



International  
Labour  
Organization



Conference Proceedings, ILO Geneva, 15–16 September 2014

**Best Practices  
in Resolving Employment Disputes  
in International Organizations**



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in Resolving Employment Disputes  
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**Conference Proceedings,  
ILO Geneva, 15-16 September 2014**

Edited by Annika Talvik

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## FOREWORD

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**E**mployment disputes are a constant feature of the life of international organizations and, despite all the good intentions, that is not likely to change in the foreseeable future. Indeed, employment disputes in this context seem to be increasing in number, principally because of the phenomenal explosion of all forms of international organizations in recent years. This has been accompanied by the growing unionization of international civil servants, resulting in greater awareness of staff rights, as well as by the cultural diversity of staff and the difficulty for international organizations to introduce reforms without revising negotiated agreements and calling into question well-established employment policies and rules. At a time when international organizations are faced by the need to adapt to the imperatives of the global economic environment, and their executive organs are calling for savings and efficiency gains through outsourcing, tensions are almost inevitable, and the cost of painful decisions is tending to be reflected in collective complaints and other group action. And yet, no matter how unavoidable employment disputes may be, they do not always need to end in costly and protracted litigation, the exchange of heated and sometimes defamatory briefs, or the definitive alienation of the aggrieved staff member from the *esprit de corps* of the employing institution. Administrations and staff alike are becoming increasingly aware that recourse to judicial proceedings in administrative tribunals is not inevitable and that there are other methods – speedy, economical and less adversarial – that offer a good chance of satisfactory settlement.

Pre-litigation arrangements, such as peer review bodies, ombudsmen and mediators, have been introduced only recently in some organizations, while others have dedicated considerable resources over the past decades to constantly improving options for dispute prevention and resolution. The ILO Administrative Tribunal, to mention but one example, which now has a mem-

bership of 60 organizations, compared with 35 in 2000, has seen the number of judgments that it delivers annually almost double over the past 20 years, and its jurisprudence now increasingly deals with topics such as the duty of care, due process in internal investigations and the disclosure of evidence. Ethics, accountability and good governance are relatively new entries in the lexicon of international organizations.

This proliferation of non-judicial dispute settlement procedures, and the ever growing volume of case law in the field of administrative justice, is making it necessary for legal professionals, human resources specialists, staff union representatives and academic scholars to come together regularly to share experience, draw lessons from newly-established practices and explore innovative tools.

This edited volume is the outcome of just such an event, intended to improve knowledge sharing and collective reflection in the area of employment dispute resolution. The International Labour Office, in light of its values and mandate to promote decent work globally, and also its special responsibilities vis-à-vis the ILO Administrative Tribunal, intends to contribute to the best of its ability and expertise to the search for innovative ideas to prevent conflict, promote dialogue and improve social health within international organizations. Building on the success of the two-day Conference held in September 2014, the Office is considering the possibility of organizing similar events on a regular basis, and also of setting up a dedicated training programme within the framework of the ILO Training Centre in Turin.

Our special thanks go to all the participants and guest speakers for a most fruitful event, and particularly to Ms Annika Talvik for her excellent initiative and for having personally managed the Conference and the publication of its proceedings from start to finish.

George Politakis

Legal Adviser  
Director, Office of Legal Services  
International Labour Office

## PREFACE

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**T**his volume contains the written versions of most of the presentations made at the *Conference on Best Practices in Resolving Employment Disputes in International Organizations*, hosted by the International Labour Office in Geneva in September 2014.

The two-day Conference was intended to provide a forum for professionals in the field of workplace conflict resolution to discuss the many challenges encountered in preventing, managing and resolving employment disputes in the specific context of international organizations, and to support reflection in this field through a frank exchange of knowledge and experience. Judging from the impressive attendance at the Conference – there were some 300 participants from 60 international institutions worldwide – as well as the interest generated by similar meetings organized in the past at the initiative of other organizations, particularly the World Bank, there is growing interest in optimizing the performance of international organizations in handling workplace disputes. The discussions during the Conference also suggest that, while organizations may vary considerably in size and culture, there are common issues behind workplace conflict in international organizations, as well as common criteria for fair and effective dispute resolution.

The introductory session of the Conference offered examples of best practices from two national contexts and an insight into the ILO's research and country level work in supporting the establishment and strengthening of labour dispute prevention and resolution systems. The second session examined both the need and the usefulness of ensuring effective employment dispute prevention and resolution mechanisms within the specific context of international organizations. The third session focused on recent examples of major reviews of internal justice systems and lessons learned, while the fourth session identified criteria for an effective justice system. The fifth session dealt with the role of

administrative and management review in ensuring more responsible and fair decision-making across the board. The role of in-house legal counsel and alternative dispute resolution mechanisms in preventing and limiting litigation and promoting social harmony within international organizations was discussed in the sixth and seventh sessions, respectively. The final session examined due process requirements in conducting internal investigations and the need to guarantee adequate safeguards for whistleblowers. The full programme of the Conference is appended at the end of this volume.

According to a post-conference survey conducted on-line among the participants, the overall assessment of the meeting was extremely positive. This should be attributed to the quality of the contributions of all panel members and moderators. The publication of the Conference proceedings is intended to ensure that the good practices discussed at the Conference are widely disseminated and implemented, for the benefit of staff, management and organizations. I am most grateful to the numerous panel members for their work and diligence in achieving this outcome.

I wish to express my sincere appreciation to Greg Vines, ILO Deputy Director-General for Management and Reform, and Mark Levin, Director of the Human Resources Development Department for their support in securing the funding for the Conference as well as to the Office of the Legal Adviser for covering most of the expenses of this publication. I also wish to thank my colleague Susan Piazza, from the Secretariat of the Joint Advisory Appeals Board, for her assistance in organizing the event. Special thanks are due to Chris de Cooker, Dražen Petrović and Marc Flegenheimer for their help in identifying potential panel members, to Jodi Glasow for her advice in preparing the Conference and to Mark Johnson for editing and translating most of the texts that follow.

Annika Talvik

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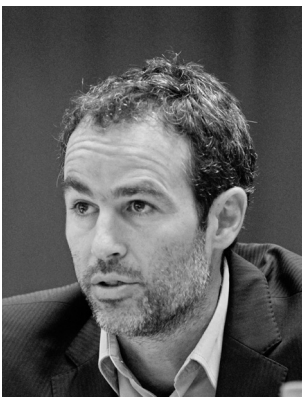
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## WELCOMING REMARKS

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**Guy Ryder** Director-General of the ILO

**W**elcome to the International Labour Organization and to this important event on Best Practices in Resolving Employment Disputes in International Organizations.

When I was first told about this Conference, I was informed that we could expect about a hundred participants bringing together practitioners in conflict resolution from the international system: human resource practitioners, legal specialists, ombudspersons, mediators, registrars, judges, etc. As you can see, we have many more than a hundred in the room. We are extremely pleased to have you all here. I think that the numbers probably send some messages about the relevance of this Conference and why it is so well attended, be they good or not so good. But I think that the conclusion that we can all draw is that the Conference meets a need that is evident to us all.

This is not the first meeting of its type. Over the past two decades, a number of similar events have been organized by sister organizations in the international system. I am thinking above all of the World Bank. And it is clear that there is major interest in and good reasons for this exchange of information, ideas and good practices. And I think that there are also good reasons why the ILO is hosting this meeting. The ILO has particular responsibilities in respect of the types of issues that are under discussion. We believe very strongly in the need for good industrial relations practices, and for workers and employees of all descriptions to have access to fair procedures of justice, mediation, arbitration and dispute resolution. It is part of what we stand for.

Of course, the specifics of the international system are very clear to us. In national industrial relations systems, with which I have spent most of my working life, we have a different situation than the one prevailing in the international

system. This arises, of course, from the fact that the immunities enjoyed by international organizations, which are necessary for them to operate satisfactorily and in independence from member States, have clear implications for their staff members, who do not have access to the normal national processes that are familiar to us all in our own countries. And so it is incumbent on all international organizations to establish equivalents to national practices for fair employment conditions, including effective dispute resolution systems. I believe, as shown by your attendance here today, that we all recognize the considerable challenges and complexities that go with that obligation.

And if the ILO is particularly interested in these issues, I do not want to give you the impression that we believe that here at the ILO we have the right answer. We are grappling with the same issues as the rest of you, with greater and lesser degrees of success at different moments. But we are committed to getting it right. And I think one of the lessons is that, just as there are a multitude of national industrial relations systems in member States, in the international system there is no single “one-size-fits-all” solution to the issues that we are addressing here.

The ILO does, of course, have some expertise in this area, and we hope to put it at your disposal. But my colleagues and I are also anxious to learn from your experiences. We know that we are operating in a fast-changing environment, and that the situation is not static. Nowhere in the world of work are these issues playing out or being addressed in a static manner: there is a great deal of dynamism. And we therefore look forward to advancing our capacities to deal with this fast-moving environment, with the objective of ensuring fair treatment for all those who work for international organizations.

Let me then express great appreciation to those who have brought us all together, who have organized and will participate in this meeting. There is an impressive and remarkable list of panellists and participants, some of whom have come a very long way to be with us in Geneva, while others are from just across the street from other Geneva-based organizations. You are all welcome and we are very grateful for your attendance. From the ILO, Annika Talvik, I would like to thank you and your colleague Susan Piazza, from the Secretariat of the Joint Advisory Appeals Board, which is the ILO’s peer review mechanism. They have been making sure that this meeting takes place in the best possible conditions. And particular thanks also go to the World Bank Group and Jodi Glasow, the Executive Secretary of the World Bank Group Peer Review Services, for her generous and expert advice in organizing this event.

I can assure you that I will be extremely attentive to the outcomes and results of this Conference, and how the ILO can both benefit from and contribute to further deliberations. So welcome to the ILO and good luck with your work.



**WORKPLACE DISPUTE  
RESOLUTION BEST PRACTICES  
IN NATIONAL CONTEXTS**





# REFLECTIONS ON ILO EXPERIENCE: HOW CAN THE EFFECTIVENESS OF DISPUTE RESOLUTION SYSTEMS BE ASSESSED?

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Corinne Vargha<sup>1</sup>

**D**iscussions about “best” or “good” dispute resolution practices, which is the theme of this Conference, pose a fundamental question regarding the criteria for measuring the effectiveness of dispute resolution systems. The ILO has a long history of assisting member States in the areas of dispute prevention and resolution through three main pillars of activity: the promotion of international labour standards related to dispute prevention and resolution, and monitoring their implementation; research and knowledge sharing; and technical advice and assistance in the establishment and strengthening of legal frameworks, and of machinery and processes for the prevention and settlement of labour disputes, in line with international labour standards.

What criteria can be drawn from ILO experience in these areas, and which international labour standards are most relevant?

## *International labour standards*

As labour disputes can occur in any area of work concerning the rights and interests of workers and employers, a number of Conventions and Recommendations are potentially relevant to the resolution of such disputes. These include the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), and the Examination of Grievances Recommendation, 1967 (No. 130), which both lay down principles and provide guidance that is useful in measuring the effectiveness of dispute resolution systems.<sup>2</sup>

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<sup>1</sup> The author would like to express gratitude to Minawa Ebisui for her help in preparing this contribution.

<sup>2</sup> Recommendation No. 92 is applicable to industrial disputes, while Recommendation No. 130 is applicable to both grievances and disputes concerning rights and interests, other than collective interest claims aimed at the modification of terms and conditions of employment.

First and foremost, both instruments call for the *participation of workers and employers on an equal footing* as a cornerstone for the effective management and governance of dispute resolution systems (Paragraph 2 of Recommendation No. 92, Paragraphs 6 and 13(1) and (2) of Recommendation No. 130).

Second, these instruments place *emphasis on dispute prevention*, which is associated with finding voluntary solutions and consensus-oriented systems involving the parties to the dispute (Paragraph 1 of Recommendation No. 92, Paragraph 7(2) of Recommendation No. 130). With a view to preventing and minimizing disputes, Recommendation No. 130 calls for the establishment and proper functioning of a sound personnel policy, which should take into account and respect the rights and interests of the workers, based on regular cooperation with the workers' representatives (Paragraph 7(1) and (2)). The importance of consensus-based systems is further highlighted in Paragraph 11, which provides that "Grievance procedures should be so formulated and applied that there is a real possibility of achieving at each step provided for by the procedure a settlement of the case freely accepted by the worker and the employer".

Third, Recommendation No. 92 indicates that voluntary conciliation procedures that assist in the prevention and settlement of industrial disputes between employers and workers should be *free of charge and expeditious* (Paragraph 3(1)).

The world of work has seen drastic changes since the adoption of these instruments. Over the years, the nature and causes of labour disputes have become more complex and more diverse than ever, as have the processes and mechanisms of dispute prevention and resolution in the context of constantly evolving industrial and employment relations. The ILO is now faced with the question of whether the guidance provided by these Recommendations is sufficient in light of the current challenges of the world of work. Are the principles that they embody sufficiently comprehensive to develop and operate effective dispute resolution systems? The ILO Governing Body has requested additional information on the possible need to revise these Recommendations or supplement them with a new instrument. In 2013, the Recurrent Discussion on Social Dialogue at the 102nd Session of the International Labour Conference further highlighted the need for the Office to gather and disseminate information on which mechanisms work best in different contexts and why. The conclusions to the Conference discussion called on the Office to expand its assistance to strengthen and improve the performance of labour dispute prevention and resolution systems and mechanisms through research, advice, capacity building and the exchange of experience.

*ILO global research on the performance of individual labour dispute prevention and resolution mechanisms and processes*

In response to this request, the Office embarked on a two-year global research project (2014-2015) on the performance of prevention and resolution mechanisms and processes for individual labour disputes across the world. The key objective of the research is to analyse which mechanisms and processes (both judicial and extra-judicial) work best in different contexts and why, with a view to identifying guiding principles for the effective prevention and resolution of individual labour disputes, while recognizing the diversity of mechanisms in different countries.

This goes beyond a comparison of the various legal frameworks and systems, which in the ILO's experience has proved to be both extremely challenging and even counterproductive in global discussions in this area. For instance, some of the key terms related to dispute resolution, such as *conciliation*, *mediation* and *arbitration*, which might be considered universally familiar, may in fact cover drastically divergent practices and realities, depending on the different ways in which dispute resolution institutions function across the globe. This ongoing research is therefore designed to focus not on how the terms are defined or used in the different systems, or how those systems are structured, but on which characteristics or elements of the various systems are key to delivering good services to users. On this basis, it is intended to identify universal guidelines for effective, accessible and well-performing dispute resolution systems worldwide.

*ILO guide on labour dispute systems*

I have referred to a few principles set out in the two ILO Recommendations as useful guidance for effective systems. However, a number of the issues posed by constituents in the areas of dispute prevention and resolution often cannot be solved solely by a set of international principles. In recent years, the Office has been called upon increasingly to provide technical assistance based not only on international labour standards, but also on comparative practices, and particularly functional or operational features of effective dispute prevention and resolution systems.

In response to this broad demand, the Office has developed a Guide entitled *Labour dispute systems: Guidelines for improved performance*,<sup>3</sup> which is used in support of technical assistance to build and improve dispute prevention and resolution systems, and to help member States assess their systems. The Guide may also be useful for effective dispute resolution within international organizations.

