal Justice at the United Nations* (2006), paragraph D/B/iv.

[68] See United Nations Staff Rule 106.4, ST/SGB/2003/1 and ST/SGB/2003/8.

[69] In Resolution 59/283 the General Assembly entrusted the Secretary-General to set up a panel of external, independent experts to review and redesign the system of Administration of Justice at the United Nations. Therefore, the Redesign Panel was established. Besides that, a couple of other bodies were requested to submit reports and recommendations, such as the Commission of Experts on Reforming Internal Justice at the United Nations (established by the United Nations Staff Union) or the Centre of Accountability of International Organizations.

standards of natural justice.[70] Meanwhile experts have agreed upon the fact that the current regime of conflict resolution, which dates back to the early years of the United Nations, is totally outmoded and therefore, instead of making marginal improvements, needs to be replaced by a totally overhauled scheme – a scheme "that is independent, transparent, effective, efficient and adequately resourced and that ensures managerial accountability."[71] The urgent need to establish such a system is of even greater importance if considered against the background that civil servants involved in employment disputes are excluded from the jurisdiction of national courts and therefore are obliged to rely on internal procedures. Many members of the civil service have joined the organization for idealist reasons but, being exposed to a scheme that lacks effective protection, have soon lost confidence in its administration and management.[72] Understandably they feel betrayed by the fact that the United Nations on the one hand urge states to comply with the internationally recognized standards of justice, such as due process or fundamental human rights, but on the other hand does not adhere to these standard within its own internal administrative system[73] – a double standard that is not acceptable for a organization playing the leading role in the international community and serving as role model for various other international organizations.

In order to provide a more detailed insight into the current discussion the following sections of this paper are intended to highlight the existing inefficiencies and dysfunctionalities of the UN dispute resolution system. Taking into consideration the reports of panels and commissions entrusted with the preparation of recommendations for a prospective reform, the paper then focuses on suggestions for improvement and finally outlines a possible new structure meeting the generally accepted standard of justice.

4.2.1. Weak points of the current system

4.2.1.1. Lacks in Informal Dispute Resolution Procedures

Basically, the various avenues provided for informal dispute settlement within the United Nations currently are currently confronted with two major problems. On the

[70] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 4.
[71] *Submission to the Redesign Panel on the UN Internal Justice System on behalf of the Centre for Accountability of International Organizations*, p. 1.
[72] See G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (2006), paragraph 6.
[73] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 5.

one hand the majorities established in this context are ineffective, lack competence to summon people and have only limited access to important documents.[74] Furthermore only a limited number of recommendations issued by these bodies are considered and implemented by the administration. These inefficiencies apply particularly to the Panel on Discrimination and other Grievances.[75]

On the other hand problems arise out of the fact that the current system features so many different channels of informal conflict resolution providing partially overlapping procedures rather than a one-stop-shop regime. Hence, the present scheme not only causes confusion amongst staff members about which body to consult in order to seek assistance but also results in needless complexity and duplication.[76] This problem is especially profound for staff members not employed at the Headquarters but rather being part of field operations or peacekeeping missions.

4.2.1.2. Lacks in Formal Dispute Resolution Procedures

However, the majority of inefficiencies within the United Nations system are to be detected in the field of formal dispute settlement.

As outlined in section 4.2.1. in greater detail, staff members unsatisfied with administrative decisions have to refer the case to the Secretary-General in order to seek administrative review. These submissions are not handled by the SG himself but by the Administrative Law Unit – the same body that performs the function of the Secretary-General in appeals procedures initiated before the Joint Appeals Board. Thus, the functions the Administrative Law Unit is put in charge of are somehow controversial. On the one hand the body is supposed to act as a fair and independent review instance – on the other hand, that is to say on the next level of review, it represents the administration and stands up for the interests of the organization possibly using information the staff member has revealed at an earlier stage to his/her disadvantage.[77] Moreover, resulting from this discrepancy, tensions between the ALU and the Staff Union have evolved with the Administrative Law Unit being regarded as "duplicitous agency for protecting bad managers".[78]

---

[74] See G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (2006), paragraph 10.
[75] *Idem*, paragraph 22.
[76] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 10-12.
[77] See G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (2006), paragraph 27.
[78] *Idem*, paragraph 10.

