

The Reform of the United Nations Administration of Justice System: The United Nations Appeals Tribunal after One Year

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Abstract

This article surveys some emerging issues in the jurisprudence of the new United Nations Appeals Tribunal. Through an analysis of both procedural and substantive questions that the tribunal has faced in its first year (for example specific performance, production of documents, and whistleblower protection), the article offers an assessment of the implementation of the reform of the formal justice system of the United Nations. The developing jurisprudence of the tribunal will be an important indicator of the success or failure of the implementation of an independent system of justice within the United Nations.

Keywords

United Nations Appeals Tribunal; justice system reform; judicial independence; international employment law; specific performance; production of documents; retaliation; whistleblower

In 2009, the United Nations General Assembly put in place sweeping changes to the Organization's internal justice system, designed to "establish

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**) The authors would like to thank Mary Gaudron and Maritza Struyvenberg for comments and suggestions that strengthened this article, though any remaining shortcomings are the responsibility of the authors. The research is current through the spring 2011 UNAT session.

a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice.”¹ A new two-tier formal system of justice, comprising the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), replaces the previous United Nations Administrative Tribunal and various peer-review advisory boards.² An informal dispute-resolution system, centred on the reorganized Office of the Ombudsman and Mediation Services, makes mediation-based services available to staff members.³ Other new offices provide oversight and key services for the system: the Office of Administration of Justice oversees the formal system, the Management Evaluation Unit reviews administrative decisions before litigation, and the Office of Staff Legal Assistance (OSLA) provides counsel for staff members undertaking litigation.⁴ This reform, the result of several years of study, proposals, and debate, and building on decades of earlier work, has brought significant changes to the ways in which employment disputes, disciplinary matters, and other aspects of staff-management relations are resolved. More fundamentally, the reform has highlighted issues of judicial independence and the rule of law within the world’s largest international organization, a development whose course will be of considerable interest to practitioners and scholars of international administrative law alike.

In this article, we present an assessment of the UNAT after its first year of operation.⁵ As is inevitable with any process of moving from an institutional reform proposal to a working system, the new administration of justice system has seen some growing pains as it becomes operational. Of more concern for the long-term viability of the reform, however, are questions that have arisen during the first year that challenge some of the ideals

¹ A/RES/63/253 (March 17, 2009).

² The statutes of the tribunals are *ibid.*, Annex I, “Statute of the United Nations Dispute Tribunal” [UNDT Statute] and Annex II, “Statute of the United Nations Appeals Tribunal” [UNAT Statute]. Details of the formal system can be found in A/65/373 (September 16, 2010), “Administration of justice at the United Nations: Report of the Secretary-General.”

³ Details of the informal system can be found in A/64/314 (August 20, 2010), “Activities of the Office of the United Nations Ombudsman and Mediation Services: Report of the Secretary-General.”

⁴ See the details in A/65/373 (September 16, 2010), “Administration of justice at the United Nations: Report of the Secretary-General.”

⁵ Both the UNDT and the UNAT were to be operational as of July 1, 2009. Though preliminary work began earlier, the UNAT began hearing cases during March of 2010. See A/RES/63/253 (March 17, 2009).

on which the reform was based. These challenges, involving both procedural and substantive issues, will be the focus of our analysis. In Part I we briefly survey the reform of the internal justice system, highlighting some of the key changes that have shaped the direction the reform has taken and continues to take. In Part II we assess some of the key practice issues on which the UNAT has ruled – rule-making power, oral hearings, friends-of-the-court, and representation – for their impact on the implementation of the ideals of the reform. In Part III, we turn to consider three key substantive issues that have arisen during the UNAT’s first year: interest on compensatory awards, specific performance, and the production of documents by the Administration. In Part IV, we briefly consider retaliation, an issue whose importance is growing but that the UNAT has not yet dealt with directly, and we offer some recommendations on the treatment of whistleblowers within the new system of justice. Finally, the Conclusion addresses some problems for the future and areas of continuing concern for the long-term viability of the reform.

I. Reform of the Administration of Justice System

The reform that has now been implemented was mandated by the General Assembly in 2005 in order to institute a system of internal justice that would be “independent, transparent, effective, efficient and fair”.⁶ This built on earlier reform initiatives dating back to 1978, though the comprehensive nature of the reform, encompassing both formal and informal modes of dispute resolution, was new. The history of these initiatives, the general outlines of the recommendations made by the Redesign Panel in 2006, and the debates surrounding the process of moving from recommendation to implementation have been carefully analyzed elsewhere, so we will only present brief remarks here.⁷ In particular, we will focus on

⁶ A/RES/59/283 (June 2, 2005).

⁷ August Reinisch and Christina Knahr, “From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – Reform of the Administration of Justice System within the United Nations”, 12 *Max Planck Yearbook of United Nations Law* (2008), 447–483; Phyllis Hwang, “Reform of the Administration of Justice System at the United Nations”, 8 *Law and Practice of International Courts and Tribunals* (2009), 181–224; Maria Vicien-Milburn, “Promoting the Rule of Law Within the United Nations”, 43 *International Lawyer* (2009), 51–57; Rishi Gulati, *The Internal Dispute Resolution Regime of the United Nations: Has the Creation of the United Nations Dispute Tribunal and United Nations Appeals Tribunal Remedied the Flaws of the*

some aspects of the final transition from proposals to implementation as they relate to the UNAT, to highlight continuing areas of concern for the achievement of the stated goals of the reform.

Unlike previous internal justice reform initiatives at the United Nations, the current reforms did not languish at the recommendation stage. The Redesign Panel, which worked in the first half of 2006, submitted recommendations that have to a large extent been implemented.⁸ Some key recommendations were not carried forward, however, and these decisions deserve some comment. In almost all instances where the recommendations of the Redesign Panel have not made it into the final UNAT Statute, the General Assembly has opted either to narrow jurisdiction or to exclude innovations not present in the previous system.⁹ This suggests a degree of conservatism about the administration of justice that may prove to be an ongoing challenge in fully implementing the reform.