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<sup>3</sup> The Guide can be found in different languages on the ILO website: [http://www.ilo.org/ifpdial/information-resources/publications/WCMS\\_211468/lang--en/index.htm](http://www.ilo.org/ifpdial/information-resources/publications/WCMS_211468/lang--en/index.htm)

A set of key elements and criteria for well-functioning and effective systems drawn from the Guide complement the principles set forth in the two Recommendations and focus on more practical aspects of dispute resolution systems.

The Guide emphasizes the importance of *offering a range of services that respond to the different needs of users*. These include not only dispute resolution processes involving the assistance of third parties, such as conciliation/mediation and arbitration, but also various other complementary services, such as the provision of information, advice, counselling, training, facilitation and investigation, with a view to ensuring the effectiveness and accessibility of dispute resolution mechanisms and processes.

The *simplicity and clarity of legal frameworks, procedures and operations*, which can help to ensure that dispute prevention and resolution services are expeditious, timely, easy to understand and accessible to users, are other very important elements of their success. The question of “access” may perhaps be less challenging for dispute resolution within international organizations than it is at the national level. Nevertheless, access to justice and to existing dispute prevention and resolution mechanisms is a widespread concern across ILO member States. The issue of access is related to the rapidly evolving nature of employment relationships, and the associated difficulty of determining who is in an employment relationship, as opposed to a commercial relationship, as well as who is the employer and who bears the responsibilities of the employer. Even among workers who are in an employment relationship, there seem to be specific categories who find access more challenging than others. These include, among many others, non-unionized employees, non-standard workers, migrant and domestic workers, those in small- and medium-sized firms, and in rural areas and certain sectors. These workers are unlikely to voice their claims or grievances for fear of retaliation or of losing their job.

*Professionalism*: the quality of those who handle labour disputes is another important practical element for the effectiveness of systems, including adequate training to meet the requirements and needs of users and deliver constituent services.

*Independence* is also a key element of an effective system. This means that the system neither belongs to nor is controlled by political parties, business interests, employers or trade unions, and that it operates without interference from the government. This is not often easy to achieve, as it tends to depend on the historical, political and cultural contexts of the countries where the ILO provides services. In this regard, ensuring equal representation of the social partners in the dispute resolution system, as envisaged in Recommendation No. 92 (Paragraph 2), is an important element in safeguarding the independence of a system.

Using the Guide, the ILO and its International Training Centre in Turin, Italy (ITC-ILO), jointly run an annual training course, in partnership with well-seasoned dispute resolution agencies, including the Advisory, Conciliation and Arbitration Service (Acas) of the United Kingdom, the Federal Mediation and Conciliation Service (FMCS) of the United States, the Labour Relations Commission of Ireland (LRC - now integrated into the Workplace Relations Commission) and the Commission for Conciliation, Mediation and Arbitration (CCMA) of South Africa. The course provides a unique opportunity to facilitate an exchange of information on experiences and innovations in member States. In 2014, the course was linked to the ILO research referred to above and a special panel session was held to facilitate a discussion among practitioners of the key elements of success and the challenges faced by these agencies.

### *Country-level assistance*

The ILO's country-level work in this area is diverse. First, the Office provides assistance to member States for the drafting and reform of labour legislation regulating dispute prevention and resolution mechanisms and procedures. The Office also supports the establishment and strengthening of dispute prevention and resolution systems and services, whether they take the form of extra-judicial processes, such as mediation and conciliation within and outside the labour administration, specialized courts, such as labour courts and employment tribunals, or other complementary services. The ILO's partnerships with dispute resolution agencies also benefit its constituents, as practitioners from these agencies are associated with ILO country-level technical work and the delivery of capacity-building courses by ITC-ILO in Turin. Training courses are run regularly on: negotiation skills, conciliation/mediation of labour disputes (certification course) and international labour standards for judges, lawyers and legal educators.

Country-level assistance is currently being provided in 17 countries in the various regions.<sup>4</sup> One interesting example of such work is the labour dispute resolution project in Cambodia, which is reviewed below.

### **From legal requirement to reality: The Arbitration Council in Cambodia**

The ILO labour dispute resolution (LDR) project started in Cambodia in 2002, a few years after the fall of the Khmer Rouge regime and following three decades of civil conflict. The country was characterized by an absence of effective institutions, basic laws, impartial judiciary or dispute resolution systems.

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<sup>4</sup> As at the date of the Conference.

The Labour Law contained provisions on the Arbitration Council, which however only existed on paper and was not operational. Through consultation with the tripartite stakeholders, the ILO first assisted in the adoption of a legal regulation (*prakas*) establishing detailed legal and procedural frameworks for the operation of the new Arbitration Council, including the features necessary to safeguard its independence, credibility and effectiveness. The development was then facilitated of a dispute prevention and resolution strategy, followed by the establishment of a new arbitration system.

At the time, the garment industry was driving growth and attracting foreign direct investment. However, with the expansion of the industry, labour conditions became a major issue. The trade union movement emerged in parallel with the development of the garment industry, but it lacked experience, capacity and cohesion. This was mirrored by a similar lack of experience and capacity on the employers' side, allegations of poor human resources practices and regular violations of labour laws, combined with the prevalence of anti-union discrimination. Strikes, sometimes quite violent, increased rapidly in numbers. Corruption was also pervasive, and still remains so today. At the same time, bad working conditions and abuses of workers' rights in the garment industry were brought to the attention of the global community, including the media, consumer groups and the international labour movement. They put pressure on Cambodia's trading partners to insist on proper compliance with labour law and respect for working conditions in the industry. This was a challenging environment in which the ILO was called upon to establish a dispute resolution institution which met the key elements of effective systems and could deliver in practice.

What were the achievements of the project? It took a year for the ILO to facilitate consultation among the tripartite stakeholders in equal numbers as a step towards the establishment of the Council. In an atmosphere of mutual mistrust, it was often difficult to get all three parties to work together and move forward. But the project promoted commitment to a transparent and accountable consultation process and contributed to a sense of ownership by all the parties. In 2003, 16 months after the start of the project, the door was opened to the establishment of the Arbitration Council in Cambodia.

Eleven years after its creation, the Arbitration Council is viewed by both national actors and international observers as being highly effective, credible and independent. It helped to resolve over 70 per cent of the cases referred to it between its inception and December 2010. The Council is mandated to resolve collective labour disputes relating to both rights and interests arising between employers and workers or their unions. One distinctive feature of the arbitration process under the Council is that, while it is mandatory for the parties to participate in arbitration, arbitral awards are in principle non-binding. This was critical in the Cambodian context, where overcoming corruption was one key

element for the system to work, and therefore in ensuring the integrity of the Council. If arbitration is not binding, users are less inclined to bribe the other party. It also makes it possible for the parties to be secure in the knowledge that they have a legal right to protect themselves from a decision being imposed upon them. However, it has also led to criticism that the Arbitration Council lacks “teeth”. It was thereafter decided to introduce the option of binding arbitration by mutual consent of the parties, although its use remains relatively low (approximately 8 per cent of all awards issued up to the end of 2010).

The Council has resolved disputes expediently, transparently and based on the law and international standards. It has had a positive impact on overall industrial relations in Cambodia, thereby improving the climate for investment and economic growth. It has also contributed to building trust among employers, workers and the government in governance institutions. An indication of the trust of the parties in the system is the landmark Memorandum of Understanding (MoU) on improving industrial relations in the garment industry, signed in 2010 between the Garment Manufacturers Association in Cambodia (GMAC) and six of the largest union confederations and federations. The MoU, which has been renewed up to the present, emphasizes the importance of collective bargaining and commits both parties to a number of principles and agreements for a more peaceful and productive industrial relations environment, including an agreement to binding arbitration for collective rights disputes.

How was it possible to set up a system that functions in such a difficult environment? What are the factors in the success of the Arbitration Council? In order to generate trust between stakeholders, transparency and consistency, the ILO first played a driving role during a transitional period in selecting and training arbitrators to build the skills necessary to perform their responsibilities. Now trade unions, employers and the Government each nominate one-third of the arbitrators, who are then appointed by the Ministry as members of the Council and arbitrators in tripartite panels. This was also an important element in ensuring the independence of the Council. Second, all awards are published and the reasoning behind them spelled out to demonstrate the Council’s commitment to transparency, as a means of gaining the trust of users. Third, the Council is guided by the legal principle of maintaining consistency in the interpretation and application of laws.

*Why is the ILO assistance provided in Cambodia considered to constitute “good practice”?*

A range of criteria lead to the qualification of the ILO experience in Cambodia as “good practice”, which may resonate with experience of dispute resolution within international organizations.

First, *the system fits the context*. The Arbitration Council in Cambodia is a hybrid of different existing national models (such as non-binding arbitration). The project did not transpose a fixed model and was implemented in a responsive and adaptive manner, with the ongoing revision of plans and objectives, taking into account the underlying constraints and the specific national context identified. Clearly, no one size fits all, which calls for creative thinking and flexible adaptation to ensure the provision of the best possible services for the benefit of users. The flexible management adopted throughout project implementation was key to coping with new situations and questions, as well as to responding to the needs of stakeholders. This also involved learning by doing, which requires *regular monitoring and adjustment of rules and procedures* to ensure and improve performance. Feedback from users is very important in this respect.

*Well-managed tripartite engagement* was fundamental to the success of the Council. Where there is a high level of distrust among tripartite stakeholders, ensuring that they are on board and fully engaged requires careful management. Also, where tripartite parties have weak capacity, providing well-adapted information and advice is necessary to promote consensus-based approaches to dispute resolution systems through tripartite dialogue and collective bargaining.

*Sustained training and intensive mentoring* were an additional factor in the success of the Council. Significant efforts and resources were devoted to comprehensive and long-term training for arbitrators and others involved in the arbitration process, including the secretariat. Developing the skills and capacity of human capital is an ongoing process.

The fact that the Council is *independent, transparent, accountable, credible and effective* is also key to attaining the trust of users and achieving results.

Finally, *securing the necessary funding* is a fundamental element in meeting the costs of providing quality services. This has thus far been a challenge for the Council, as its operation still depends almost entirely on funding from international donors. However, many dispute resolution agencies, including those in developed countries, face resource challenges. The existence of recognition that dispute resolution systems are important should not therefore be taken for granted. Each national system is under pressure to demonstrate that it delivers value for money, particularly in times of crisis. This calls for constant monitoring and assessment of the effectiveness and performance of dispute resolution systems. They must respond to the needs of users, meet their objectives and ultimately deserve the public money spent on them. Going forward, this agenda could usefully be taken up in the discussions on this topic within international organizations.

# RESOLVING WORKPLACE DISPUTES IN THE UNITED KINGDOM: SOME IMPLICATIONS FOR INTERNATIONAL ORGANIZATIONS

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Roy Lewis

**T**erms and conditions of employment are regulated in three principal ways: legal enactment; unilateral action by employers; and a process of interaction between employers and employees.<sup>1</sup>

Interaction between employers and employees is of particular interest, as it involves employee participation. It divides into two main models: joint consultation and collective bargaining. Under joint consultation, the employer provides information and consults with employees directly, or via a committee, a staff association or a trade union. The employer then makes the decision, having taken account of the views of the employees. Under collective bargaining, the employer and a trade union make joint decisions about terms and conditions of employment, and also about the procedural relationship subsisting between them. Collective bargaining expresses the conflict between employers and employees and, paradoxically, provides the means of resolving it. But conflict exists in the absence of trade unions. A conflict of interests, as well as an overlapping of interests, is inherent in all employment relationships.

## **The system of dispute resolution in the United Kingdom**

Turning from the general to the particular case of dispute resolution in the United Kingdom, for much of the post-war period collective bargaining was the typical method of job regulation. This is no longer the case. In 2013, around 29 per cent of workers were covered by collective bargaining.<sup>2</sup> The proportion

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<sup>1</sup> See ILO (2013): *Labour dispute systems: Guidelines for improved performance*, especially Chapter 1.

<sup>2</sup> The 2013 statistics for the United Kingdom and other countries are drawn from the European Trade Union Institute website *worker-participation.eu*.

was much higher in the public sector, at 67 per cent, but was only 16 per cent in the private sector. Around 26 per cent of workers were members of trade unions. In addition, since 2005, European Union statutory procedures have encouraged employee participation structures outside collective bargaining,<sup>3</sup> but have only had a limited impact in practice.<sup>4</sup>

In 2013, the coverage of both collective bargaining and joint consultation was greater in other West European countries. In France, 98 per cent of workers were covered by collective bargaining, although only 8 per cent were trade union members. There is also a system of works councils, which are in practice dominated by the trade unions. In Italy, 80 per cent of workers were covered by collective bargaining, and 35 per cent were union members. In Germany, 62 per cent of workers were covered by collective bargaining, while 18 per cent were union members. Collective bargaining in Germany co-exists with a well-established system of co-determination involving works councils and employee representation on company boards.

In these countries, the high coverage of collective bargaining compared with the United Kingdom is explained by a variety of factors, including legal structures that facilitate the application of collective agreements across entire industries. That is not a feature of United Kingdom labour law, under which there is a complex statutory procedure through which a trade union may apply to obtain recognition from a single employer to bargain collectively over pay, hours and holidays.<sup>5</sup> Furthermore, in contrast with the position in European countries generally, collective agreements in the United Kingdom are not usually legally enforceable contracts between the collective parties.<sup>6</sup>

In the United Kingdom, the Advisory Conciliation and Arbitration Service (Acas) plays a pivotal role in encouraging dispute resolution. Although Acas is a state agency, it is exempt from direction by the government. In connection with the

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<sup>3</sup> The Information and Consultation of Employees Regulations 2004, based on Directive 2002/14/EC, and the Transnational Information and Consultation of Employees Regulations 1999, as amended, based on Directive 2009/38/EC.

<sup>4</sup> Hall, M., et al. (2010): *Information and consultation under the ICE Regulations: Evidence from longitudinal case studies*, BIS, Employment Relations Research Series No. 117; and European Foundation for the Improvement of Living and Working Conditions (2011): *Information and consultation across Europe five years after the EU Directive*.

<sup>5</sup> Under Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, applications for recognition are made to the Central Arbitration Committee, which also deals with cases on information and consultation and European works councils.

<sup>6</sup> There is a rebuttable statutory presumption that the parties to collective agreements do not intend to create legal relations: s 179 of the 1992 Act. First enacted in 1974, this reflects a pre-existing common law presumption to similar effect.

resolution of collective disputes, it provides conciliation and arbitration.<sup>7</sup> In the context of conciliation, the collective parties are assisted by a third party conciliator to reach an agreed settlement. In the case of arbitration, the dispute between the collective parties is settled by the decision of the third party arbitrator.

Conciliation is undertaken by officials known as conciliation officers, who are employees of Acas, while arbitrations are performed by independent persons on a panel maintained by Acas. There is no legal compulsion to submit to these processes and no legal sanctions attach to them. This is a distinctive feature of the system of collective labour relations in the United Kingdom. Conciliation is the main activity. In 2013-14, Acas was involved in over 850 collective labour disputes, with a high success rate of over 90 per cent settlement.<sup>8</sup>

Against the background of the relative decline in the coverage of collective bargaining, one of the major functions of trade unions is to support their members in cases heard by employment tribunals, which are the British version of first instance labour courts. Acas provides a conciliation service for the predominantly individual legal claims in the tribunals. The majority of cases are successfully conciliated or withdrawn. Pre-hearing conciliation by Acas has recently become mandatory. However, the number of tribunal claims is in steep decline following the introduction in 2013 of prohibitively high court fees for those using the tribunals.