As far as the Joint Appeals Board and the Joint Disciplinary Committee are concerned the following deficiencies need to be underlined:

First of all the fact that both bodies have solely advisory powers and on this account lack competence to make binding recommendations to the Secretary-General is one of the major deficiencies in this context.[79] This situation is exacerbated by the fact that a former policy requiring that unanimous opinions of the JAB/JDC are to be accepted by the Secretary-General except for major questions of law is not preserved anymore. Within a time period of only three years 43,2% of unanimous recommendations had been dismissed by the Secretary-General. The justification put forward by the Office of Human Resources Management arguing that these rejections are due to defective applications of law by the boards – what in turn is caused by a lack of legal knowledge and experience of their members – may apply to the majority of these cases. Nevertheless this development creates the impression that the management is unwilling to accept unfavorable decisions and that the current system puts staff members at a disadvantage with the administration.[80]

Another severe deficiency that causes the present regime to be intolerable is the lack of independence of the members of the JAB/JDC. The majority of them are members of the civil service and therefore in some way subordinated to the Secretary-General. Not only do they perform the service on the panel in addition to their regular employment duties but also do they usually possess little legal knowledge and experience.[81]

Furthermore the current system before the JAB/JDC shows delays mainly resulting from insufficient resources and frequent extensions of time limits[82] – especially field staff is highly affected by this inefficiency. Figures issued by the Office of Internal Oversight confirm that the average delay in proceedings initiated before the JAB lay somewhere between 27 to 37 months in 2004.[83] Especially in cases concerning the non-renewal of employment contracts such delays invoke unbearable pressure on the staff members concerned.[84] Combined with a generally low success rate of staff appellants prevailing over the administration of only 30 percent these huge delays

[79] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 6.
[80] See F.Bouyada/H. Hernandez, Administration of Justice at the United Nations (2000), p. 19, paragraph 125ff.
[81] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 6.
[82] See G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (2006), paragraph 31.
[83] See OIOS Report of October 1 2004, A/59/408, paragraph 19.
[84] See G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (2006), paragraph 31.

detain a fractional amount of the staff from initiating proceedings before the JAB and thus deny them justice.[85] The protractions are even advanced by the fact that both boards are supported by a common secretariat. Although priority is given to disciplinary matters, what results in even greater delays in appeals procedures, there are still massive delays in proceedings before the JDC.[86] In this context, there is no need to describe the dimensions of psychological pressure imposed on staff members and their families when confronted with the allegation of unsatisfactory conduct or even of misconduct.

4.2.2. Suggestions for improvement

In order to remedy the inefficiencies the current dispute resolution procedures of the United Nations are confronted with it is necessary not to undertake modifications but to establish a whole new system meeting the requirements of effectiveness, efficiency, transparency, independence, staff participation and fairness. Therefore the following measures need to be instituted.

As far as informal dispute settlement is concerned, it is first of all essential to establish a "one-stop-shop" system in order to eliminate confusion amongst staff members and duplication in proceedings. In this context, integrating the functions of the existing bodies into a single office providing assistance to all staff members seems to be the most suitable approach. In doing so not only the current inefficiencies would be abolished but also would a procedure of a more effective and efficient nature be installed, allowing the sharing of facilities and resources. Therefore, it is advisable to integrate the existing offices of the United Nations Ombudsman as well as those of the UNDP/UNFPA/UNICEF/UNOPS Ombudsman and the UNHCR Mediator into a single Office of the Ombudsman affiliating their functions. This Office should in turn consist of two subunits; the Ombudsmen on the one hand – responsible for the identification of systematical problems through monitoring of maladministration – and the Mediation Division on the other hand – competent to settle conflicts through peaceful means of conciliation and mediation.[87]

---

[85] See *the Submission to the Redesign Panel on the UN Internal Justice System on behalf of CAIO, the Centre of Accountability of International Organizations*, p. 11-12.
[86] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 15.
[87] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 11-12.