Among the most significant changes are those involving the jurisdiction of the new tribunals, both *ratione personae* and *ratione materiae*. Regarding the former, the UNDT statute (which as a necessary consequence determines who will have access to the UNAT as well) limits jurisdiction to present and former staff members and the representatives or successors of incapacitated or deceased staff members.¹⁰ In so limiting access to the system, the General Assembly rejected the proposal of the Redesign Panel, subsequently supported by the Secretary-General and incorporated into the Draft UNDT Statute, to include as well “[a]ny person performing work by way of his or her own personal service for the United Nations Secretariat

United Nations Administrative Tribunal? (Advanced Masters of Public International Law thesis, Leiden University, 2010), online SSRN: <http://ssrn.com/abstract=1695215>; Paolo Vargiu, “From Advisory Opinions to Binding Decisions: The New Appeal Mechanism of the UN System of Administration of Justice”, 7 *International Organizations Law Review* (2010), 261–275.

⁸ See A/61/205 (July 28, 2006), “Report of the Redesign Panel on the United Nations System of Administration of Justice” [Redesign Panel Report]. The Panel’s recommendations were first reviewed by the Secretary-General: A/61/758 (February 23, 2007), “Report of the Redesign Panel on the United Nations System of Administration of Justice: Note by the Secretary-General” [S-G Recommendations]. This was followed by draft statutes for the two tribunals: A/62/782 (April 3, 2008), “Administration of justice: Report of the Secretary-General,” Annex I, “Draft statute of the United Nations Dispute Tribunal” [Draft UNDT Statute] and Annex II, “Draft statute of the United Nations Appeals Tribunal” [Draft UNAT Statute].

⁹ For an overview of many of the decisions, see A/62/294 (August 23, 2007), “Administration of justice: Report of the Secretary-General.”

¹⁰ UNDT Statute, art. 3(1)(a)–(c).

or separately administered United Nations funds and programmes, no matter the type of contract by which he or she is engaged.”¹¹ The General Assembly did make management evaluation available to interns, type II gratis personnel and certain volunteers, and noted that the issue of personnel excluded under the current rules would be revisited at a later date.¹² However, limiting access to the formal internal justice system to present and former staff members excludes the large and growing number of personnel on individual contracts, creating a marked discrepancy in the justice recourses available to different kinds of personnel within the Organization. The most recent UNAT decisions suggest that the strict standard is being relaxed somewhat in practice. Litigants caught between jurisdictions¹³ or applying for their first position within the Organization¹⁴ have been granted access to the system, since to exclude them would deny them any recourse and constitute a denial of justice.

Aspects of jurisdiction *ratione materiae* were similarly restricted, which may have the effect of limiting recourses even for those with access to the formal system. For example, where the Draft UNAT Statute allowed an appeal in cases in which the UNDT “[e]rred on a question of material fact,” the final statute limits this to an error of fact “resulting in a manifestly unreasonable decision.”¹⁵ This is a much stricter standard of review, with the effect of limiting the appellate review of factual findings by the UNDT. Similarly, for errors in procedure, the Draft UNAT Statute would have allowed appeals where the UNDT “[c]ommitted a fundamental error in procedure that has occasioned a failure of justice,” while the final UNAT Statute limits such appeals to cases of “an error in procedure, such as to affect the decision of the case.”¹⁶ These are subtle changes, to be sure, but the tendency is to circumscribe the discretion of the new tribunal.

¹¹) Draft UNDT Statute, art. 3(1), which also enumerates certain exceptions. See also Redesign Panel Report, ¶¶20, 156; S-G Recommendations, ¶10.

¹²) A/RES/63/253, ¶¶7–8.

¹³) 2011-UNAT-116, *Iskandar v. Secretary-General*. The appellant worked for the World Food Programme (subject to the International Labour Organization Administrative Tribunal), but was on loan to the African Union/United Nations Hybrid Operation in Darfur (subject to the UNDT), where the contested decision was made.

¹⁴) 2011-UNAT-120, *Gabaldon v. Secretary-General*.

¹⁵) Draft UNAT Statute, art. 2(1)(e); UNAT Statute, art. 2(1)(e).

¹⁶) Draft UNAT Statute, art. 2(1)(c); UNAT Statute, art. 2(1)(d).

Besides jurisdictional issues, certain additions to the system recommended by the Redesign Panel were rejected outright by the General Assembly. The power to award punitive or exemplary damages, which the Redesign Panel would have given the UNDT “in exceptional circumstances,” was explicitly rejected in the final statutes of both tribunals.¹⁷ Another contentious recommendation by the Redesign Panel was the ability of staff associations to bring class or representative actions on behalf of their members.¹⁸ In his evaluation of the Redesign Panel Report, the Secretary-General advised against adding class actions, recommending instead limiting the standing of staff associations to the following specific cases: (a) to enforce the association’s own rights; (b) to pursue in its own name the challenges of a group of named staff members arising all from the same administrative decision; and (c) to file friend-of-the-court briefs on behalf of members.¹⁹ This issue has been tabled for further consideration by the General Assembly.²⁰

Finally, the General Assembly made some changes regarding the selection and tenure of UNAT judges that may be significant in the long term. For example, while the Redesign Panel recommended that judges should have at least fifteen years’ “relevant professional experience,” should serve a five-year term that would be renewable once, and afterwards should be ineligible for any non-judicial post within the Organization, the final UNAT Statute specifies at least fifteen years’ “judicial experience in administrative law (or national equivalent),” seven-year non-renewable terms, and a five-year moratorium on non-judicial posts within the United Nations.²¹ Restricting the pool of candidates to judges with administrative law experience (rather than employment law experience more generally) may in the long run lead to recruitment difficulties,²² but more problematic

¹⁷ Redesign Panel Report, ¶83 (regarding the UNDT only; the Panel does not specify whether the UNAT would have had this power as well). Excluded by UNDT Statute, art. 10(7) and UNAT Statute, art. 9(3).

¹⁸ Redesign Panel Report, ¶160.

¹⁹ S-G Recommendations, ¶26.

²⁰ A/RES/63/253, ¶15.