It should be noted that civil servants in the United Kingdom are in principle covered by collective bargaining and have access to employment tribunals, in much the same way as other employees. This is in contrast with the situation in France, where civil servants (*fonctionnaires*) are governed by a separate code that is distinct from the general Labour Code, and their disputes are adjudicated in separate courts. An individual's national perspective on the civil service may exert a subtle influence on the approach adopted to the analysis of international administrative law, that is the law applicable to the employment of international civil servants.<sup>9</sup>

Finally, over recent years there has been a marked growth in "atypical work" in the United Kingdom. This includes part-time and fixed-term employment contracts, self-employment and agency work. The extent to which workers involved in these arrangements may have access to employment tribunals is a contentious issue.

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<sup>7</sup> The statutory framework under which Acas provides these services is contained in Chapter IV of the 1992 Act, although its origins can be traced back to the Conciliation Act 1896 and beyond.

<sup>8</sup> *Acas Annual Report 2013/2014*, on-line.

<sup>9</sup> Sir Bob Hepple "International civil service: Labour law and administrative law", unpublished paper prepared for the symposium commemorating the 20th anniversary of the Administrative Tribunal of the IMF, Washington D.C., 4 April 2014.

## **Two examples of best practice in the United Kingdom: The Royal Mail and the London Underground**

### *The new collective agreement in the Royal Mail*

The Royal Mail is one of the largest employers in the United Kingdom, with a labour force of around 150,000. Some 80 per cent of its operative (non-managerial) grades are trade union members. The terms and conditions of employment of such grades have traditionally been settled by collective bargaining between the Royal Mail and the Communications Workers Union (CWU).

In recent years, the Royal Mail has experienced difficult industrial relations, including strikes. There was widespread recognition of the need for more efficient industrial relations and working practices, especially at a time when the industry was being opened up to competition, and then in 2013 was privatized through a stock market flotation. A new national collective agreement, entitled the Agenda for Growth, Stability and Long-term Success Agreement, came into effect in January 2014. The Agreement acknowledged the legitimacy of collective bargaining, awarded a pay increase of around 9 per cent to be implemented in three annual stages and outlined revised working methods. At the same time, it introduced new elements designed to engender more constructive industrial relations and the rapid resolution of disputes.

The new and innovative elements of the Agreement include the right of the CWU to address and participate in senior policy meetings. This is not co-determination on the German model, but rather an expansion of the pre-existing direct access of the CWU to senior management. A major programme of joint training for both managers and CWU representatives was also introduced to professionalize joint discussions and assist in the rapid resolution of differences. In addition, “early warning” or “flashpoint” procedures were introduced to alert senior managers and union representatives to the emergence of serious industrial relations problems. Such flashpoints are to be dealt with by internal mediation conducted jointly by specially trained managers and union officials. If the problem persists, the appointment is envisaged of an external mediator from an Acas panel. In the absence of an agreed solution, the external mediator is empowered to make non-binding recommendations. Finally, the Royal Mail gave a series of undertakings to allay employee concerns over privatization, including limits on outsourcing, franchising and agency working, an undertaking not to undercut collectively agreed terms and conditions of employment, and the stated aim of trying to deliver change while avoiding compulsory redundancies.

Unusually in the United Kingdom, the new collective agreement is a legally enforceable contract between the Royal Mail and the CWU. Legal remedies for breach of contract, such as injunctions and specific performance, may

therefore be open to either party. The underlying reality is that, if the CWU breaches the agreement, it runs the risk not only of legal sanctions, but also of losing the management guarantees enshrined in the Agreement.

### *The London Underground arrangements for the London Olympics*

The case of the Royal Mail is an example of the collective parties agreeing upon a major reform, albeit with the benefit of assistance from Acas conciliators. More extensive involvement of Acas is demonstrated by negotiations with London Underground (“the Tube”) in connection with the London Olympic Games of 2012.

Transport arrangements to accommodate the Olympics necessitated changes to the normal pattern of working hours. Negotiations took place with four recognized trade unions, the biggest of which for the Tube is the National Union of Rail, Maritime and Transport Workers (RMT). When negotiations with the RMT broke down, there was a danger that transport strikes might spoil the Games and disrupt virtually all economic activity in London. There would also have been substantial reputational damage for the United Kingdom.

These dangers were averted with the assistance of Acas.<sup>10</sup> Over a period of two months, Acas held a series of confidential meetings between the two sides, often in separate rooms, and also with the key negotiators on each side. Without expressing judgment on the merits of the dispute, the conciliator was more than a mere messenger. Probing questions were asked with a view to encouraging the parties to reach common ground. Eventually, the deadlock was broken and an agreement was reached on rewards and special working time arrangements for the Olympics. The agreement included a role for Acas in the avoidance of disputes. Only a skilled and experienced conciliator who understood the leading personalities and organizational politics on each side could have performed so effectively.

### **Some questions arising for international organizations**

Consideration of workplace dispute resolution in a national context prompts a series of questions about the internal justice systems of international organizations:

*Question.* On the proposition that conflict is inherent in the working relationship, is the inevitability of such conflict accepted by the management and governing bodies of international organizations?

*Comment.* Acceptance of the inevitability of conflict involves a correlative acceptance of the need to provide appropriate machinery for its resolution. Inter-

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<sup>10</sup> *Acas conciliation during London 2012*, Case study, Acas Research and Evaluation, on-line.

national organizations typically offer the procedural means to resolve conflicts with individual employees. But disputes concerning groups of employees, or even all of an organization's employees, may be more difficult to deal with in internal justice systems tailored to address cases initiated by individuals. In order to avoid unnecessary tensions with staff, international organizations should be alive to the possibility that conflicts may have a collective dimension.

*Question.* To what extent do international organizations fully consult with individual staff members and with staff associations, committees and councils prior to taking decisions that affect staff? Or do they sometimes appear merely to go through the motions of consultation prior to making decisions?

*Comment.* An international organization may be required by law to consult before making a decision and, if that is the case, runs the risk of incurring legal liability in the event of not doing so. A duty to consult may stem from an organization's explicit provisions of internal law and/or the generally recognized principles of international administrative law.<sup>11</sup>

*Question.* Subject always to the terms of their founding treaties, can international organizations engage in joint decision-making with staff associations?

*Comment.* The ILO provides the clearest example of an international organization engaging in joint decision-making through collective agreements negotiated with the ILO Staff Union.<sup>12</sup> While the ILO, in the same way as most United Nations agencies, applies the pay levels and allowances set by the International Civil Service Commission, it has nevertheless entered into a series of collective agreements on other topics that are applicable to its 3,000 employees. The subjects of these agreements include: recognition and procedural arrangements with the Staff Union; recruitment and selection procedures; job grading procedures; procedures in respect of grievances and complaints of harassment; travel arrangements; and maternity protection. Such collective agreements are consistent with the ILO's unique tripartite membership of governments, employers and trade unions, and its mission to promote internationally recognized human and labour rights. This mission is reflected in its core Conventions, such as the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

*Question.* To what extent can or should a staff association in an international organization be akin to an independent trade union in its role and finances?

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<sup>11</sup> See Amerasinghe, C.F. (2005): *Principles of the institutional law of international organizations*, 2nd edition, Cambridge University Press, Chapter 9, especially pp. 305-306 ("Procedural irregularities").

<sup>12</sup> This comment is made in the light of information helpfully supplied by and discussed with Mark Levin, Director, Human Resources Development Department, ILO.

*Question.* While mediation may be used in the internal justice systems of international organizations, is there a place for something bearing a resemblance to arbitration below the level of administrative tribunals? This would be neither pure peer group review, which features in many organizations, nor the full-blown but highly unusual first instance court, exemplified by the United Nations Dispute Tribunal, from which employees or employers may appeal to the United Nations Appeals Tribunal. The nearest examples are the Grievance Committees of the International Monetary Fund (IMF) and the European Bank for Reconstruction and Development (EBRD). Operating below the level of their respective administrative tribunals, these bodies are chaired by independent lawyers and make recommendations based not only on the application of international administrative law, but also on systematic fact-finding in the light of oral hearings.

*Comment.* A frequent criticism made by the staff of international organizations is that administrative tribunals are overly reluctant to hold oral hearings, despite having the power to do so. In reality, such tribunals are not designed or resourced to hold oral hearings, except on a highly exceptional basis. The arrangements at the IMF and the EBRD go some way towards meeting this staff criticism. Even if an issue remains unresolved following a grievance hearing and ends up being decided by the relevant administrative tribunal, the independent and evidence-based fact-finding function of grievance committees mitigates the understandable reluctance of the tribunals to hold oral hearings.<sup>13</sup>

*Question.* What is the appropriate role of lawyers in representing employees in the internal justice systems of international organizations? It is relatively uncontroversial for such lawyers to have a role at the level of administrative tribunals. But what is the appropriate role for employees' lawyers during the stages below tribunals, for example in processing grievances prior to formal legal pleadings, or in seeking a settlement through mediation or direct negotiation?

*Question.* To what extent does the problem of atypical work arise in international organizations? This is a question that may be asked about those who are not categorized as employees, and those who are employees but are not classified as regular "staff members" for the purposes of access to internal justice systems.

*Comment.* Reflecting the importance of this issue, there is a growing body of jurisprudence in the decisions of international administrative tribunals, and particularly the ILOAT and the tribunals of the multilateral development

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<sup>13</sup> See Zack, A. (2012): "The step below: Can arbitration strengthen administrative tribunals?" in Elias, O. (ed.): *The development and effectiveness of international administrative law: On the occasion of the thirtieth anniversary of the World Bank Administrative Tribunal*, Nijhoff.

banks.<sup>14</sup> Against the background of the facts and the application of legal tests developed in the case law, the specific issue in litigation may boil down to whether a particular individual falls on one side of the line or the other. However, such litigation may not resolve the underlying policy question of the appropriate coverage of an internal justice system.

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<sup>14</sup> ILOAT, Judgments Nos 701, 1385, 2232, 3090 and 3225; Asian Development Bank Administrative Tribunal, Decision No. 24; International Monetary Fund Administrative Tribunal, Judgment No. 1999-1; World Bank Administrative Tribunal, Decision No. 215.

## MEDIATION BY LABOUR COURTS IN SPAIN

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Sara Pose Vidal

I will focus in this intervention on the efforts that are being made by Spanish labour courts to promote mediation as an appropriate mechanism for the resolution of labour disputes, as a service provided by the judicial authorities.

Receptivity towards alternative dispute resolution mechanisms has increased greatly during the current deep-rooted socio-economic crisis. Such mechanisms have never been excluded from Spanish labour law, which provides for a prior compulsory conciliation procedure between the parties to disputes with a view to avoiding a judicial procedure, and without which cases are not accepted by the courts. A process of prior administrative conciliation is therefore a requirement before a case can be examined by the courts. However, although conciliation, mediation and arbitration offer certain common elements in their definition and implementation, there are also significant differences. Arbitration consists of certain binding and compulsory forms of dispute resolution, in which the award of the arbitrator is binding for the parties, in the same way as a court ruling. In contrast, in conciliation and mediation, the third party does not decide on the issue or impose any solution. Mediators are *inter partes*, in contrast with arbitrators who, like judges, are *supra partes*.

It is important to emphasize in this respect that the mechanisms referred to in national procedural law are 'non-' or 'extra-judicial'. But there can be no doubt that they are instruments which, when they operate effectively, can contribute to reducing the number of labour disputes that go to court and thereby the enormous financial costs that are always involved in judicial proceedings, and accordingly to achieving greater efficiency by the justice system.

However, at present, these objectives are not being met. Indeed, for several years, despite the provisions contained in national law on compulsory prior conciliation and mediation, it has been necessary to improve significantly their impact in practice, as their level of success in avoiding judicial procedures is

very low. One of the causes of this failure has to be sought in the very high workload, in the same way as the courts, of individual conciliation services of labour advisory authorities in the Autonomous Communities. The result is that prior conciliation has become little more than a pre-court procedural formality, in which conciliation and mediation by the lawyer responsible for mediation is absent. Agreements are normally reached in cases in which the parties have already negotiated a solution to the dispute privately through professional services. The conciliation service is simply left to record the corresponding agreement, which means that in practice it merely fulfils a bureaucratic function. Moreover, the very high workload of these administrative services gives rise to other dysfunctions in the operation of the labour courts. The extremely long delays in the setting of dates for prior conciliation by the administrative services have the effect in practice that, in order to comply with the time limits, the procedure is considered to have been completed, even though there has been no real possibility for the parties to set out their positions or propose a solution to the dispute in the presence of the mediator. Prior conciliation is accordingly today no more than a formal procedure that does not fulfil the function set out in the law and does not contribute to the avoidance of court cases. It is therefore to be regretted that public funds are being spent on maintaining a mechanism and a service that is currently totally ineffective.

For all these reasons, there is steadily growing interest in the promotion of mediation, either as an alternative to the courts ('non-judicial' mediation) or to supplement them ('intra-judicial' mediation). The promotion of mediation, in both of its forms, has therefore been given priority in the plan to modernize the justice system.

However, in this intervention I will focus on 'intra-judicial' mediation, or in other words a mediation procedure within a specific judicial procedure that is already under way with a view to offering the parties a solution agreed to with the assistance of a third person, or at least to reducing areas of disagreement. As such, intra-judicial mediation is not an alternative to judicial proceedings, but rather a new form of action by courts and tribunals involving an effort, within the context of an adversarial procedure, to help the parties reach agreement or to bring their positions closer. The essential objective of mediation is not necessarily therefore to reach an agreement. In certain cases, it is sufficient to reduce differences, improve communication and smooth over points of disagreement, although no one would disagree that reaching agreement is a very positive step.

In recent years, encouraged by the General Council of the Judiciary – the governing body of the Spanish Judiciary, there have been a number of pilot experiments of intra-judicial mediation. In the labour courts, this resulted in a pilot plan in the one of the Labour Courts of Bilbao in 2010, which achieved

interesting results. There is also a pilot plan in the Labour Courts of Madrid, based on several protocols and the conclusion of collaboration agreements between the General Council of the Judiciary and, in the case of Madrid, institutions such as the NGO “Civil Law Foundation”. In addition, a pilot is being implemented in four Labour Courts of Barcelona, of which I am the coordinator, in collaboration with the Observatory for Mediation of the University of Barcelona.

Mediation, whether non-judicial or intra-judicial, has the same starting point, which is that the solution to the dispute proposed by a third party, in this case the labour judge, is not always a real solution. In other words, in accordance with the traditional model of justice, the parties entrust a third person with resolving their dispute, with those involved moving to the margins of the process. This has the effect of making it extremely difficult to bring their positions closer. As a court ruling is usually drafted in terms of winners and losers, it has fairly frequently been found that, despite offering a response to a specific divergence, it may end up aggravating the underlying problem and destabilizing collective industrial relations, thereby transcending the individual nature of the original dispute. Often, a court ruling does not offer a direct solution to a dispute, as it may not fully satisfy any of the parties, or may not be useful in resolving the basic problem. As a result, although the solution proposed may be in conformity with the law, it may well be out of line with the real employment relation issue. In certain labour disputes, mediation may therefore contribute to regaining the balance that has been lost, with the parties once again taking responsibility for the resolution of disputes, even though it is through the help of a third party, who does not have the power to issue a binding decision. In contrast with judicial proceedings and arbitration, the third party in mediation does not impose a solution, and must not even express a personal opinion, as the intervention is intended to re-establish communication and dialogue between the parties, encourage them to identify the root of the problem and provide them with the means of overcoming it through an agreement.