Besides, it is essential to enhance decentralization of the informal dispute settlement procedures in order to provide equal access and prompt response to both the staff serving at the Headquarters as well as servants taking part in field operations and peacekeeping missions. Therefore, it is advisable to install regional Ombudsmen at various duty stations all over the world supplying staff employed away from the Headquarters with informal conflict facilitation.[88]

Furthermore greater emphasis needs to be placed on the encouragement of civil servants to seek dispute resolution through means of alternative dispute settlement before initiating formal proceedings.[89] Therefore, it should be ascertained that informal steps can be initiated at any time before a final judgment is issued.[90] A possible option to implement this demand would also be to request staff members to seek mediation before each stage of review[91] or to give judges of the United Nations Dispute Tribunal the power to order the parties to undergo informal proceedings if appropriate for their particular case.[92] Nevertheless, "the use or failure to use such a process should not affect availability of more formal procedures nor be taken into account in the substantive decisions of such processes".[93]

However, such a system can only function correctly and meet the requirements of fairness, effectiveness and efficiency if the mediators are provided with well-founded education and targeted training.[94] It is up to the Organization to ensure that greater importance is placed on this factor.

When it comes to reforming the formal dispute resolution system a complete restructuring will be necessary to establish a fair and independent system ensuring the equality of arms of both parties.

First of all it is essential to abolish the Secretary-General's power to veto recommendations of the advisory boards unilaterally by establishing a board of judges empowered to set up binding decisions and issue interim orders instead of just

---

[88] *Idem*, p. 10, 12, 13.
[89] [89] See G. Robertson/R. Clark/O. Kane, *Report of the Commission of Experts on Reforming Internal Justice at the United Nations* (2006), paragraph 38.
[90] *Idem*, p. 20.
[91] See *the Submission to the Redesign Panel on the UN Internal Justice System on behalf of CAIO, the Centre of Accountability of International Organizations*, p. 4.
[92] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 20.
[93] *The Submission to the Redesign Panel on the UN Internal Justice System on behalf of CAIO, the Centre of Accountability of International Organizations*, p. 4
[94] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 24-25.

submitting their opinions to do so to the Secretary-General.[95] Being competent not only for appeals cases but also for disciplinary issues, this so-called United Nations Dispute Tribunal, consisting of professional and experienced judged would subsume the fields of responsibility of both the Joint Appeals Board as well as the Joint Disciplinary Committee. Instead of the current administrative review process that has to be sought before turning to the advisory boards it would be advisable to install a scheme where staff members themselves could initiate proceedings directly before the United Nations Dispute Tribunal without being obligated to consult the Secretary-General first.[96] In order to increase transparency and fairness the UNDT should be urged not only to substantiate each decision that proceeds to a judgment but also to deliver and publish its final findings publicly. Moreover, more attention needs to be paid to the performance of oral hearings. They should generally be held in public and should be designed to be compulsory in cases where appropriate and necessary to ensure equality of arms of both parties.[97]

The problem of immense delays and hindered access to seek assistance from formal dispute resolution bodies may be handled by installing registries of the United Nations Dispute Tribunals at several duty stations all over the world. The employment of half- or full-time judges at various locations would provide improved access to and quicker processing of cases submitted by staff participating in field operations and peacekeeping missions.[98]

Another issue that is of immense importance in this context is the currently insufficient guidance and representation of staff members in formal dispute resolution proceedings. As it turned out the present scheme, where legal counseling is provided by a network of volunteering staff members – whereas the administration consults a panel of professional lawyers to seek assistance in employment disputes – is not in the position to give adequate advice to servants involved in staff disputes and ensure equality of arms. Therefore, it is essential to deploy persons with professional legal qualifications providing civil servants with sufficient support during dispute resolution proceedings.[99]

---

[95] See *The Submission to the Redesign Panel on the UN Internal Justice System on behalf of CAIO, the Centre of Accountability of International Organizations*, p. 5; *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 17, 19.

[96] See the *Report of the Redesign Panel on the United Nations system of administration of justice* of July 28 2006, A/61/205, p. 17, 20.

[97] *Idem*, p. 20-21.

[98] *Idem*, p. 17.

[99] *Idem*, p. 23.

Additionally, it is advisable to create and expand staff associations in order to ensure the proper assertion of employment rights. Due to the fact that staff members, horrified by possible displeasing consequences, frequently refrain from initiating action against the organization providing these associations with the right to bring class actions or representative actions can be a helpful tool to resolve grievances and to enhance fairness.[100] Furthermore the creation of a legal aid system with staff associations offering insurance to staff members and thus, liberating them from financial fears related to the initiation of employment dispute proceedings, needs to be taken into consideration.[101]

5. Conclusion

By now it has become a generally accepted notion that international organizations are exempted from the jurisdiction of domestic courts. Therefore, nothing else remains to members of the civil service than to rely on the internal dispute resolution proceedings established by the organization. However, the employment rights of staff members of international organizations can only be preserved adequately by an internal system meeting the requirements of independence, fairness, equality of arms, efficiency and effectiveness and those set forth by internationally recognized standards of justice.