²¹ Redesign Panel Report, ¶¶129–30; UNAT Statute, art. 3(3), (4), (6).

²² In practice, this requirement seems to be interpreted more liberally; in recommending candidates to fill a vacancy in January 2011, the Internal Justice Council looked at “depth of experience in the field of administrative and labour law”. A/65/679 (January 18, 2011), “Appointment of a judge of the United Nations Appeals Tribunal: Memorandum by the Secretary General,” ¶8.

is the possibility for re-appointment in non-judicial posts. This could lead to a perception of pro-Administration bias, which could reinforce the perceived inequality of power between the Administration and staff members, one of the issues the reform was conceived to correct.²³ Another change that could compromise the protection of judicial independence is the weakening of the grounds for removal of judges. While the Draft UNAT Statute would have allowed the General Assembly to remove judges for “proven misconduct or incapacity,” the final UNAT Statute omits the word “proven,” which ostensibly makes removal easier.²⁴ With judicial independence one of the stated cornerstones of the new system, and indeed crucial to the success of a judicial system operating within a closed organization, these changes are worrying.

II. Procedural and Practice Issues

In its first four sessions, the UNAT dealt with a range of procedural and practice issues, many of which – unsurprisingly – related to the transition from the previous system. Among its early decisions, for example, the UNAT interpreted the strict time limits for lodging appeals and its own discretion for extending those limits in exceptional cases.²⁵ It also determined that the jurisprudence of the United Nations Administrative Tribunal would be persuasive and not binding.²⁶

More importantly, however, the fact that the UNAT is a new court operating under a new statute required it to interpret its statute and the scope of its own powers. This resulted in several important decisions, but also significant controversy with the Administration around the issue of how silences in the statutes of the two new tribunals should be interpreted.

For example, the UNAT Statute is silent on the issue of the appeal of interlocutory decisions of the UNDT. It states only that the UNAT is “competent to hear and pass judgement on an appeal filed against a

²³ Reinisch and Knahr, pp. 461–462.

²⁴ Draft UNAT Statute, art. 3(10), following Redesign Panel Report, ¶130; UNAT Statute, art. 3(10).

²⁵ See e.g. 2010-UNAT-043, *Mezoui v. Secretary-General*, ¶21: “The old system was perhaps too generous in extending or waiving time – we will not be. But this case was directly in the path of the changeover, and we grant some leeway here.”

²⁶ 2010-UNAT-084, *Sanwidi v. Secretary-General*, ¶37.

judgement rendered by the United Nations Dispute Tribunal...²⁷ In a series of decisions, the UNAT has affirmed in strong terms that its jurisdiction extends only to final judgments of the UNDT rendered on the merits of the case, with the exception of cases where the UNDT has exceeded its authority.²⁸ This interpretation arises both from the jurisprudence of the United Nations Administrative Tribunal and from the stated efficiency goals of the reform, since “cases could seldom proceed if either party was dissatisfied with a procedural ruling.”²⁹

A second issue is the apparent rarity of oral hearings at the UNAT. While the Redesign Panel stressed the importance of oral hearings at the UNDT, particularly where issues of fact are involved,³⁰ at the appellate level too oral hearings are an important part of due process and dispensing with them should be the exception rather than the norm. The final UNAT Statute gives the tribunal the discretion to decide whether or not an oral hearing is necessary, “if such hearings would assist in the expeditious and fair disposal of the case.”³¹ Following the first two sessions of 2010, the Internal Justice Council found that few oral hearings were being held, though the UNAT expressed the intention of holding them more frequently in the future.³² The first year’s jurisprudence, however, shows the UNAT exercising its discretion very strictly. In its first judgment, the UNAT rejected an application for an oral hearing, noting that the appellant “had the opportunity to make a full written argument on all issues” and that the appellant “does not claim that there is any particular complexity or other reason why this case would demand an oral hearing or the hearing of witnesses.”³³ In later cases, applications were rejected for similar reasons.³⁴ Holding oral

²⁷) UNAT Statute, art. 2(1).

²⁸) 2010-UNAT-005, *Tadonki v. Secretary-General*; 2010-UNAT-060, *Wasserstrom v. Secretary-General* [*Wasserstrom*]; 2010-UNAT-062, *Bertucci v. Secretary-General* [*Bertucci* (UNAT) 2010].

²⁹) 2010-UNAT-005, *Tadonki v. Secretary-General*, ¶8.

³⁰) Redesign Panel Report, ¶92.

³¹) UNAT Statute, art. 8(2), (3).

³²) A/65/304, “Administration of justice at the United Nations: Report of the Internal Justice Council,” ¶50: “The Appeals Tribunal has held only two open hearings during its first two sessions, but the Council understands that the Appeals Tribunal intends to hold open hearings more frequently in future. It understands that the shortage of registry staff... is one of the factors that has hampered the Appeals Tribunal in this regard.”

³³) 2010-UNAT-001, *Campos v. Secretary-General*, quotations ¶35 and ¶38 respectively.

³⁴) *E.g.* 2010-UNAT-014, *Luvai v. Secretary-General*; 2010-UNAT-033, *Mebtouche v. Secretary-General*; 2010-UNAT-035, *Crichlow v. Secretary-General*; 2010-UNAT-046, *Vangelova v. Secretary-General*; 2010-UNAT-050, *Ishak v. Secretary-General*; 2010-UNAT-051, *Ilic v. Secretary-General*;

hearings only when exceptional circumstances dictate ignores the importance for the appearance of justice of giving the parties the opportunity to argue their cases fully.