The specific characteristic of intra-judicial mediation lies in the fact that it forms part of the judicial proceedings. A series of basic elements therefore have to be in place, as indicated below.

#### *Key elements of mediation by labour courts*

In addition to the judge, who is responsible for promoting and actively facilitating the intra-judicial mediation process, and the registrar, whose role consists of compiling statistical data, providing information and administrative supervision, the essential component of mediation by the labour courts is the existence of a team of mediators with the proven training, experience and professional

skills needed to guarantee the quality of the mediation service. It is important to recall in this respect that the effectiveness and persuasive power of mediators depends largely on the willingness of the parties to accept mediation. It is for this reason that professional mediators are needed, as they offer guarantees of independence, professional qualifications and confidentiality. It should be recalled in this respect that what is at stake is not only the prestige of the mediation service, but also of the judiciary as a whole. Indeed, in practice, it is highly recommended that the team of mediators should be linked to public institutions, which guarantee the quality of the service and its provision free of charge.

The importance of experts and lawyers in the project is clear; in their capacity as advisors and representatives of the parties to the dispute, it is their role to ensure that intra-judicial mediation is a valid alternative for the resolution of the dispute. It is advisable for them to be present at the initial information session, and perhaps also at the mediation sessions, on the understanding that the parties are the main protagonists in the procedure, with the assistance of the mediator, and that the role played by lawyers and experts is secondary.

The parties to the dispute are the real protagonists of mediation. They therefore need to be duly informed of the voluntary nature of mediation and that it is free of charge. They need to know that they are authentic actors in the mediation process, and that they determine the points at issue and the possible solutions, in which they are assisted by the mediator and advised by their representatives.

### *Subjects liable to be covered by mediation*

Mediation can turn out to be particularly helpful in cases in which the dispute has arisen within the framework of a current employment relationship, which is likely to continue. Accordingly, the most propitious subjects for mediation include: entitlement to leave, geographical and functional mobility, substantial changes in terms and conditions of employment, the right to the reconciliation of personal, working and family life, the recognition of rights, and disciplinary sanctions.

However, depending on its characteristics, any other issue may be the subject of mediation. It would not be appropriate to draw up a limitative list of fields that can be covered by mediation. Instead, it is necessary to analyse each specific case with a view to understanding whether, in light of the characteristics of the dispute, and the possibility of the parties reaching agreement, mediation may offer a better solution than judicial proceedings.

These are therefore the main characteristics of the supplementary mechanism of mediation, the introduction of which is now being proposed in Spanish labour courts.

# 2

## **THE NEED FOR EFFECTIVE INDIVIDUAL AND COLLECTIVE DISPUTE RESOLUTION MECHANISMS IN INTERNATIONAL ORGANIZATIONS**



# THE NEED TO DEVELOP EFFECTIVE INDIVIDUAL DISPUTE RESOLUTION MECHANISMS PRIOR TO JUDICIAL APPEALS IN INTERNATIONAL ORGANIZATIONS<sup>1</sup>

Anne-Marie Thévenot-Werner

**T**he increasing number of appeals that are being lodged, particularly with the ILOAT, which is a victim of its own success,<sup>2</sup> show that the observation made by the International Court of Justice (ICJ) in 1954 that “[i]t was inevitable that there would be disputes between the Organization and staff members as to their rights and duties”<sup>3</sup> is more true than ever. Indeed, it applies not only to staff members, but to all agents, that is to all “persons through whom [the Organization] acts”.<sup>4</sup> At the same time, international organizations often benefit from immunity of jurisdiction, which denies their agents access to national

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<sup>1</sup> The research used for this contribution is taken from the author’s doctoral thesis on *Le droit des agents internationaux à un recours effectif: Vers un droit commun de la procédure administrative internationale* [“The right of international agents to effective recourse: Towards a common law of international administrative procedure”], under the direction of Professor Pierre Michel Eisemann. The thesis was presented at the Law School of the Sorbonne on 1 December 2014.

<sup>2</sup> In 2013, as a result of the increasing number of cases, the average length of a case at the ILOAT was a little over 30 months, or around two-and-a-half years, with a minimum duration of nearly one year and three months (ILOAT, Judgment No. 3152) and a maximum of three years and ten months (ILOAT, Judgment No. 3205).

<sup>3</sup> ICJ, Advisory Opinion, 13 July 1954, *Effect of awards of compensation made by the United Nations Administrative Tribunal, Reports 1954*, p. 57.

<sup>4</sup> ICJ, Advisory Opinion, 11 April 1949, *Reparation for injuries suffered in the service of the United Nations, Reports 1949*, p. 177, “any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions”. This definition is recognized as being applicable to the agents of other international organizations, cf. Dubois, L., “La Condition juridique des Agents internationaux”, in *Société française pour le droit international (SFDI), Les agents internationaux*, Pedone, Paris, 1985, p. 6. cf. also Ruzié, D., “Fonctionnaires internationaux”, *Répertoire du droit international*, Dalloz, 2009, p. 2, § 1; Geslin, A., “Les agents des organisations internationales”, in Lagrange, E., and Sorel, J.-M., (ed.), *Droit des organisations internationales*, Paris, LGDJ, 2013, p. 524, § 1027.

courts. As a result of the noted rulings of the European Court of Human Rights (ECHR) in *Waite and Kennedy* and *Beer and Regan*,<sup>5</sup> as well as national case law, particularly in Europe, international organizations are encouraged to establish effective redress mechanisms, including remedies offering access to a judicial authority, to resolve disputes with their agents.<sup>6</sup> For example, in a ruling of 13 May 2014, the Social Chamber of the French Court of Cassation set aside the immunity from jurisdiction of the Pacific Community in light of the lack of judicial means of redress available to its agents.<sup>7</sup>

In their awareness of the need – and of their obligation – to establish judicial means of redress, such mechanisms are therefore being developed by an increasing number of international organizations, the latest of which is the oldest international organization, the Central Commission for the Navigation of the Rhine (CCNR) which, by a decision of 4 December 2014, attributed its competence in this respect to the Administrative Tribunal of the Council of Europe.<sup>8</sup>

However, it is constant practice that the international administrative tribunals and courts established require the exhaustion of internal means of redress as a condition for the receivability of complaints, and more precisely the exhaustion of *administrative* means of redress. The latter may be defined as procedures before an administrative authority with a view to obtaining the legal cessation of an act, its annulment or modification, or compensation for the damages caused.<sup>9</sup> Such formal means of redress frequently consist of a simple request for the decision-making authority to review a decision,<sup>10</sup> often<sup>11</sup> supplemented by the

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<sup>5</sup> ECHR (Grand Chamber), 18 Febr. 1999, *Waite and Kennedy v. Germany*, application no 26083/94, § 67; 18 Febr. 1999, *Beer and Regan v. Germany*, application no 28934/95, § 57.

<sup>6</sup> See the analysis of national and European case law on this point in Thévenot-Werner, A.-M., 2014: “The right of staff members to a tribunal as a limit to the jurisdictional immunity of international organisations in Europe”, pp. 111-139, in Peters, A., *et al.*, *Les acteurs dans l'ère du constitutionnalisme global/Actors in the age of global constitutionalism*, UMR de droit comparé de Paris, Vol. 35, Paris, Société de législation comparée.

<sup>7</sup> France, Court of Cassation (Social Chamber), 13 May 2014, *X v. Pacific Community*, Application No. 12-23805.

<sup>8</sup> CCNR, CC/R (14) 2 final, 4 December 2014, *Protocol 25. Agreement extending the jurisdiction of the Administrative Tribunal of the Council of Europe to officials of the Central Commission for the Navigation of the Rhine (CCNR)*.

<sup>9</sup> Salmon, J., *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, p. 1137, entry “Voie de recours”, B.

<sup>10</sup> Examples of organizations exclusively providing for this procedure in order to exhaust administrative means of redress: European Schools, Eumetsat, ITER Organization.

<sup>11</sup> The World Bank constitutes an exception, as it does not provide for an obligation to make an application for reconsideration prior to bringing the claim before an internal advisory body.

requirement,<sup>12</sup> or possibility,<sup>13</sup> to appeal to an internal advisory body. They may also be complemented by informal means of redress, particularly mediation.<sup>14</sup> It should be noted in this regard that all organizations have broad discretion as to the manner in which they choose to organize internal means of redress.

Such formal and informal dispute resolution mechanisms are effective when they actually exist in practice or, in other words, when they are real.<sup>15</sup> As the organization determines the arrangements for the operation of dispute resolution mechanisms, and the decision-making authority determines the extent to which it takes their opinions into account, responsibility for guaranteeing that such mechanisms are effective lies principally with the organization itself. Indeed, the organization may wish to strengthen the effectiveness of such mechanisms with a view to reducing the number of complaints made to judicial bodies.

Accordingly, the existence of disputes leads to a *practical* need to establish internal dispute resolution mechanisms. However, the question also arises as to whether there is also a legal requirement to establish such mechanisms and, if so, how the organization can best give effect to this requirement.

It is clear from international administrative case law that when an organization provides internal means of redress, it has the legal obligation to ensure that the mechanisms established are effective. Internal means of redress therefore have to be accompanied by all the necessary guarantees, although that does not of course reduce the importance of the guarantees offered by judicial authorities.

### **The existence of a legal requirement**

The obligation to ensure that internal redress mechanisms are effective is a result of the requirement to exhaust internal remedies before a complaint is receivable by a judicial authority. And this, far from being a simple formality, is the corollary of the priority right of the decision-making authority which, in

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<sup>12</sup> Examples: the Inter-American Development Bank (“Formal mediation”), the European Organization for Nuclear Research (CERN), the Permanent Court of Arbitration, the GAVI Alliance (for the offices in Switzerland), the European Patent Organization, the Organization of American States (OAS), the ILO (unless specifically stipulated otherwise for certain cases), the World Trade Organization, the World Intellectual Property Organization, and UNESCO.

<sup>13</sup> Examples: the CCNR, the Council of Europe, the Organization for Joint Armament Cooperation and the International Organization of Vine and Wine. The OCDE is a particular case: in order to exhaust the administrative means of redress, the applicant is required to submit a request either for reconsideration or for having the dispute referred to the Joint Advisory Board. He also has the possibility to pursue both remedies one after the other in the here presented order.

<sup>14</sup> Examples: the World Bank, the Council of Europe, the IMF, the OCDE, the International Organization of La Francophonie, the World Trade Organization, the UN and the Organization for the Prohibition of Chemical Weapons.

<sup>15</sup> See Salmon, J., *Dictionnaire...*, *op. cit.*, p. 411, entry “*Effectivité*”.

conjunction with the right of international officials to effective redress, gives rise to an obligation.

*An obligation deriving from the priority right of the decision-making authority to review its own decisions*

The requirement to exhaust internal means of redress allows the decision-making authority to exercise its priority right to review its own decisions in order to avoid a situation that is in violation of the rules or contrary to proper administration. This priority right also serves to avoid, insofar as possible, additional material and psychological costs, as explained by the Mediator of the International Monetary Fund.<sup>16</sup> The basic duty of organizations to ensure the proper management of the public funds made available to them by member States requires them to examine in depth any appeal that is lodged, irrespective of the manner in which they organize their internal means of redress. The ILOAT has tended to encourage decision-making authorities to fulfil this duty by requiring them to give reasons for any divergence between the final decision and the opinion of an internal advisory body. It considers that “[...]the right to an internal appeal is a safeguard enjoyed by international civil servants. [...] The value of the safeguard is significantly eroded if the ultimate decision-making authority can reject conclusions and recommendations of the internal appeal body without explaining why.”<sup>17</sup>

But what happens when an organization does not provide any means of internal redress and an agent nevertheless submits a request for review? According to the ILOAT, there is “*nothing to prevent the [organization] from following the common practice of international organisations and entertaining an appeal [...] ex gratia.*”<sup>18</sup> In the event that an agent requests the organization to exercise its right to rectify a decision before an appeal is lodged with a judicial authority, it can therefore do so even in the absence of a legal rule. For example, even though no means of administrative redress is envisaged in the Staff Rules of the Franco-German Youth Office,<sup>19</sup> it is exercised in practice by complainants before lodging complaints with the judicial authority. The fact that a complainant calls on the decision-making authority to exercise its right to review a decision, even if there is no requirement to do so for the exhaustion of internal means of redress, may not therefore count against the complainant when computing the time-limits for the receivability of a complaint.<sup>20</sup>

This brings us to the rights of complainants.

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<sup>16</sup> See the contribution by Ms Ravindra.

<sup>17</sup> E. g. ILOAT, Judgment No. 3208, § 11.

<sup>18</sup> ILOAT, Judgment No. 1082, § 17.

<sup>19</sup> *Statut des Agents de l’Office franco-allemand pour la jeunesse*, art. 23.

<sup>20</sup> ILOAT, Judgment No. 1082, § 17.

### *An obligation deriving from the right to effective redress*

According to the constant case law of the ILOAT:

*“the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. Thus, except in cases where the staff member concerned forgoes the lodging of an internal appeal, an official should not in principle be denied the possibility of having the decision which he or she challenges effectively reviewed by the competent appeal body”.*<sup>21</sup>

Internal means of redress therefore supplement the possibility of lodging complaints with a judicial authority. While judicial bodies determine the legal situation, formal and informal means of redress can give rise to an agreed solution to a dispute that takes into account considerations of equity, and may provide an opportunity to the parties by granting them greater flexibility and extending the range of channels available for the resolution of disputes.

Similarly, in the case of mediation, the ILOAT has found that, in accordance with the principle of *tu patere legem quam ipse fecisti*,<sup>22</sup> an organization is required in practice to establish a mediation procedure if such a mechanism is provided for in its rules.<sup>23</sup> This is in addition to the finding in Judgment No. 3064 that the organization’s duty of care implies that it must make every effort to seek a solution to a dispute.<sup>24</sup> In contrast, in the absence of a provision on mediation, it is not required to establish a mediation procedure, as it enjoys discretion in this regard.<sup>25</sup>

It may therefore be concluded that it is a practical and legal necessity, in the interests of both parties, for an international organization to guarantee the existence of the effective internal means of redress that are provided for in its rules. But what does this legal requirement imply?

### **Consequences of the legal requirement**

To exist in practice, it is essential for administrative means of redress to be conducted in accordance with a number of general legal principles, without however becoming a judicial authority.

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<sup>21</sup> ILOAT, Judgment No. 3127, § 13, confirming Judgments Nos. 2781, § 15 and 3068, § 20.

<sup>22</sup> A principle prohibiting an organization from ignoring the rules that it has itself established.

<sup>23</sup> ILOAT, Judgment No. 3170, § 42.

<sup>24</sup> ILOAT, Judgment No. 3064, § 12.

<sup>25</sup> ILOAT, Judgment No. 2306, § 8; Administrative Tribunal of the OAS, Judgment No. 2307, § 6.15.