Especially where people of various different cultural, linguistic and legal backgrounds foregather, as it is the case within international organizations, it is essential to provide a system viable to respond to individual peculiarities. Such a result can be achieved best through means of informal dispute resolution. On this account great attention need to be paid not only to establishing a system that provides sufficient opportunities to staff members but also to highlighting its importance and to encouraging both the civil servants as well as the management to make use of this option prior to initiating formal proceedings. Settling disputes by amicable means at a relatively early stage where the conflict level is still rather low demonstrably improves the working atmosphere and strengthens the relations of an international organization with its employees.

Within the current United Nations system double standards are applied on a frequent basis. Although the UN urge states and other subjects of international law to obey

[100] *Idem*, p. 18.
[101] See *The Submission to the Redesign Panel on the UN Internal Justice System on behalf of CAIO, the Centre of Accountability of International Organizations*, p. 12.

certain international standard of justice, they themselves fail to adhere to them when it comes to employment matters. Furthermore the present regime lacks independence, transparency and efficiency. Especially for an organization that enjoys such important standing and plays a leading role in the international community, these grievances are totally beyond the pale. Therefore, there is an urgent need to establish a whole new system of internal dispute resolution rather than only deploying marginal improvements within the current model. Only if the suggestions highlighted in the section above are taken into considerations an internal conflict settlement system, viable to preserve the rights of the members of the civil service adequately, can be established. Hopefully these momentous changes can be expected to happen shortly.

6. Bibliography

Books & Articles

M.B. AKEHURST, *The Law governing Employment Relations in International Organizations*, Cambridge University Press – London (1967)

C.F. AMERASINGHE, *The Law of the International Civil Service as applied by International Administrative Tribunals*, Vol.1, Clarendon Press – Oxford (Second Revised Version - 1994)

C.F. AMERASINGHE, *Principles of Institutional Law of International Organizations*, Cambridge University Press - London (1996)

Y. BEIGBEBER, *Management Problems in United Nations Organizations – Reform or Decline?*, in *International Affairs (Royal Institute of International Affairs 1944-)*, Vol. 63, No. 4 (Autumn, 1987), p. 636

Chris DE COOKER, *Pre-Litigation Procedures in International Organisations* in C. de Cooker (ed.), *International Administration*, Martinus Nijhoff Publishers – The Hague/Boston/London (1998)

H.G. SCHERMERS & N.M. BLOKKER, *International Institutional Law – Unity within Diversity*, Martinus Nijhoff Publishers – The Hague/Boston/London (2003)

Reports

Report of the Commission of Experts on Reforming Internal Justice at the United Nations, prepared by G. ROBERTSON, R. CLARK, O. KANE, published by the United Nations Staff Union – New York (2006)

Administration of Justice at the United Nations, Joint Inspection Unit, prepared by F. BOUAYAD-AGHA, H.L. HERNANDEZ, Geneva (2000)

Report of the Redesign Panel on the United Nations system of administration of justice, published by the General Assembly, A/61/205 (28.7.2006)

Submission to the Redesign Panel on the UN Internal Justice System on behalf of CAIO, publishey by the Centre of Accountability of International Organizations

Report of the Secretary-General, *Activities of the Ombudsman*, published by the General Assembly, A/61/524 (17.10.2006)

Information Curricular of the Under-Secretary-General for Management, *Conflict resolution in the United Nations Secretariat*, ST/IC/2004/4* (23.1.2004)

Report of the United Nations Office of Internal Oversight Services (OIOS), A/59/408 (1.10.2004)

Further UN-Documents

United Nations Staff Regulations, ST/SGB/2003/5

United Nations Staff Rules, ST/SGB/2003/1, ST/SGB/2003/8.

Secretary-General's Bulletin, *Office of the Ombudsman – appointment and terms of reference of the Ombudsman*, ST/SGB/2002/12 (15.10.2002)

Rules of Procedure and Guidelines of the Joint Appeals Board at the Headquarters, New York (Nov. 2004), http://www.un.org/jab/procedure.html

WebPages

http://www.un.org/jab

http://www.un.org/ombudsman