We have already briefly mentioned the issue of friend-of-the-court briefs. The Rules of the UNAT specify that anyone with recourse to the tribunal as well as staff associations may apply for permission to file such a brief, provided that the UNAT President or the panel hearing the appeal “considers that the filing of the brief would assist the Appeals Tribunal in its deliberations.”³⁵ Common in national jurisdictions, such briefs allow an appeals court to move beyond the narrow focus on the interests of the parties to consider broader systemic implications of the litigation. Though proliferation of such briefs can clearly undermine the objective of the timely and efficient resolution of disputes, the added perspective can be valuable in complex cases. In two cases in 2010, the UNAT was faced with applications for friend-of-the-court briefs from staff associations and from a group of staff members (who were also lawyers) in the OSLA. In both, the applications were rejected under the UNAT’s discretionary power.³⁶ The tribunal clarified its position as follows:

The purpose of a friend-of-the-court brief will generally be to address matters other than the law. The Appeals Tribunal is composed of experienced, professional Judges who are able to ensure that proper deliberations are held concerning the general principles of law that are applicable in the case with the benefit of the parties’ submissions, the UNDT Judgment and the judicial work of the Tribunal itself, without the need for additional contributions from friends-of-the-court.

2010-UNAT-054, *Atogo v. Secretary-General*; 2010-UNAT-085, *Beaudry v. Secretary-General*; 2010-UNAT-092, *Mmata v. Secretary-General*. Exceptions are 2010-UNAT-034, *Muthuswami et al. v. United Nations Joint Staff Pension Board* (oral hearing granted; see Orders 1 and 2 of 2010); 2010-UNAT-068, *Appellant v. Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East* (oral hearing granted but ultimately cancelled due to scheduling problems; see Orders 17 and 18 of 2010); 2010-UNAT-076, *Kasyanov v. Secretary-General* (oral hearing granted by Order 12 of 2010); 2011-UNAT-118, *Abu-Hawaila v. Secretary-General*; 2011-UNAT-123, *Messinger v. Secretary-General*.

³⁵ A/RES/64/119, Annex I, “Rules of Procedure of the United Nations Appeals Tribunal,” art. 17(1)-(2) [UNAT Rules].

³⁶ 2010-UNAT-084, *Sanwidi v. Secretary-General* (including Order 14 of 2010); 2010-UNAT-098, *Masri v. Secretary-General* (including Order 13 of 2010).

If the issues in a case raise very specific or particular questions of law which are not generally within the expertise of counsel or the Judges, an application to file a friend-of-the-court brief may be granted.

The Appeals Tribunal strives to dispose of its caseload in the most efficient way possible. In this case, granting the application to file a friend-of-the-court brief would defeat this goal by forcing the postponement of the hearing of the appeal to the next session to enable the parties to file submissions in response to the brief. The Appeals Tribunal considers that this outcome would be less desirable than the absence of additional submissions on the legal issues in the case.³⁷

The strict line drawn here appears to confuse the role of friend-of-the-court with that of an expert witness; the purpose of a friend-of-the-court brief is not to clarify legal intricacies by bringing information to the attention of the tribunal, but to present the argument of an affected but not impleaded party to ensure the full airing of all sides of an issue. While efficiency is a concern, the quality of justice to be rendered – particularly at the UNAT, whose judgments will serve as jurisprudence for the future – demands a more flexible approach to such applications.

One final issue that deserves continued monitoring is the availability and quality of counsel for staff members. The “egregious inequality of arms” under the previous system was a concern of the Redesign Panel, which recommended the implementation of the OSLA to replace the previous system’s largely volunteer-based Panel of Counsel.³⁸ Despite this, a significant number of staff members who appeared before the UNAT in 2010 were self-represented, calling into question the degree of equality of arms in practice.³⁹ Moreover, some staff members raised questions of the competence of counsel, alleging that counsel failed to attend hearings or showed signs of apparent intimidation before the UNDT.⁴⁰ While this may be due to lack of experience with a new system, it also suggests systemic problems in organizing legal assistance in a geographically and

³⁷⁾ *Masri, ibid.* ¶¶26–28.

³⁸⁾ Redesign Panel Report, ¶¶100–111, quotation at ¶106.

³⁹⁾ In the reported judgments from 2010, approximately twenty-five percent of staff members were self-represented.

⁴⁰⁾ 2010-UNAT-081, *Azzouni v. Secretary-General*, ¶24. See also 2010-UNAT-096, *Antaki v. Secretary-General*, ¶13. In neither case did the UNAT address the issue.

culturally diverse organization. The Administration's response in one case to the staff member's complaints about counsel – that outside counsel can always be retained – is less than realistic for staff members who have been dismissed or not renewed and who are consequently operating under limited resources.⁴¹ The recruitment and training of competent counsel and, most important, the funding of the OSLA are crucial if the arms gap between staff members and the Administration is to be narrowed.

III. Substantive Issues

On a substantive level, the UNAT in its first year addressed three key issues that bear watching because of their continuing importance on the course of the reform: interest on compensatory awards, specific performance, and production of documents. Like the procedural and practice issues just analyzed, these questions as well relate to the process of interpreting the UNAT Statute, and particularly to balancing the relative weight of the tribunal's competence and the discretionary and prerogative powers of the Administration in areas where the statute is silent or unclear. The experience of the first year has shown that while the institutional will to reform the system was sufficient to put new institutions in place, it is far from certain whether the will to accept and respect the power necessary to run an effective and independent system of justice is also present.

A. *Interest on Compensatory Awards*

In its first ruling as a full panel of seven judges, a six-to-one majority of the UNAT found that the absence of an express power in either the UNDT or the UNAT statute to award interest on compensation payments did not preclude the tribunals from making such awards. Interest awards had been one of the remedies suggested for the tribunals in the draft statutes, but this was not carried over into the final versions.⁴² Rejecting the idea that the legislative history of the statutes is determinative of the tribunals' powers, the majority found that denying interest would frustrate the

⁴¹ *Azzouni, ibid.* ¶32. It should be noted that these remarks were presented as an argument in the context of adversarial proceedings.