*An obligation requiring guarantees of effective procedure*

In the first place, guarantees that appeal procedures are effective are best provided when the applicable rules are clear. In this regard, the ILOAT has strongly criticized “*confusion in the relevant texts, the multiplicity of conflicting remedies and the inability on the part of the existing mechanisms [...] to exercise their [...] powers effectively*”.<sup>26</sup>

This concern for simplification is one of the reasons that led the United Nations to abolish many of its internal advisory bodies. Without going as far as wiping the slate clean, if appeals to advisory bodies were optional, redress procedures could be expedited, particularly where the decision-making authority tends to maintain its position, without really taking into account the opinion of the internal advisory body. The optional nature of such appeals would also be more in line with their function of facilitating an amicable solution which, by definition, cannot be imposed.

Our research also shows that procedures are more effective if those responsible for issuing an opinion on an appeal, including the organization’s legal advisors, are as objective as possible. Objectivity is optimal when the advisors are experts in the field, their independence is recognized by the decision-making authority and by staff representatives, and they are not current or former staff members of the organization or, as what concerns legal advisors, they work at least in an independent unit. For example, in the case of review procedures, the establishment by the United Nations of the Management Evaluation Unit as an *independent* body resulted in a significant reduction in the number of judicial appeals, as indicated in the reports of the United Nations Secretary-General for 2011 and 2012.<sup>27</sup> The success of the Unit is due to the adoption of a transparent approach, which involves providing replies in writing and setting out the reasons within the shortest possible time.<sup>28</sup> In its decision, the Unit includes “*a summary of [...] the request and the comments on the request provided by the decision maker or makers, the relevant internal rules of the Organization, relevant jurisprudence [...], an explanation of why the Unit considered that the contested decision comported with the rules and the final decision of the*

<sup>26</sup> ILOAT, Judgment No. 2307, § 6; IMFAT, Judgment No. 2003-1, § 89.

<sup>27</sup> A/RES/62/228, §§ 50-56, esp. § 52. Of the 837 requests made to the Management Evaluation Unit in 2012, only 32 were the subject of appeals to the United Nations Dispute Tribunal, of which four were overturned (A/68/346, Table 1, p. 9). In contrast, in 2011, 952 requests had been made to the Management Evaluation Unit. Almost half of the decisions upheld by the Management Evaluation Unit were the subject of judicial appeals (A/67/265, p. 7 § 10.)

<sup>28</sup> Within a limit of 30 calendar days, and 45 calendar days for staff at offices away from Headquarters, unless an amicable settlement procedure is initiated. United Nations, doc. A/68/346, op. cit., p. 10, §§ 31 and 32.

*Secretary-General*".<sup>29</sup> In so doing, it demonstrates due diligence and allows complainants to understand why their requests have been dismissed.

In joint appeals bodies, the appointment of an external chairperson, such as a law professor, has been particularly beneficial, for example in the case of the Organisation for Economic Co-operation and Development (OECD). However, guaranteeing the independence and impartiality of the members of such bodies is more difficult in smaller organizations. For this reason, the Appeals Board of the Permanent Court of Arbitration is composed of a member representing the staff, a member employed by another intergovernmental organization which is not an international tribunal or court, and a Chairperson who has served as a judge or arbitrator in an international tribunal or court.<sup>30</sup> In other international organizations, such as the International Organisation of Vine and Wine and the Central Commission for the Navigation of the Rhine, the internal advisory body is composed of a single external member appointed by an international administrative tribunal or court to facilitate the amicable settlement of disputes through a less onerous procedure.<sup>31</sup>

The expertise of the members of internal appeals bodies should also provide guarantees of the observance of the right to a fair procedure which, in conformity with international administrative case law, is fundamental for appeals to advisory bodies. The right to a fair procedure is essentially guaranteed by the right to a hearing<sup>32</sup> in a timely manner.<sup>33</sup> The right to an adversarial procedure<sup>34</sup> is also derived from the right to a hearing including, where relevant, the right to an oral procedure and possibly to the hearing of witnesses, as well as the right to "equality of arms". This right must be respected, not only because it is a human right, but particularly because it serves to allow the bodies to establish the facts, consider the various arguments put forward properly and issue a reasoned ruling based on the full facts.<sup>35</sup>

Observance of these guarantees results in greater confidence in the system by the parties to disputes and therefore contributes to its effectiveness, which may in turn encourage decision-making authorities to follow the recommendations issued and complainants to avoid initiating judicial procedures.

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<sup>29</sup> A/67/265, op. cit., p. 7, § 9.

<sup>30</sup> Permanent Court of Arbitration, *Staff Rules and Directives*, Rule 11, Directive 11.1 (v), §§ 1-3. The two external members must exercise, or have exercised their functions at The Hague.

<sup>31</sup> International Organization of Vine and Wine, *Internal Rules. Staff Status Regulations*, art. 131; *Règlement du personnel du Secrétariat de la Commission centrale*, art. 2, § 1.

<sup>32</sup> ILOAT, Judgment No. 476, § 6.

<sup>33</sup> ILOAT, Judgment No. 2891, § 7.

<sup>34</sup> See, for example, ILOAT, Judgments Nos 3223, § 6, and 2598, §§ 6 and 7.

<sup>35</sup> See, for example, ILOAT, Judgments Nos 3222, §§ 9 and 10, 3287, § 13, and 3311, § 4.

Nevertheless, the development and improvement of administrative redress procedures raises the question of their articulation with judicial procedures.

*A means of redress that remains a supplement to judicial complaints*

In Judgment No. 2811, for example, the ILOAT emphasizes that the purpose of requiring the exhaustion of internal means of redress:

*“is not only to ensure that staff members do actually avail themselves of any opportunities they may have within an organisation for obtaining redress before filing a complaint with the Tribunal, but also to enable the Tribunal, in the event that a staff member lodges a complaint, to have at its disposal a file supplemented by information from the records of the internal appeal procedure.”*<sup>36</sup>

But this raises the question of whether a judicial authority can allow itself to base its findings on the facts as established during an administrative appeal procedure (bearing in mind that mediation procedures are always confidential), or should it establish the facts itself as the court of first, and in most cases, last instance? In other words, can administrative redress procedures replace the function of a court of first instance of establishing the facts? *A priori*, the logic of the complementarity of the internal redress procedure with complaints to judicial bodies would mean that the judicial body would itself establish the facts, and that it would therefore be allocated the necessary financial resources to do so. This is the approach followed, for instance, by the World Bank Administrative Tribunal (WBAT), as illustrated, for example, in *Lewin and Pephrah*,<sup>37</sup> and *de Raet and Yoon* (No. 12).<sup>38</sup>

And yet, in Judgment No. 3222, as confirmed on several occasions, the ILOAT emphasized that it *“is ill-equipped to act as a trial court”*,<sup>39</sup> or in other words a court of first instance. Even though there are various definitions of what is a court, or more generally speaking a jurisdictional body, they all have in common the criteria that there must be a body invested with the power to render decisions which are binding on the parties and taken in accordance with the law.<sup>40</sup> In this regard, it should be recalled that bodies

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<sup>36</sup> ILOAT, Judgment No. 2811, § 11.

<sup>37</sup> WBAT, Decision No. 152, 22 October 1996, § 44, as confirmed by Decision No. 275, of 30 September 2002, § 20.

<sup>38</sup> WBAT, Decision No. 85, 22 September 1989, § 54, as confirmed, among others, by Decision No. 436, of 29 October 2010, § 18.

<sup>39</sup> ILOAT, Judgments Nos 3222, *op. cit.*, § 10, 3287, § 13, and 3311, *op. cit.*, § 4.

<sup>40</sup> See, for example, the definitions of “jurisdiction” in French of Cavaré, L., “La notion de juridiction internationale”, AFDI, vol. 2, 1956, pp. 503-504; Bastid, S., *Cours de droit international public. La fonction juridictionnelle dans les relations internationales*, Paris, Les cours de droit,

which intervene prior to the final decision of the decision-making authority, namely the various internal advisory bodies, which are often joint appeals bodies, only adopt *recommendations*. Admittedly it is desirable for decision-making authorities to follow such recommendations. However, in law, they may choose not to do so. These bodies are not therefore courts. Moreover, in certain cases, the prior referral of an issue to an internal advisory body is not even compulsory, or indeed envisaged. Staff members may not therefore be required to go to such bodies. The ILOAT, the judicial nature of which is not open to doubt, as a body composed of judges who are responsible for issuing a ruling that is binding on the parties, in accordance with the law,<sup>41</sup> examines final decisions by defendant organizations,<sup>42</sup> and therefore intervenes in first instance.

In the light of the complementarity of the two types of procedures, one of which is designed to seek an amicable settlement, while the other imposes on the parties, in accordance with the law, a decision issued by a qualified third party who is independent and impartial, the strengthening of formal and informal internal procedures does not discharge the judicial authority from its obligation to fulfil its role as a court of first instance. Indeed, it has an interest in ensuring that internal redress procedures are effective in order to avoid being submerged by cases, while at the same time ensuring and strengthening the effectiveness of its own procedural guarantees. While the WBAT refuses to review the manner in which the joint appeals body deals with cases,<sup>43</sup> it should not be forgotten that it is nevertheless competent to review final decisions by decision-making authorities. When such decisions are based on a recommendation by an internal advisory body, such a recommendation is integral to the process leading up to the final decision. The judicial body is accordingly under the obligation to examine the lawfulness of the procedure leading up to the adoption of the recommendation. In this regard, the WBAT has also confirmed that “[i]n conducting its business, the Appeals Committee is, of course, bound

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Note 40 continued

1956-1957, p. 32; Rideau, J., *Juridictions internationales et contrôle du respect des traités constitutifs des organisations internationales*, Paris, LGDJ, 1969, pp. 50-80, esp. p. 79; Philip, C., and De Cara, J.-Y., “Rapport général. Nature et évolution de la juridiction internationale”, in SFDI, *La juridiction internationale permanente*, Paris, Pedone, 1987, p. 10; Rials, S., “La fonction de juger. Ouverture: L’office du juge”, *Droits*, vol. 9, 1989, pp. 3-20; Santulli, C., “Qu’est-ce qu’une juridiction internationale? Des organes répressifs internationaux à l’ORD”, *AFDI*, vol. 46, 2000, pp. 61 et 70-81 pris ensemble; Janicot, L., “Les tribunaux administratifs internationaux. Réflexions sur la notion de juridiction internationale”, *Revue française de droit administratif*, vol. 23, 2007, No 6, p. 1246.

<sup>41</sup> Statute of the ILOAT, Articles I, II, III and IV, § 1, read in conjunction.

<sup>42</sup> Statute of the ILOAT, Article VII, § 1.

<sup>43</sup> See, for example, WBAT, Decisions Nos 275, op. cit., § 20, and 436, op. cit., §§ 18 to 22.

*to follow basic requirements of fairness*”.<sup>44</sup> Ultimately, this implies the requirement for international organizations (and therefore their member States) to provide the necessary financial resources for the redress bodies concerned, thereby emphasizing the basic concept that they are responsible for guaranteeing the right to effective redress.

In conclusion, we have seen that the requirement to exhaust internal means of redress places the organization under the obligation to guarantee that this stage of the procedure is effective. The effort of achieving transparency may, in return, have a beneficial effect on the confidence of the parties in the procedure. The requirement to ensure the effectiveness of the procedure implies that the decision-making authority has to accept, where appropriate, the need to review its initial decision. Rather than a constraint, this may also be considered an opportunity, which may be of great value and benefit to both parties.

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<sup>44</sup> WBAT, Decision No. 436, op. cit., § 22.

# THE COST OF CONFLICT AND THE NEED FOR CONFLICT-COMPETENT ORGANIZATIONS

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Geetha Ravindra

## *The cost of conflict*

International organizations bring together colleagues from around the world who are highly educated and hard working, but who have different languages, communication styles, approaches to decision making and management styles. While this creates a rich and diverse work environment, these differences in perspective and approach can sometimes lead to conflict. The word “conflict” generally brings to mind negative images associated with fighting, disagreement, stress and anger. However, conflict in the work environment is inevitable. While conflict is most often considered negative, it is important to note that it can also stimulate problem-solving and creativity. Addressing conflict positively fosters teamwork and improves relationships, as it encourages listening and open communication, and promotes reflective thinking. Conflict is often a signal that changes are necessary in relationships or organizations, and it provides a means of expressing emotions that can reduce tensions. In short, while conflict is generally deemed to be negative and to be avoided, it can provide an opportunity for growth, change and improved understanding.

Poorly managed conflict results in enormous costs in the form of wasted management time, higher turnover, lower productivity and formal grievances. When people are engaged in destructive conflict, they begin to disengage, stop communicating, lose focus and motivation, and create a negative work environment. The result can be poorer quality work and decision-making. Lower morale and strained working relationships can cause stress and drain the ability of employees to focus on their tasks. When managers spend their time dealing with conflict, rather than focusing on the mission of the organization or helping staff serve internal and external clients, productivity lags. When workers brood at their desk about conflict issues, spend time complaining to their co-workers, stay at home to avoid conflict or leave the organization when it becomes unbearable, the entire organization suffers.

When conflict is mismanaged by an organization, the costs associated with dealing with it increase. Some out-of-pocket expenses, such as absenteeism and lawsuits/formal grievance processes are easier to see and calculate. And yet, even though they are harder to quantify, poor performance, lost trust, ineffective decisions, unproductive communication and diminished quality of working relationships can prove to be more costly. One cost concern is the management time wasted dealing with conflict instead of addressing more substantive or productive issues. Surveys show that most managers spend between 20 and 40 per cent of their time dealing with conflict. Another cost of conflict is the loss of employees. It is estimated that over half of employee retention problems are related to poorly handled conflict. When conflict creates morale problems and interferes with the ability of employees to do their job, they may look for a better place to work. The replacement costs of finding, training and bringing new personnel up to speed can exceed the annual salary of those who leave.<sup>1</sup> Absenteeism and health costs related to work stress also contribute to the financial toll caused by ineffectively managed conflict. Some employees attempt to avoid dealing with conflict by taking a day's sick leave to delay or escape dealing with a difficult problem. Another aspect of absenteeism relates to the actual physical or emotional distress or illness associated with conflict. According to the *Journal of Occupational Environmental Medicine*,<sup>2</sup> health care expenditure is nearly 50 per cent greater for workers reporting high levels of stress. The Canadian Fitness and Lifestyle Research Institute notes that employees who report interpersonal relationships, job control and management practices as a source of stress are more likely than others to be absent for six or more days.<sup>3</sup> The cost of employee absence in Canada alone is approximately USD 8.6 billion.<sup>4</sup>

A conflict cost study prepared by the KPMG network in 2009 found that German companies spend several million euros every year on conflict-related costs. A CPP study that questioned 5000 employees in nine countries around Europe and the Americas found that 85 per cent of employees have to deal with conflict to some degree.<sup>5</sup> In the United States, employees spend 2.8 hours a week dealing with conflict, which is equivalent to approximately USD 359 billion in paid hours.

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<sup>1</sup> *The price tag of disclosure*, Personnel Journal, Dec. 1990.

<sup>2</sup> Corbitt Clark, Mary, *The Cost of Job Stress*, mediate.com, online.

<sup>3</sup> *Workplace Health System*, no. 3, 1998, Health Canada, Canadian Fitness and Lifestyle Research Institute.

<sup>4</sup> *The case for comprehensive workplace health promotion: Making "cents" of a good idea*, the Health Communication Unit, online.