⁴² Draft UNDT Statute, art. 10(4)(c); Draft UNAT Statute, art. 9(1)(d).

compensatory purpose of damages awards.⁴³ In a lengthy dissenting opinion, Judge Boyko would have rejected the power to award interest, since the legislative history shows that the General Assembly explicitly rejected the inclusion of such power in the two statutes.⁴⁴ Subsequently, the UNAT affirmed this power in other cases, and the details of the rate of interest to be applied have been worked out.⁴⁵

This issue relates to the more general question of the scope of the new tribunals' powers. The UNAT addressed this question in *Warren* as follows:

The Appeals Tribunal acknowledges that General Assembly resolution 63/253 affirmed that the tribunals “shall not have any powers beyond those conferred under their respective statutes”. The same resolution, however, also emphasized that the new system of administration of justice is “independent, transparent, professionalized, adequately resourced and decentralized” and is “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”. For the Appeals Tribunal to hold that no interest can be awarded would not be reconcilable with the tribunals' mandates.⁴⁶

This explicit linkage of a substantive question to the independence of the tribunals and to general principles of the rule of law and due process is interesting. It suggests that the new tribunals are not exclusively creatures of their respective statutes, but rather courts whose powers, while limited, nonetheless include those required to give force to general principles of law and the demands of due process.

B. *Specific Performance*

The question of whether the new tribunals could order specific performance – as opposed to compensation in lieu of specific performance – was a source of considerable conflict between the recommendations of the Redesign Panel and the final statutes approved by the General Assembly.

⁴³ 2010-UNAT-059, *Warren v. Secretary-General*, majority decision ¶¶10–14.

⁴⁴ *Warren, ibid.*, dissenting opinion ¶¶1–5.

⁴⁵ See 2010-UNAT-082, *Castelli v. Secretary General*; 2010-UNAT-092, *Mmata v. Secretary-General*; 2010-UNAT-093, *Iannelli v. Secretary-General*.

⁴⁶ *Warren*, ¶13.

Under the previous system, the United Nations Administrative Tribunal could award specific performance (for example reinstatement or a promotion) to a successful applicant, but at the same time was required to

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.⁴⁷

In practice, this meant that most successful applicants were awarded two years' salary as compensation.⁴⁸ From one point of view this could be seen as preserving the discretionary power of the Administration to determine questions of staffing. From another point of view, however, it opened the door to a cost-benefit analysis by which the Administration could "purchase" the maintenance of illegal decisions for the price of two years' net base salary.

The Redesign Panel criticized this practice, noting that it

can, and sometimes does, result in inadequate compensation, particularly in cases of wrongful termination or non-renewal of contract. A system that cannot guarantee adequate compensation or other appropriate remedy is fundamentally flawed.⁴⁹

The Panel recommended giving both tribunals the power to order specific performance of the obligation at issue.⁵⁰ In his reply to the Redesign Panel Report, the Secretary-General followed the Staff-Management

⁴⁷ Statute of the Administrative Tribunal of the United Nations, art. 10(1), online: <http://untreaty.un.org/unat/Statute.htm> (accessed August 17, 2011).

⁴⁸ Reinisch and Knahr, pp. 475–476.

⁴⁹ Redesign Panel Report, ¶71.

⁵⁰ *Ibid.*, ¶83 and ¶97.

Coordination Committee in arguing for maintaining the requirement of setting compensation in lieu of specific performance, but recommended abolishing the limit of two years' net base salary.⁵¹ The final statutes of both tribunals retain the qualification of the power to order specific performance, requiring the tribunals to set an amount for compensation that "shall normally not exceed the equivalent of two years' net base salary of the applicant."⁵²

In practice, the early decisions of the UNAT have upheld the UNDT's awards of damages in lieu of specific performance, despite strong challenges by the Administration. As we have seen, the statutes of both the UNDT and the UNAT explicitly exclude the awarding of punitive damages. In several cases, however, in which the UNDT awarded compensation for non-pecuniary moral injury, the Secretary-General has appealed, arguing that these compensatory awards actually hide a punitive purpose. In each case, the UNAT has upheld the compensation, rejecting the argument that they are punitive damages by another name.⁵³ In so doing, however, the UNAT sent a warning to the UNDT, suggesting that such compensation could not be set artificially high in order to make specific performance a real option.⁵⁴ The tribunal noted:

Under Article 10(5)(a) of the UNDT statute, the Secretary-General has the right to elect between paying compensation and implementing the order for rescission. The submission [by the appellant] that compensation ought to be set by the UNDT at a level which would force the Secretary-General to implement the order for rescission is without any foundation.⁵⁵

While this is in keeping with the compensatory purpose of damages mandated by the statutes, and while it reaffirms the discretionary power of the Administration, it is troubling nevertheless, since it indicates a rejection of the critique of compensation in lieu of specific performance raised by the

⁵¹ A/61/758 (February 23, 2007), ¶¶21–22.

⁵² UNDT Statute, art. 10(5)(a)–(b); UNAT Statute, art. 9(1)(a)–(b).

⁵³ 2010-UNAT-035, *Crichlow v. Secretary-General*, ¶22; 2010-UNAT-042, *Wu v. Secretary-General*, ¶33; 2010-UNAT-076, *Kasyanov v. Secretary-General*, ¶30.

⁵⁴ This argument was raised in 2010-UNAT-044, *Solanki v. Secretary-General* by the appellant staff member, but was rejected by the tribunal (¶16).

⁵⁵ *Ibid.*, ¶19.

Redesign Panel as well as other commentators. Particularly in cases of unwarranted termination, an award of two years' compensation is far from the *restitutio in integrum* required by national legal systems. The almost exclusive resort to this option by the Administration is a clear indication that it is in most cases a far cheaper choice.

C. *Production of Documents*

The final substantive issue to be considered here is the question of the tribunals' power to order the production of documents by the Administration. While this issue so far has mostly developed at the UNDT, it will be of crucial importance to the UNAT as well because it directly affects the viability of the reform. The issue involves not just the ability of the tribunals to consider all relevant evidence in evaluating cases, but also their power to enforce their orders and to compel the Administration in matters that affect the integrity of the adjudication process.

The UNDT Statute gives that tribunal the power to “order production of documents or such other evidence as it deems necessary.”⁵⁶ While the UNDT Statute is silent about the enforcement of its orders, it would be absurd to argue that orders to produce documents are entirely unenforceable.⁵⁷ Moreover, the UNAT plays a key role in ensuring the viability of orders issued by UNDT judges through its general power to review excesses of jurisdiction by the lower tribunal.⁵⁸

The issue of orders to produce documents first arose in *Calvani v. Secretary-General*, which came to the UNAT in its first session.⁵⁹ In that case, the applicant, challenging a decision to place him on administrative leave without pay, sought production of the decision by the respondent Secretary-General. Instead, the respondent produced a letter from the Deputy

⁵⁶ UNDT Statute, art. 9(1). See also UNDT Rules, art. 18(2): “The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings.”

⁵⁷ The UNAT Statute, art. 2(3), grants that tribunal the power to “issue all orders necessary or appropriate in aid of its jurisdiction and consonant with the present statute.” The UNDT Statute does not contain an analogous provision, but it is given the power to decide on its own competence: UNDT Statute, art. 2(6).

⁵⁸ UNAT Statute, art. 2(1)(a).

⁵⁹ 2010-UNAT-032e, *Calvani v. Secretary-General* (translation of the original French, 2010-UNAT-032) [*Calvani* (UNAT)].

Secretary-General that the Secretary-General had made the decision. Upon a further order from the tribunal to produce the decision, the respondent

informed the Tribunal that it would not comply with the order since it had “submitted all evidence that it intends to adduce in support of its contention that the decision was made by the Secretary-General”. The Respondent further indicated that it was “preparing a notice of appeal with respect to the [above-mentioned] order”.⁶⁰

In the face of a refusal to comply with an order of the court, the UNDT noted that it

must draw consequences from such refusal. An administrative decision is unlawful if the author of the decision cannot be clearly identified. In the present case, it results from the Respondent’s ill will that the proof of the identity of the author of the contested decision has not been adduced. Thus the decision to place the Applicant on administrative leave appears *prima facie* to be unlawful.⁶¹

The UNDT as a result ordered the suspension of the decision pending the management evaluation.

The UNAT found the Secretary-General’s appeal of the order to produce confirmation of the decision not receivable. Ordering the production of the document was within the powers of the UNDT, and nothing permits an appeal “against a simple measure of inquiry.”⁶² In coming to this decision, however, the UNAT noted hypothetically that if the UNDT had erroneously ordered the production of a document “that was immaterial, non-existent or deemed confidential under the relevant provisions of the Organization,” an appeal of the order would lie.⁶³ How the nature of a document could be determined if the Administration refused to produce it, the UNAT did not say. However, the implications of this remark were later explored in *Bertucci v. Secretary-General*.⁶⁴

⁶⁰ UNDT/2009/092, *Calvani v. Secretary-General*, ¶15, Cousin J.

⁶¹ *Ibid.*, ¶26.

⁶² *Calvani* (UNAT), ¶10.

⁶³ *Ibid.*, ¶9.

⁶⁴ *Bertucci* (UNAT) 2010.

The *Bertucci* affair has certainly been one of the most serious tests of the integrity of the new system, and until a final decision on its merits is rendered, the result of that test will remain uncertain.⁶⁵ The case concerns a failure to appoint the applicant to a vacancy at the Assistant Secretary-General level, the applicant alleging that the non-appointment was influenced by groundless but widely publicized accusations and investigations concerning him. In challenging the decision, the applicant sought production of documents from the selection committee and the Secretary-General's Executive Office.⁶⁶ The respondent, citing confidentiality and privilege, refused even to produce these to the tribunal for a ruling on their relevance. Judge Michael Adams issued repeated orders to produce the documents and for the person responsible for ordering non-compliance with the orders to appear before the UNDT. His orders became increasingly forceful as they continued to be met with a refusal to comply:

To disobey an order of the Tribunal is undoubtedly contempt. Whether it is so described matters not. A deliberate decision to disobey is a direct attack upon the jurisdiction of the Tribunal and its power to undertake the responsibilities with which it has been entrusted in its Statute by the General Assembly.⁶⁷

In light of the continued non-compliance with the orders, Judge Adams ultimately rendered a decision in favour of the applicant, with negative inferences having been drawn from the Secretary-General's refusal to produce the documents.⁶⁸ In dismissing the respondent's arguments that the Secretary-General should be considered like a head of state, and so accountable politically rather than judicially, Judge Adams' rejection was pointed: "His lawyers can claim that the Secretary-General should be considered as

⁶⁵ In 2011, the UNAT overturned the decisions of the UNDT and sent the matter back to the lower tribunal for rehearing. 2011-UNAT-121, *Bertucci v. Secretary-General* [*Bertucci* (UNAT) 2011].

⁶⁶ See generally UNDT/2010/080, *Bertucci v. Secretary-General* [*Bertucci* (UNDT)].

⁶⁷ UNDT Order 42 (NY/2010), ¶4.

⁶⁸ Besides *Bertucci* (UNDT), see UNDT Order 40 (NY/2010) (March 3, 2010); UNDT Order 42 (NY/2010) (March 8, 2010); UNDT Order 43 (NY/2010) (March 8, 2010); UNDT Order 44 (NY/2010) (March 9, 2010); UNDT Order 46 (NY/2010) (March 10, 2010); UNDT Order 59 (NY/2010) (March 26, 2010).

a head of state as much as they like, but he leaves his crown outside the courtroom.”⁶⁹

Before the final decision, however, the Secretary-General appealed the orders to the UNAT, arguing principally that the UNDT had erred in law by failing to recognize that the documents in question were protected by a sort of executive privilege.⁷⁰ In addition, the argument was raised that Judge Adams’ orders amounted to a kind of contempt power, something beyond the powers granted to the UNDT by its statute.⁷¹ By majority decision, the UNAT dismissed the appeals, reaffirming its earlier rulings against interlocutory appeals, thereby avoiding making a ruling on the issue of claimed executive privilege.⁷² Though it did not at this time directly address the broader issues of the enforceability of UNDT orders, the UNAT did underscore the discretion of the UNDT to manage its cases.⁷³

Most recently, during its ruling on the merits of the appeals in this case, the UNAT issued some guidelines on the issue of production of documents and on the scope of the protection of confidentiality enjoyed by the Administration. Following the practice of the International Labour Organization Administrative Tribunal, the UNAT held that material alleged to be confidential should first be produced to the tribunal, which would determine whether confidentiality is justified. If yes, the whole document or a particular part would be withdrawn from the file.⁷⁴

On the serious issue of the Administration’s refusal to comply with orders, the UNAT rejected Judge Adam’s solution (barring the defendant from participation and entering a default judgment) as a violation of the defendant’s due process rights, but endorsed the drawing of negative inferences from the refusal to produce the documents sought.⁷⁵ The Appeals Tribunal thus declined to endorse the quasi-contempt power asserted by the UNDT, preferring a more persuasive approach. Whether this will work

⁶⁹ *Bertucci* (UNDT), ¶27.