<sup>5</sup> *Workplace conflict and how businesses can harness it to thrive*, CPP Global Human Capital Report, July 2008, online.

Grievances, complaints and lawsuits can sometimes be a result of ineffectively managed conflict. Complainants often just want an opportunity to talk about their problem or receive an apology for a perceived wrong. If handled effectively from the start, such issues can be resolved informally with much less cost. If problems are ignored or not handled well, they may escalate and require formal intervention by a third party, such as a grievance committee or administrative tribunal, which can increase the time, effort and cost required for resolution. Workplace conflict also has the potential to lead to a worse problem, namely workplace violence. The National Institute of Occupational Safety and Health (1997) estimates that over one million workers are assaulted every year at work.<sup>6</sup> The emotional toll on co-workers in such situations can be enormous and can increase the costs associated with retention, absenteeism and health care.

### *The need for conflict-competent organizations*

The effects of conflict are dramatic on both human resources and the bottom line. Effective conflict management and the availability of informal dispute resolution resources reduce the cost of conflict. But not all conflict is negative or harmful. Harnessing the power of conflict can be a catalyst for new ideas and creative solutions to challenging business issues. Weiss and Hughes suggest that “executives underestimate not only the inevitability of conflict, but also – and this is key – its importance to the organization. The disagreements sparked by differences in perspective, competencies, access to information, and strategic focus within a company actually generate much of the value that can come from collaboration across organizational boundaries.”<sup>7</sup> There needs to be debate and the airing of different opinions which can stimulate creativity. When conflict is used constructively to elicit ideas and challenge them appropriately, it helps to prevent teams from falling into the trap of groupthink.

Research demonstrates that there is a relationship between how leaders perceive conflict and the strategies that they use to address it. When leaders have a zero-sum or all-or-nothing view, their organization is more likely to adopt an adversarial approach to conflict resolution. If leaders see conflict as an opportunity for all parties to gain, they may adopt more collaborative approaches to conflict resolution. Conflict-competent organizations recognize the strategic

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<sup>6</sup> *Workplace Violence: A Report to the Nation*, University of Iowa Injury Prevention Research Center, Iowa City, February 2001; *Violence in the Workplace, 1993-1999 Special Report*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, D.C., December 2001, NCJ 190076.

<sup>7</sup> Weiss, J., and Hughes, J. (2011): “Want collaboration? Accept – and actively manage – conflict”, in *Harvard Business Review on Collaborating Effectively*, p. 67.

and economic importance of effective conflict resolution systems and support the development of constructive mechanisms to address conflict situations. An integrated conflict management system is one that addresses conflict through several approaches, including prevention, management and the early resolution of conflict at the lowest possible level. They espouse a systems approach and use a wide variety of approaches to resolve conflict.

### *Conflict prevention*

One resource that supports conflict prevention is training. Training in conflict resolution skills and effective communication can be a good way of imparting problem-solving skills that can empower staff to address conflict proactively. Instruction on how perception of conflict develops, the brain's automatic "fight or flight" response to conflict, the basic human needs that are threatened in conflict situations and the emotional responses that are associated with conflict can help people understand better how easily issues can escalate. Moreover, helpful skills that support positive teamwork include: discussion and exercises related to active listening; understanding different approaches to conflict (as described in the Thomas-Kilman Conflict Mode Instrument – competing / compromising / avoiding / accommodating / and collaborating); distinguishing between positions and interests; reframing more positively; separating people from the problem; understanding various perspectives on an issue; and brainstorming solutions using objective criteria for evaluation. I have participated in delivering such training, which was mandatory for NASA employees, and have also offered it at both the World Bank and the International Monetary Fund, with excellent feedback from participants.

Another valuable resource for conflict prevention and/or management is the Respectful Workplace Advisors (RWA) programme. The RWA programme is one of a range of informal services available to staff within the internal justice system of the World Bank Group. This programme supports the World Bank's commitment to fostering a positive work environment in which all staff can work together with trust and respect. The RWA programme provides peer volunteers trained in the organization's policies and procedures to address conflict, active listening, how to problem-solve workplace problems that are shared with them and how to refer staff to appropriate dispute resolution resources. The issues that RWA trained peer volunteers can help staff address informally and confidentially include interpersonal conflicts, unfair treatment, harassment, disrespectful behaviour, bullying and other forms of workplace stress. RWAs do not intervene, investigate, mediate or participate in resolving issues directly. The RWA programme has been very successful at the World Bank, and four departments at the IMF were due to pilot a similar programme in November 2014.

### *Conflict management*

There is a responsibility for leaders to address conflict. Effective leaders hold themselves accountable for establishing a work environment that ensures safety and respect, while helping the organization meet business and financial goals. Conflict-competent leaders understand the dynamics of conflict, are aware of their strengths and developmental opportunities for handling personal conflict, model appropriate behaviours when engaged in conflict, and find ways of fostering constructive responses among others, while reducing or avoiding destructive responses. Such leaders encourage the development of a conflict-competent organization through systems and culture. They support training, coaching and mentoring at all levels. Leaders who see conflict as an opportunity have a better chance of: persevering through the difficult emotional challenges associated with conflict; getting to the root of conflict to support resolution; empowering the parties to engage in discussions about conflict that are safe, honest and fair; and finding solutions that meet the expectations of the parties involved.

### *Informal conflict resolution services*

One very effective alternative dispute resolution tool to address conflict at the lowest level is mediation. In mediation, which is an informal dispute resolution process, a neutral third person facilitates discussion between the parties to a conflict and assists them in reaching a resolution that meets their needs. Mediation offers many advantages, including: assisting the parties efficiently and with very little formality; supporting constructive dialogue; developing collaborative solutions that meet the needs and interests of the parties; helping to reduce the direct and indirect costs of unresolved conflict; preserving and strengthening business/working relationships through understanding and sharing different perspectives; confidential discussions with limited exceptions which promote candour; and future-focused solutions that are based on self-determination.

Simply having the option of mediation demonstrates to staff that their concerns are taken seriously and that they are in line with the values of the corporate culture. Internal conflict costs are reduced and the negative effects of untreated conflicts can be avoided, such as loss of motivation and productivity, absences due to illness, resignations, poor morale, mistrust and damaged working relationships.

Guiding principles for an integrated conflict management system include:

- Provide options that are available to everyone in the workplace, including workers, managers, professionals, teams involved in disputes and contractual workers, to prevent, identify and resolve all types of problems, including interpersonal issues between employees and managers.

- Foster a culture that welcomes good-faith dissent and encourages the resolution of conflict at the lowest level through direct discussion.
- Provide multiple access points. Employees should be readily able to identify and access a knowledgeable person whom they trust for advice about the conflict management system, such as an RWA, manager or human resources team member.
- Provide multiple options for addressing conflict, giving employees the opportunity to choose a less formal problem-solving approach to conflict resolution, such as the Mediation Office or the Office of the Ombudsperson.
- Provide the necessary systematic support and structure to coordinate access to multiple options and promote competence in dealing with conflict throughout the organization.

The policy or rule structure should incorporate safeguards, such as confidentiality, impartiality, timeliness and protection against retaliation.

When organizations adopt these proactive approaches, conflict does not disappear, but is easier to manage in a manner that supports positive effects and minimizes negative impacts. Stakeholders should be involved in the development of internal conflict management systems. Widespread participation by managers, employees and the staff association is important because it clarifies concerns, provides a range of recommendations, overcomes potential resistance and establishes trust. Coordination also includes recognition that internal conflict management system goals are aligned with other organizational policies, other formal or informal resources, and the organization's ethical standards and practices, so that it becomes an integral part of the institution. There should be clear communication about the goals of the dispute resolution services, the process for access to such services and strong support for participation.

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# **DISPUTE RESOLUTION MECHANISMS: A GUARANTEE OF RESPECT FOR LEGAL PROCESS AND THE ‘RULE OF LAW’?**

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**Nicolas Lopez-Armand**

**A**s everything, or almost everything has been covered brilliantly by Anne-Marie Thévenot-Werner and Geetha Ravindra, all that is left for me to do is to wander somewhat off the beaten track and address an atypical and much less conventional aspect of the need for dispute resolution mechanisms. My nearly 12 years as legal advisor to the Staff Union of the International Labour Organization (ILO) has, I believe, given me a certain privileged insight into the good and bad (administrative) points of this United Nations specialized agency.

The sound functioning of an institution is closely related to its social and legal environment. And yet, in international organizations, this environment is very specific, which has serious consequences, even for observance of legal process. This is where I would like to start, before going on to explain briefly why, in my view, dispute resolution mechanisms can offer an – unexpected – solution to the shortcomings arising out of this original environment. I will then conclude by referring to the limitations inherent in dispute resolution mechanisms and the solutions that we could find together to improve compliance with rules in international organizations (in the interests of the staff, of course, but also of the organizations themselves).

## **Social and legal environment of international organizations**

In the first place, it should be recalled that, while international organizations may well be composed of member States, they are not subject to the oversight of a single State exercising overall control. In practice, this means that international organizations, as we all know, are not subject to the sometimes overwhelming, but often salutary pressure of national law. As a result, they do not benefit from a real system of labour inspection, as is the case in host countries, to review the lawfulness of employment contracts, working conditions, the

manner in which officials are appointed and occupational safety and health. There is no permanent court of audit. And although there are indeed auditors, officials responsible for ethics and a central administration, their goodwill is sometimes negated by the confidentiality of procedures and the fact that they report directly to the executive head of the organization.

The absence of a State also means that the rules governing recruitment, as well as the means used, are not comparable to those of national States. The absence of balance and the separation of powers, which is integral to national States, is a terrible loss. There are no checks and balances which could, perhaps not punish, but at least prevent certain abuses. The political pressure exerted upon the leaders of public institutions by democratic elections does not exist. Indeed, the elections held in certain organizations are sometimes the origin of kickbacks and other reprehensible practices.

But it is not only that these organizations are not subject to national law. Nor do they come under the same pressure from civil society as other public State institutions. Indeed, the public opinion shows very little interest in the internal management of international organizations. If, in certain countries, someone who is close to or is related to a politician obtains a favour or a public position in irregular circumstances, the newspapers and political parties take up the matter and public opinion often takes an interest. And yet, although this type of reprehensible practice is undoubtedly widespread among colleagues in international organizations, public opinion is rarely involved.

And if public opinion does not play a role, that is also because there are no media (the ‘fourth estate’) to exercise scrutiny and identify even the smallest irregularities, the use of taxpayers’ funds and appointments of dubious legitimacy. Issues affecting international organizations are rarely headline material in the press. This lack of a counterweight is therefore conducive to the development of abuses, which are more difficult to sanction.

### **Dispute resolution mechanisms: The only solution**

So, in this situation, what can be done? In my view, one of the few instruments available to unions and individuals of goodwill in ensuring legality and the rule of law, not by States, but by international organizations, are the dispute resolution mechanisms in those organizations.

In the ILO, as in many organizations, these mechanisms consist of two main bodies, the internal appeals body properly speaking, and the ILOAT. Their independence and effectiveness are guaranteed by joint nomination, in the case of the internal appeals body, and nomination by member States and the professional competence of the judges, in the case of the ILOAT.

In my view, this duality allows for full and professional review of the legality of administrative decisions that are challenged. In international organizations, this is one of the sole means of guaranteeing respect for legality and the rule of law since, as noted above, there is no other way of sanctioning unlawful acts.

Historically, the system has been reserved for international staff members acting in their own individual capacities. In accordance with the regulations of the various tribunals and international organizations, the representative bodies of the staff do not have access as such to the tribunal, although case law has started to open access through elected staff representatives. For example, in a recent recommendation the ILO Joint Advisory Appeals Board (JAAB) indicated the reasons why it accepted the interest of a staff representative to act in a dispute concerning recruitment. The following is an extract of the recommendation:

*“In the interests of efficiency, consistency of decision making and the timely resolution of disputes, it is conceivable that the complainant, in her capacity as a representative of the staff, may appeal against the decision to appoint Ms X. The Board considers that it is all the more necessary to accept the receivability of the appeal as otherwise the recruitment of Ms X. without a competition would not be subject to any review of its lawfulness. The Board considers that, in the absence of a higher body responsible for reviewing the lawfulness of the ILO’s administrative acts, staff representatives play a fundamental role, in accordance with the principles of justice and the public interest, in denouncing decisions that are not in conformity with the applicable rules.”*

In my view, this type of case law (which is found in more moderate terms in the ILOAT) can strengthen the review of legality by transferring the responsibility for lodging appeals from officials to staff representatives. With a view to denouncing unlawful decisions, representative bodies now therefore make use of these mechanisms more frequently than other more radical means, such as industrial action. Through international public service disputes, internal appeal bodies and the ILOAT deal with cases relating to abuses in recruitment, abuse of power, harassment and precarious contracts. These problems are examined in judgments, and they are sanctioned and may be made public.

### **The limits of dispute resolution mechanisms and perspectives**

At the risk of adopting an over-subjective vision, I consider, perhaps because I am a jurist, that dispute resolution mechanisms are the only means, in the current situation, of guaranteeing compliance with the rule of law in international organizations.

But it is not enough to have these mechanisms in place. As has been seen, recourse to appeal bodies is reserved for staff members acting in their individual

capacity or as individual members of bodies representing the staff. But, as you know, it is very difficult for a staff member (even a staff union member) to take the responsibility of denouncing a violation through an adversarial or quasi-judicial procedure. This difficulty is all the greater as the number of precarious contracts is relatively high, at least in the United Nations system. Fear of reprisals, whether or not it is well-founded, is also very strong. The serious lack of lawyers specializing in the law of international organizations and the absence of equality of arms between staff members and administrations, which have access to incomparably greater resources, are also obstacles.

Another issue is that the officials who defend the administration's position are often the same as those who examine the substance of the recommendations made by the internal appeals body, which gives rise to a feeling of frustration among complainants, as well as the members of joint appeals bodies. For this reason, irregularities are not denounced as they should be because the victims are hesitant, understandably, to engage in a battle of this type.

One other problem is that the sanctions are also relatively limited. Compensation in the event that a decision is overturned is relatively unpredictable, as is the publicity given to the decisions and the penalties imposed on the organization. Sometimes, administrations know that they will be sanctioned and include the cost of the compensation that will probably be granted by the tribunal in their final decision.

So what can be done? In all honesty, I do not have a solution of my own. Indeed, it is perhaps the purpose of the present Conference to seek a solution collectively. In my view, strengthening the means available to the ILOAT and internal appeals bodies would be a good start. So would facilitating social dialogue, as has been the case in the ILO since the appointment of the present Director-General. In the ILO there is a solid tradition of collective bargaining, which undoubtedly came under pressure during the previous administration, but which has gradually been regaining strength since 2011.

The recent decision by the ILOAT to allow the expeditious review of certain complaints under the new Article 7bis of its Rules is also an excellent initiative, which should be welcomed by bodies representing the staff. This amendment to the Rules of the Tribunal introduces a more expeditious procedure in cases where the dispute concerns only a question (or questions) of law, identified by agreement between the parties, and the main facts are uncontested.

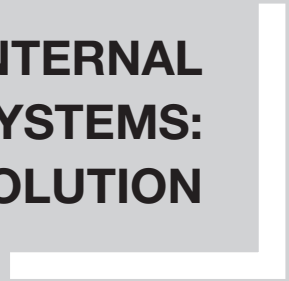
Finally, I also consider that it would be wise to create a general inspection service, independent of the executive director of the organization and with broad powers to impose sanctions. This service could take up issues *ex officio*, or they could be referred to it by staff members, constituents or users of the organization.

I hope that I have been able to show you another facet of the action of staff associations. We are often seen as a bunch of enthusiasts defending unworthy individuals or causes. However, in practice, a large part of our work involves defending the interests of the organization by ensuring that the rules are followed. We are attached to our organizations, and it is for that reason that, insofar as possible, we need to work together to find common solutions. This Conference may help in achieving that objective.





**INTERNAL  
JUSTICE SYSTEMS:  
A DYNAMIC EVOLUTION**





# REFORM OF THE UNITED NATIONS INTERNAL JUSTICE SYSTEM: DYNAMIC PROCESS OR DISAPPOINTMENT?

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Pierre Bodeau-Livinec

**L**aunched in 2005 and brought into effect in 2009, the reform of the internal justice system in the United Nations has a dual ambition: to allow the United Nations to “practice what it preaches”<sup>1</sup> by guaranteeing internally the “rule of law”<sup>2</sup> that it advocates in the outside world; and also to ensure a process in accordance with “the evolving nature of the system [...] and the need to carefully monitor its implementation.”<sup>3</sup>

The assessment that can now be drawn up of this important reform remains nuanced. On the positive side, as noted in the Sixth Committee, “[f]ew decisions adopted by the General Assembly [have] produced such tangible results in so short a time.”<sup>4</sup> In quantitative terms, at least, the new system appears both credible and functional. Even in light of the relatively high workload experienced by the United Nations Administrative Tribunal during its final year of existence, the professionalism expected of the new system is bearing fruit. In 2014, the United Nations Dispute Tribunal (UNDT) received 411 cases and issued 148 judgments, while the United Nations Appeals Tribunal (UNAT) received 137 appeals and issued 100 judgments.<sup>5</sup> In the view of the Internal Justice Council, the reasons for this success lie in the fact that the “system is achieving its goals of delivering impartial and quick results” and that “there is growing satisfaction with the treatment accorded to complaints by the

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<sup>1</sup> A/61/758, para. 5(b).

<sup>2</sup> A/61/205, para. 13.

<sup>3</sup> A/RES/69/203, para. 7.

<sup>4</sup> A/C.6/65/SR.4, para. 74 (Guatemala).

<sup>5</sup> These statistics are provided in the *Eighth Activity Report of the Office of the Administration of Justice*, 2014.

Tribunals”.<sup>6</sup> However, the backlog of cases has become significant (317 cases for the UNDT and 101 for the UNAT, or a full year’s work).

More importantly, the new mechanism still appears to be unstable and shifting. This is demonstrated by the continued failure to determine the competence *ratione personae* of the tribunals, which are not accessible to significant categories of persons working for the United Nations, and the continued extension of the mandates of the *ad litem* judges of the UNDT, which reveals a chronic incapacity to consolidate the basis of the United Nations internal justice system.

It would therefore appear to be delicate to assess the reform of the administration of justice in the United Nations. In making this assessment, it is necessary to take into account the initial expectations of the reform, before examining the perspectives offered by certain of the areas in which work is still ongoing.

### **An entirely reformed system**

As its name suggests, the “Redesign Panel on the United Nations system of administration of justice”,<sup>7</sup> established by the General Assembly in 2005, was not intended to summarily airbrush a system of justice that was seen as being on its last legs. In the words of the Secretary-General himself, there were “significant problems”<sup>8</sup> with the existing system, which was “slow, cumbersome and costly” and no longer guaranteed the “principle of due process”.<sup>9</sup> In other words, the approach of renovation, rather than complete reform, was rejected, not because it would not have been technically possible, but because it would not have sufficed to respond to the credibility crisis of the existing mechanisms. The Redesign Panel made a severe, but certainly lucid, assessment in this respect:

the United Nations internal justice system is outmoded, dysfunctional and ineffective and [...] lacks independence. The financial, reputational and other costs to the Organization of the present system are enormous, and a new, redesigned system of internal justice will be far more effective than an attempt to improve the current system.<sup>10</sup>

This was the basis on which a system was developed that was characterized by the dual concerns of a more judicial process and greater accessibility.

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<sup>6</sup> A/67/98, para. 18.

<sup>7</sup> A/RES/59/283, para. 49.

<sup>8</sup> A/61/758, summary.

<sup>9</sup> A/RES/59/283, 12th and 4th preambular paragraphs.

<sup>10</sup> A/61/205, summary.

*A more judicial system*

When, on 4 April 2007, the General Assembly formally launched the reform of the system of administration of justice in the United Nations, it expressed a clear and demanding ambition:

to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.<sup>11</sup>

To implement such a project, only a veritable judicial system could be envisaged, which involved both developing existing mechanisms and making them more professional.

The extension of the existing structure was characterized in particular by the establishment of a dual system of tribunals. A new United Nations Dispute Tribunal (UNDT) has been created to replace the “existing advisory bodies within the current system of administration of justice, including the Joint Appeals Boards [and the] Joint Disciplinary Committees”.<sup>12</sup> This first tribunal is supplemented by an Appeals Tribunal to decide matters in the final instance, on both matters of law and of substance, with the appropriate compensation. Although the General Assembly at first appeared to give priority to reinforcing informal resolution procedures “to avoid unnecessary litigation”,<sup>13</sup> it has in fact strengthened the attractiveness of the formal system, which has the capacity to offer complainants, if not the assurance of always being found right, at least that their complaint will be dealt with in an impartial, coherent and equitable manner.

A reform of this type cannot work without stronger commitment by those involved in the operation of the system. One of the significant innovations introduced in the system for the administration of justice is therefore the establishment of a procedure for the selection of candidates for positions as judges, which is entrusted to a new “Internal Justice Council” (IJC).<sup>14</sup> For each vacancy, the IJC has to recommend to the General Assembly “two or three candidates [...] with due regard to geographical distribution”.<sup>15</sup> The profile of the judges themselves is set out more precisely in the Statutes of the two Tribunals,

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<sup>11</sup> A/RES/61/261, para. 4

<sup>12</sup> Ibid., para. 20.

<sup>13</sup> Ibid., para. 11.

<sup>14</sup> A/RES/62/228, para. 35.

<sup>15</sup> Ibid., para. 37(b).

which require, in addition to a condition of nationality and gender balance,<sup>16</sup> that candidates have “judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions” of at least ten years for the UNDT and 15 years for the UNAT.<sup>17</sup>

Although it is sufficiently sophisticated to be in line with standards for the selection of international judges, the system has some negative aspects. The hybrid structure of the UNDT, caused by the need to obtain professional judges at lower cost, sees three full-time judges sit alongside two part-time judges and three ad litem judges, whose appointments have been constantly renewed since 2009.<sup>18</sup> The regular operation of the Tribunals, subject to the various work-related commitments of their members, is therefore rendered somewhat fragile.<sup>19</sup> That is compounded by the dominance of common law legal systems, both in the case of the Tribunals and the IJC,<sup>20</sup> which affects the drafting and content of the judgments, in which the contribution of continental administrative cultures is marginalized.<sup>21</sup>

### *An accessible system*

Several measures were taken to improve the accessibility of a system which, up to then, had been concentrated excessively in New York. Antennae of the UNDT have therefore been established, with their respective registries, in Geneva and Nairobi. This decentralization has had a substantial effect, resulting in a significant increase in the number of applications from the funds and programmes, as well as from the staff of peace-keeping operations.<sup>22</sup>

The changes introduced also include electronic communication technologies. It would certainly be too much to speak of a type of ‘e-justice’, although the creation in June 2010 of the Internet site of the Office of Administration of

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<sup>16</sup> This balance may be considered to have been achieved since, of the 15 judges currently in office in the two Tribunals as at 30 June 2105, nine are women (including five of the seven judges of the UNAT).

<sup>17</sup> Articles 4(3) of the Statute of the UNDT and 3(3) of the Statute of the UNAT.

<sup>18</sup> A/RES/69/203, para. 8.

<sup>19</sup> “The whole point of having a decentralized tribunal would be defeated if one location had to stop functioning owing to the absence of its sole judge, for example, in cases of leave, sickness or resignation” (A/67/265, para. 33).

<sup>20</sup> In the case of the UNAT, the current judges are from Ireland, Ghana, Argentina, Uruguay, Samoa, United States and Trinidad and Tobago. The members of the Internal Justice Council are from Canada, United Kingdom, Uruguay, Sri Lanka and Australia.

<sup>21</sup> In 2014, no UNAT judgment was issued in French as the original language.

<sup>22</sup> In 2014, 44 per cent of appeals were filed by staff members of the funds and programmes, and 18 per cent by the staff of peace-keeping operations (*Eighth Activity Report of the Office of Administration of Justice*, op. cit., para. 10).

Justice ([www.un.org/en/oaj](http://www.un.org/en/oaj)) and, in July 2011, of an electronic system for the management of cases on line are clearly going in this direction. Once again, the results appear to be convincing: between twelve and 14 months are currently necessary for a case to be completed by the UNDT, in contrast with nearly five years under the former system.<sup>23</sup>

### **An incomplete reform**

As might be expected of any project of such scope in a system that is as complex as the United Nations, the reform of the internal justice mechanisms has not yet been fully carried through. From the outset, the process was conceived as being dynamic, and substantive changes have been made since 2009. However, important problems remain.

#### *Substantive changes since 2009*

The legal framework of the reformed system is continuing to develop in accordance with the needs felt for further and more specific measures. One of the main illustrations of this dynamic process is the adoption by the General Assembly of the “Code of Conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal”.<sup>24</sup> The objective of the Code is the “public confidence” that is necessary in the internal justice system.<sup>25</sup> The Code consists of seven principles, which include traditional considerations relating to the independence, impartiality, integrity, fairness and competence and diligence that are required of judges, as well as more original requirements concerning “propriety” of conduct that have to be respected by judges, and the concern for transparency.

Following certain hesitations, which were symptomatic of the tensions that remain between the principal actors in the system, namely Member States, the Administration and the judges, the General Assembly supplemented the Code of Conduct with a complaint procedure in the event of the possible misconduct of judges. This is based essentially on the unanimous opinion of the judges concerning the conduct of one of their peers.<sup>26</sup> This mechanism offers the advantage of preserving judicial independence and is in conformity with the practice of several international organizations.<sup>27</sup>

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<sup>23</sup> A/67/547, para. 38.

<sup>24</sup> The text of the Code is annexed to A/RES/66/106.

<sup>25</sup> Ibid., preamble, para. 6.

<sup>26</sup> A/67/265, Annex VII, para 2.

<sup>27</sup> Ibid., paras 3 and 4.

This significant progress could soon be supplemented by a further development, if the General Assembly manages to adopt a “single code of conduct for all legal representatives”,<sup>28</sup> after somewhat curiously having supported a draft that would only have covered external legal representatives.<sup>29</sup>

Since the establishment of the Office of Administration of Justice, which coordinates the whole of the formal system, the methods used in the internal justice system of the United Nations have become decidedly more professional. The support provided to staff members by one of the units of this Office, the Office of Staff Legal Assistance (OSLA), is one of the central pillars of the new structure. The assistance furnished by OSLA offers clear benefits to potential appellants. In contrast with the possibility for staff members to represent themselves or to be represented by a colleague who is in service or retired, OSLA provides professional and objective legal expertise. Its assistance is free of charge, which is an essential advantage in countries where recourse to an external lawyer could be very costly and not particularly effective. Symbolically, the Secretary-General, who is nevertheless the one who is most directly exposed to the consequences that might be expected from the continued operation of OSLA, has expressed clear support for a service which, because it encourages the “effective and appropriate utilization” of the system and “acts as a filter”, therefore offers “benefits to both staff members and the Organization”.<sup>30</sup>

In a context of substantial budgetary restrictions, the question of the financing of the assistance provided to staff members is clearly sensitive. No method of compulsory contribution is fully satisfactory, and the proposal of the Secretary-General that the Organization “continue to fund the entire cost” of OSLA<sup>31</sup> would not currently appear to be acceptable to the General Assembly, which has finally decided that the financing of OSLA will be supplemented, on an experimental basis, by a voluntary contribution by staff members amounting to 0.05 per cent of their monthly net base salary.<sup>32</sup> The fact that staff members are increasingly convinced, and legitimately so, that they are entitled to legal aid could hinder the establishment in practice of this method of financing.

### Continuing uncertainties

The renovation of the mechanisms of the administration of justice was launched within the broader framework of the “human resources reform in the

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<sup>28</sup> A/RES/69/203, para. 44

<sup>29</sup> A/RES/68/254, para. 38.

<sup>30</sup> See A/68/346, paras 123 and 124.

<sup>31</sup> *Ibid.*, para. 121.

<sup>32</sup> A/RES/68/254, para. 33.

Organization”.<sup>33</sup> The objectives of the reform are therefore primarily administrative and financial, as it is called upon to participate in the improved overall management of the Organization and its staff, without giving rise to costs that the main contributors to the system would refuse to meet. Clearly, this objective does not prevent the new system from offering, from the viewpoint of international law, better guarantees of independence and impartiality than the one it replaced. Nevertheless, the interests of the rule of law remain, to a certain extent, subordinate to those of good management.<sup>34</sup>

The tensions inherent in this approach sometimes come to light. For example, in 2012, the General Assembly noted that “some decisions taken by the Tribunals may have contradicted the provisions of General Assembly resolutions on human resources management-related issues”.<sup>35</sup> In this respect, the judges of the UNDT expressed their “deep concern about this conclusion because it constitutes an interpretation of judicial decisions by a legislative body. In doing so, the legislative body exceeds the well-known and generally accepted principle of separation of powers that draws a clear distinction between the competencies of each body.”<sup>36</sup>

In the limited context of the present contribution, only two examples will be cited of the persistent uncertainties that illustrate this tension between justice and management.

The first concerns the scope of the competence *ratione personae* of the new Tribunals. As a result of the agreements concluded by the Secretary-General with specialized agencies and other entities covered by the Common System of terms and conditions of employment, the UNAT can hear disputes covering a large part of the United Nations system.<sup>37</sup> However, these mechanisms remain inaccessible to a significant number of persons who, without being United Nations officials, have an employment relationship with the Organization, such as “individual contractors, consultants, personnel under service contracts, personnel under special service agreements and daily paid workers”.<sup>38</sup> And yet, to reflect the current reality of the United Nations, one of the objectives of the

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<sup>33</sup> A/RES/59/283, ninth preambular paragraph.

<sup>34</sup> Symbolically, the General Assembly is always careful to invite “the Sixth Committee to consider the legal aspects of the report to be submitted by the Secretary-General, without prejudice to the role of the Fifth Committee as the Main Committee entrusted with responsibilities for administrative and budgetary matters” (for example, A/RES/69/203, para. 49).

<sup>35</sup> A/RES/67/241, para. 8.

<sup>36</sup> A/68/306, Annex II, para. 9.

<sup>37</sup> The UNAT is open, for example, to staff members of the International Court of Justice, the International Tribunal for the Law of the Sea, the International Civil Aviation Organization and the United Nations Relief and Works Agency.