⁷⁰ *Bertucci* (UNAT) 2010, ¶13.

⁷¹ *Ibid.*, ¶14.

⁷² *Ibid.*, ¶25. Judge Boyko dissented, on the ground that Judge Adams erred in proceeding without the Secretary-General’s evidence. She also faulted Judge Adams for not ruling on whether or not the claimed privilege existed before ordering the production of the documents. *Ibid.*, dissenting opinion ¶¶20, 22.

⁷³ *Ibid.*, majority decision, ¶23.

⁷⁴ *Bertucci* (UNAT) 2011, ¶50.

⁷⁵ *Ibid.*, ¶¶51–52.

in practice to ensure the effectiveness of court orders or will allow the Administration to avoid compliance by writing off certain cases will remain to be seen, particularly in the rehearing of *Bertucci*.

The *Bertucci* case has been the most serious challenge to date of the independence of the new tribunals and indeed to the integrity of the entire reformed system of administration of justice. Such behaviour on the part of the Organization is disturbing in light of the UNAT's statement in an earlier case that the Organization must be held to a higher standard than other litigants:

The United Nations should act as an ideal litigant and display a clear and consistent stand on all important issues. It is the ordinary litigants who take inconsistent and devious pleas because individual litigants have their self-interest in mind. They usually deviate from the truth and the correct interpretation of the law. The United Nations should be above reproach on this count.⁷⁶

The UNAT's decisions in this case send a signal that the effectiveness of the tribunals depends on their power to secure obedience to their orders. Indeed, this is a necessary attribute of any independent system of justice.

IV. Retaliation: A Proposal for Whistleblower Protection

An issue that arises frequently in litigation in the employment context and that promises to become increasingly important as the new UN justice system develops is allegations of retaliation against staff members who report misconduct by their superiors. Given the still closed nature of the UN justice system, protection from retaliation is crucial if staff members are to be confident that they can bring concerns forward without fear of reprisal. The UNAT has recognized the importance of the issue within the context of the reformed system of justice, recommending in one of its first judgments that safeguards be put in place to protect staff members reporting misconduct.⁷⁷

⁷⁶) 2010-UNAT-042, *Wu v. Secretary-General*, ¶32.

⁷⁷) 2010-UNAT-022, *Abu Hamda v. Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, ¶42 [*Abu Hamda*].

To date, however, the UNAT has not yet had occasion to clarify the legal aspects of retaliation, which remain governed by a Secretary-General's Bulletin from 2005.⁷⁸ In the tribunal's first year, the issue has arisen as a factual question only, and the UNAT has either dismissed the allegations outright,⁷⁹ or has ruled the sanction in question to be justified regardless of the allegations,⁸⁰ or has refused for procedural reasons to consider the allegations.⁸¹ In no case has the tribunal yet defined retaliation or whistleblowing, nor has it discussed key issues such as the applicable standard of proof. In the interests of beginning to harmonize the existing principles within the new framework of the reformed UN system of justice, we suggest here an analytical approach to retaliation that builds on an examination of the relevant texts.

The Retaliation Bulletin imposes on staff members a positive duty to report violations of the Organization's regulations and rules.⁸² Though the Bulletin does not define such action as whistleblowing *per se*, it is clear that reporting violations, if done in good faith and within six months of becoming aware of the misconduct, gives the staff member in question a protected status to which specific rules and procedures apply in the ensuing investigation.⁸³

To establish a *prima facie* case of retaliation, the staff member must present to the Ethics Office⁸⁴ sufficient evidence (1) that they engaged in a protected activity; (2) that they suffered a detrimental action contemporaneously with or subsequently to the protected activity; and (3) that a causal link exists between the protected activity and the detrimental action.

⁷⁸ ST/SGB/2005/21 (December 19, 2005), "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations" [Retaliation Bulletin]. The procedure it outlines draws on retaliation protection in national legal systems.

⁷⁹ 2010-UNAT-041, *Balestrieri v. S.-G.*; 2010-UNAT-078, *Zhang v. S.-G.*; 2011-UNAT-119, *Koumoin v. S.-G.*; 2011-UNAT-124, *Appellant v. S.-G.*

⁸⁰ *Abu Hamda*.

⁸¹ *E.g. Wasserstrom*, where the appeal was dismissed as not receivable since it was interlocutory.

⁸² Retaliation Bulletin, s. 1.1.

⁸³ *Ibid.*, s. 2.1(a). The term "whistleblower" is used in Conference of International Investigators, *Uniform Guidelines for Investigations*, 2d ed. (2009), online: http://www.un.org/Depts/oios/investigation_manual/ugi.pdf, s. 13 [*Uniform Guidelines*]: "A staff member who qualifies as a 'whistleblower' under the rules, policies and procedures of the Organization shall not be subjected to retaliation by the Organization. The Organization will treat retaliation as a separate act of Misconduct."

⁸⁴ Retaliation Bulletin, s. 5.1. *See also* ST/SGB/2005/22 (December 30, 2005), "Ethics Office – establishment and terms of reference," s. 3.1(b).

A protected activity is the reporting of a violation of or a request to violate the rules, regulations, or standards found in the UN Charter, the Staff Regulations and Rules, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service.⁸⁵ Retaliation, for its part, comprises actions taken as well as threats or recommendations of retaliatory action in response to protected activity.⁸⁶

Once the staff member has brought the issue of retaliation forward, and after a preliminary review, the Ethics Office determines whether there exists a *prima facie* or credible case of retaliation. The matter is then referred to the Office of Internal Oversight Services (OIOS) for investigation according to the *Uniform Guidelines*.⁸⁷ The OIOS then reports back confidentially to the Ethics Office on the results of its investigation, and the latter dismisses or allows the complaint and makes recommendations on remedies.⁸⁸

The recourses of the staff member and the Administration following this procedure remain to be clarified, but a key aspect of the analysis of retaliation and the protection of whistleblowers is the relevant standard of proof. Here the applicable texts diverge, and how this divergence is reconciled will have a strong bearing on whether there is effective protection against retaliation within the new system. Though in ordinary investigations the governing standard is a simple balance of probabilities, it seems clear that in cases of retaliation a heavier burden of proof must apply. The Retaliation Bulletin shifts the burden of proof on the Administration, which must prove “by clear and convincing evidence that it would have taken the same action absent the protected activity.”⁸⁹ The “clear and convincing” standard, sometimes described as “enhanced balance of probabilities,” requires evidence that establishes the truth of a disputed fact by a high probability. Since the Retaliation Bulletin was adopted to encourage the reporting of misconduct within the Organization and to enhance the protection for whistleblowers, we believe it must be considered a *lex specialis* that displaces the more general *Uniform Guidelines*. The burden of proof in retaliation investigations is thus significantly higher than the “more probable

⁸⁵) Retaliation Bulletin, s. 2.1(a).

⁸⁶) *Ibid.*, s. 1.4.

⁸⁷) *Ibid.*, s. 5.5.

⁸⁸) *Ibid.*, s. 5.7–5.9, 6.1.

⁸⁹) *Ibid.*, s. 2.2.

than not” standard mandated for general investigations, or the “reasonable conclusions supported by adequate evidence” standard defined by the former United Nations Administrative Tribunal.⁹⁰ Giving a workable meaning to this higher standard will be an important contribution as the UNAT develops jurisprudence on retaliation.

V. Conclusion: Looking Forward

While the basic institutional status of the UNAT and the rest of the administration of justice system is secure, its effectiveness will depend on how the various questions that have already arisen – as well as others, such as retaliation – will be dealt with. Judicial independence is crucial to a working justice system, and this value is difficult to establish in an administrative system at the international level.⁹¹ Adequate funding is a crucial foundation upon which judicial independence must rest, and this has been a concern for the UNAT. Recently, Judge Jean Courtial, UNAT President, has voiced concerns over funding in a letter to the General Assembly. The Fifth Committee has taken note of the concerns, but whether long-term sustainability of the tribunal will be guaranteed remains to be seen.⁹² The funding issue is more than a matter of workload and efficiency: a tribunal starved for resources cannot be expected to perform its duties un beholden to outside interests.

Other developments, outlined above, also bear watching for their potential to affect the viability of the new system. The fallout from the *Bertucci* case, for example, goes to the very heart of the authority of the new tribunals to render justice and of the applicability of the rule of law within the highest levels of the Organization. *Bertucci* has brought up a more general issue, namely the extent to which the tribunals may interpret their statutes, and in particular whether they should be seen as having powers not

⁹⁰ *Ibid.*, s. 2.2; *Uniform Guidelines*, s. 12.

⁹¹ See e.g. A/65/86 (June 15, 2010), “Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal,” Annex. See also Paul Mahoney, “The International Judiciary – Independence and Accountability,” 7 *Law and Practice of International Courts and Tribunals* (2008), 313–349.

⁹² A/65/568, “Letter dated 5 November from the Secretary-General addressed to the President of the General Assembly,” containing the letter of Courtial J. See also A/65/650, “Administration of Justice at the United Nations: Report of the Fifth Committee,” ¶¶48–49.

explicitly enumerated in the statutes. In his 2010 Report on the reforms, the Secretary-General questions the UNDT's assertion of contempt power:

... the General Assembly may wish to reaffirm that the Dispute Tribunal and the Appeals Tribunal shall not have any powers beyond those conferred under their respective statutes and the exercise of such powers shall be in accordance with the role of the Secretary-General as the chief administrative officer, which includes his authority to determine when staff members have engaged in misconduct and to impose appropriate disciplinary measures.⁹³

In reply, the Fifth Committee, in tabling full consideration of the new system until the General Assembly's 66th Session, has expressed reservations about some of the developments: "Stresses that all elements of the new system of administration of justice must work in accordance with the Charter of the United Nations and the legal and regulatory framework approved by the General Assembly."⁹⁴ To treat the new tribunals strictly as creatures of statute is however to ignore the aspirations of the reform, and in particular the ambition to bring the internal justice system of the United Nations in line with broader ideals of justice, accountability, and the rule of law. In the UNAT's most recent decisions, there have been welcome indications that it is asserting its role as guardian of broader principles of justice, including fundamental human rights, and not just working within its statutory powers.⁹⁵

The answers to these questions will determine whether the new system of justice will truly be independent and whether the rule of law in its fullest sense will prevail within the United Nations. The reform of the Organization's system of internal justice was received with strong though guarded optimism by stakeholders. The optimism came from a sense that the

⁹³) A/65/373, "Administration of Justice at the United Nations: Report of the Secretary-General," ¶211.

⁹⁴) A/65/650, "Administration of Justice at the United Nations: Report of the Fifth Committee," ¶9.

⁹⁵) In 2011-UNAT-107, *Chen v. Secretary-General*, for example, the UNAT condemned in strong terms the Administration's argument that budgetary considerations justified paying a female staff member less than male colleagues for comparable work, in violation of the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social, and Cultural Rights*.

institutional will for change was finally in place; the reserve was due to a history of decades of unachieved promises of reform to a system that was slow, highly discretionary, and lacking in transparency. Whether that optimism will prove to be founded or unjustified depends both on the Administration's acceptance of and respect for an independent system of justice and on the ability of the tribunals to exercise their powers in conformity with the ideals that inspired the reform.