<sup>38</sup> A/RES/64/233, para. 8(b).

reform was to offer recourse to effective mechanisms to resolve disputes for all categories of personnel, whatever their status.<sup>39</sup>

The most advanced proposal in this respect concerns contractors and consultants employed by the United Nations, who could be subject to disputes of some importance.<sup>40</sup> The Secretary-General specified the characteristics of potential expedited arbitration procedures for the resolution of disputes between these categories of staff and the Organization.<sup>41</sup> However, the General Assembly confined itself to taking note of this proposal, preferring to continue examining it, rather than to take the necessary measures for its implementation.<sup>42</sup> Admittedly, as indicated by the Secretary-General himself, the introduction of such procedures would require “significant additional resources”.<sup>43</sup>

The General Assembly’s circumspection is also perhaps related to the fact that the introduction of such a procedure would only provide a partial response to the problem of the determination of the real scope of the new system of administration of justice *ratione personae*. As the Secretary-General himself has admitted, several categories of persons with a professional relationship with the United Nations would not be covered by the mechanism that he proposed. These would include, among others, United Nations volunteers and other volunteer workers, interns (whose numbers are estimated at between 4000 and 5000), as well as experts on mission who are not considered to be consultants (including UNAT judges and members of the International Court of Justice) and “officials other than Secretariat officials” (including the judges of the UNDT).<sup>44</sup> There is therefore a real persistent difficulty, which denies effective and credible recourse to eminent actors in the United Nations system, as well as to precarious young professionals.

The second example of a persistent uncertainty in the system concerns the delicate question of the accountability of staff members. This requirement responds to the wish expressed at the 2005 World Summit to develop “an efficient, effective and accountable Secretariat [...] in a culture of organizational accountability, transparency and integrity”.<sup>45</sup> The Statutes of both Tribunals provide that they “may refer appropriate cases to the Secretary-General [...] or

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<sup>39</sup> A/RES/67/241, para. 50.

<sup>40</sup> The Secretary-General estimates the numbers of such staff at 80,000 (A/67/265, Annex IV, para. 44).

<sup>41</sup> Ibid., paras. 3 to 5.

<sup>42</sup> A/RES/67/241, para. 51.

<sup>43</sup> A/67/265, Annex IV, para. 46.

<sup>44</sup> Ibid., Annex VI, para. 1.

<sup>45</sup> A/RES/60/1, para. 161.

the executive heads of [...] United Nations funds and programmes for possible action to enforce accountability”.<sup>46</sup>

The mechanisms therefore exist in law for staff members of the Organization to be held accountable for their conduct. However, this measure has only been implemented timidly: in 2014, only four cases were referred to the Secretariat by the UNDT, and none by the UNAT. However, in three cases the latter found that the UNDT had applied Article 10(8) wrongly.<sup>47</sup> As emphasized by the President of the UNDT, “it is very difficult, if not impossible, to achieve any positive action in regard to staff members [...] regarding accountability.”<sup>48</sup>

It would therefore be premature to conclude that the new system of administration of justice has fulfilled the objective of the “the accountability of managers and staff members alike”.<sup>49</sup> In practice, this aspect of the reform will perhaps remain incomplete. It would appear that the General Assembly has decided to take other approaches, not through judicial means, but management tools, to ensure the “accountability of all persons where violations of the Organization’s rules and procedures have led to financial loss.”<sup>50</sup>

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<sup>46</sup> Article 10(8) of the Statute of the UNDT and Article 9(5) of the Statute of the UNAT.

<sup>47</sup> Eighth Activity Report of the Office of Administration of Justice (op. cit.), paras 17 and 36.

<sup>48</sup> A/67/538, p. 8.

<sup>49</sup> A/RES/61/261, para. 4.

<sup>50</sup> A/RES/68/254, para. 42.



# EVOLUTION OF THE WORLD BANK GROUP'S INTERNAL JUSTICE SYSTEM

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Alison Cave

**I**n my presentation, I discuss the evolution of the World Bank Group's internal justice system. I look at how and why it was established and how it has changed over time. I also discuss current initiatives to change the institutional culture and approach to conflict.

The system developed over four distinct phases: the establishment of the formal services; the establishment of the informal services; reform and integration; and inculcating a culture of conflict competence.

## *Establishment of the internal justice services*

The International Bank for Reconstruction and Development (IBRD or World Bank) was established in 1945. Additional institutions, namely the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), were established in 1956 and 1988, respectively. Together, all of these institutions form the World Bank Group (WBG).

The WBG's first "grievance process" was Administrative Review, through which staff could submit a personnel decision for reconsideration by management. A staff member had to do this on his or her own. However, the staff gained support in 1972 with the establishment of the Staff Association, which provided counseling to staff on handling grievances and worked collectively to uphold staff rights.

*Establishment of the formal services:* by 1976, the Administrative Review had come to be regarded as a "rubber stamp" for management decisions. An Appeals Committee was established that year to handle appeals against administrative review decisions. The World Bank Administrative Tribunal (WBAT) was established in 1980 to hear appeals against the recommendations of the Appeals Committee.

*Establishment of the informal services:* by the late 1980s, the WBG had begun to look seriously at adding alternative dispute resolution (ADR) services to its conflict resolution system as a means of resolving disputes before they became adversarial and costly to the institution and its staff. Accordingly, the Ombudsman function was established in 1991 and an Ombudsman recruited. In 1993, a programme of volunteer peer counsellors, known as Anti-Harassment Advisors, was launched in Washington and in country offices.

Although not an informal service, the Office of Professional Ethics (later the Office of Ethics and Business Conduct) was established in 1991. In addition to maintaining the code of conduct and providing training and advice on ethics, it conducted misconduct investigations.

### **The 1998 and 2009 reforms**

The WBG undertook its first systemic review of the grievance process in 1998. This review recommended: strengthening provision for informal conflict resolution; increasing the independence of the system; strengthening procedural safeguards for staff using the system; and expanding access to staff in country offices.

To strengthen the informal conflict resolution mechanisms, administrative review was abolished. An Office of Mediation Services was established and began work in 2000. An additional Ombudsman was recruited and Staff Association volunteer counsellors, trained by the Appeals Committee, began advising staff who were using the Appeals Committee.

The Statutes of the WBAT were revised in 2001 to enhance its actual and perceived independence. The revisions gave the WBAT the power to make binding judgments, including the reinstatement of terminated employees, to consider similar cases together and to extend judgments to similarly situated staff. The process of selecting and renewing the terms of the judges of the WBAT was amended to incorporate external expertise and to give the Staff Association a more formal role. Also in 2001, the Department of Institutional Integrity was established to investigate fraud and corruption. It took over internal misconduct investigations from the Office of Ethics and Business Conduct (EBC).

In 2005, the Anti-Harassment Advisors programme was expanded and revised to become the Respectful Workplace Advisor (RWA) programme. More RWAs were recruited to cover all country offices with 15 or more staff. At present, nearly all country offices have at least one RWA.

*The 2009 reform:* a 2007 review of the conflict resolution system and a simultaneous review of the Department of Institutional Integrity resulted in a substantial reform of the system in 2009, informed by contemporaneous changes

at the United Nations and the African Development Bank. The main changes included:

- *The reform of the Appeals Committee*: the 2007 review recommended that the Appeals Committee become less "legalistic" and return to its origins as a peer review body. Accordingly, in 2009, the Appeals Committee was transformed into the current Peer Review Services. Its procedures became lighter, with staff and managers preparing and presenting their own cases. Although parties may not have legal representation in hearings, they are still allowed access to legal counsel to help prepare cases. Peer Review panels elect their own chairs, instead of automatically being headed by a manager.
- *Enhancements to the independence of the WBAT*: changes to the Appeals Committee necessitated changes to the WBAT. As Peer Review became less legalistic, it was decided that termination and investigation cases could go directly to the WBAT. Peer Review transcripts would no longer be available to the judges. The WBAT was moved physically off the premises of the WBG and gained greater budgetary independence. The WBAT became distinct from the conflict resolution system.
- *Whistleblower protections* were established in 2008, including protection for staff using the internal justice services.
- *The Internal Justice Council*, a governance body, was established with representation from all stakeholder groups: Ombuds/RWA, Peer Review, Mediation, Human Resources, Legal, EBC, Integrity and the Staff Association. The WBAT is present as an observer.
- *An Internal Justice Coordinator's Office* was established to ensure coordination between the various services, compile and publish statistics, conduct studies and serve as the secretariat to the Internal Justice Council.
- *Internal misconduct investigations* were moved back to the Office of Ethics and Business Conduct and internal investigation procedures were updated and codified.
- *Focus on country offices*: a country office-based Ombuds and regional mediators were recruited, and the Peer Review services began selecting panelists located in country offices.

In addition, a post of legal counsel was provided to the Staff Association. Emphasis was placed on conflict management awareness, training, prevention and early resolution using informal systems, while flexibility of access was maintained.

### *Effects of the 2009 reforms*

Since the introduction of the 2009 reforms, there has been a considerable improvement in the functioning and viability of the internal justice and related

services. More staff are aware of and willing to use the services, with usage increasing from 7 to 11 per cent of the staff between 2009 and 2014. Most cases (95 per cent) are addressed through the informal system. More country office staff are using the internal justice services, although they tend to use informal services more often. The presence of regional mediators increased country office use of mediation from 13 to 36 per cent of cases between 2009 and 2014, while the use of Ombuds services by country office staff has increased from 29 to 42 per cent of cases. Average case processing times in the formal services have decreased, with Peer Review case processing times falling from eight to three months, and the processing time for the WBAT falling from twelve to eight months.

### *Creating a culture of conflict competence*

The World Bank Group has all the necessary conflict management structures in place, but is now focusing on transforming its culture and approach to conflict. The current organizational change initiative presents both challenges and opportunities. There is still fear of the system by staff and managers. Certain groups of staff (administrative staff, those on fixed-term contracts and visa-dependent staff) are wary of using internal justice services. In order to combat real and perceived retaliation or reprisal and increase comfort in addressing conflict, the WBG is focusing on the following initiatives:

- *Improving conflict competence*, starting with managers and human resource officers, and then the staff at large. Conflict management is now one of the “core competencies”, although this aim still needs to be supported by incentives.
- *Consistent messaging from the top*, with the desired behaviour being modelled from the top down.
- *Instilling a corporate mission and values consistent with a conflict management approach*. The WBG is placing emphasis on collaboration, learning and smart risk-taking as part of day-to-day operations.

However, culture changes slowly. The WBG will monitor both the use of the internal justice services and the attitudes of staff and management to managing conflict to ensure success in becoming an organization that manages workplace disputes constructively.

## THE ILO ADMINISTRATIVE TRIBUNAL: SHAPING THE INTERNAL REVIEW PROCESS

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Annika Talvik<sup>1</sup>

**T**he International Labour Organization (ILO) is best known around the world for its efforts to promote decent employment opportunities and workers' rights. However, increasing numbers of people, especially those employed by international organizations, also rightly associate the ILO's name with its Administrative Tribunal, the ILOAT. This reputation seems well-deserved. Today, over 55,000 officials working for organizations that enjoy immunity from legal process before national courts, have the right to bring their employment-related complaints before this independent international judicial body hosted by the ILO.

Created in 1946, the ILOAT is the successor of the Administrative Tribunal of the League of Nations set up in 1927, and is therefore the most senior of the international administrative tribunals. The stability of the ILOAT and the quality of its decisions, drafted by high-level professional magistrates,<sup>2</sup> has certainly contributed to its reputation. The ILOAT's competence to consider complaints alleging non-observance – in substance or in form – of the terms and conditions of employment of international officials has expanded considerably over time. Soon after its creation in 1949, it was decided to open up its jurisdiction, in addition to the ILO itself, to “any other intergovernmental international organisations approved by the Governing Body”,<sup>3</sup> and since 1998 non-governmental organizations have also been allowed to become

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<sup>1</sup> The views expressed herein are those of the author and do not necessarily reflect those of the International Labour Organization.

<sup>2</sup> According to established practice, ILOAT judges are appointed from amongst persons holding or who have held high judicial office, with account being taken of the need for an overall equilibrium at the linguistic level, as well as in terms of different systems of law and geographical representation.

<sup>3</sup> International Labour Conference, *Record of Proceedings*, 32nd Session, 1949, pp. 409-410.

parties to its Statute,<sup>4</sup> provided that they meet certain conditions.<sup>5</sup> As a result, some 60 international organizations, including many from outside the United Nations system, have to date accepted the jurisdiction of the ILOAT.

The broad membership and remarkable longevity of the ILOAT have enabled it to develop a rich case law, currently consisting of some 3500 judgments, which is a valuable source of judicial wisdom in matters such as due process and good governance. Over the years, the ILOAT has dealt with an extremely wide range of issues, covering both substance and procedure. As a single jurisdiction, issuing judgments as both the first and last judicial authority, it necessarily examines the entire sequence of events that have contributed to the contested outcome, including any internal review of the matter carried out by the defendant organization. The internal appeal process, also known as the pre-litigation procedure or “step(s) below”,<sup>6</sup> since it immediately precedes judicial review, commonly consists of an administrative or management review of the challenged decision and a review by a joint advisory peer review body. The ILOAT has, through its jurisprudence, not only emphasized the usefulness of internal review, but has also greatly contributed to shaping it, where it exists, into a more effective and fair process.

#### *Internal review: What for?*

In the view of the ILOAT, the internal appeal process is an “extremely significant element of the entire system of review of administrative decisions affecting the rights of staff.”<sup>7</sup> The ILOAT has consistently held that an internal appeal procedure that works properly is an “important safeguard of staff rights and social harmony in an international organization.”<sup>8</sup> While the existence of an internal appeal mechanism is not a *conditio sine qua non* for accepting the Tribunal’s jurisdiction, and its absence is not therefore a fatal flaw per se, it is nonetheless considered desirable and useful as it helps to prevent litigation and thus reduce the workload of the ILOAT.<sup>9</sup> Internal appeal procedures are, according to the ILOAT, designed and intended to contain conflict within the boundaries of the organization by bringing fair, satisfactory, rapid and less

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<sup>4</sup> ILO, Governing Body, doc No. GB.271/PFA/11/2.

<sup>5</sup> The conditions of eligibility are set out in the Annex to the Statute of the ILOAT.

<sup>6</sup> de Cooker, C. (2012): “Improving the steps below: Peer review in the internal justice system of international organizations”, in *The Administrative Tribunal of the Asian Development Bank: 20 years of operation*.

<sup>7</sup> Judgment No. 3222, §9.

<sup>8</sup> Judgment No. 3184, §15.

<sup>9</sup> Judgment No. 2312, §5.

expensive resolution to many disputes at an earlier stage.<sup>10</sup> It is evident to the ILOAT that both the complainant and the organization benefit from resolving the dispute through a fair internal appeal process, as opposed to costly and time-consuming litigation.<sup>11</sup> The non-judicial nature of internal appeal procedures allows for matters of equity and good management to be taken into account, whereas the ILOAT itself will rule primarily in law.<sup>12</sup> Apart from potentially reducing the number of complaints filed with the ILOAT, the existence of an internal appeal mechanism also greatly facilitates the work of the Tribunal in the event of a complaint by identifying the material issues of fact and law and by providing a full account of the administrative handling of the dispute.<sup>13</sup> The fact-finding carried out by the appeal body, when done properly, also normally makes it unnecessary for the Tribunal to reweigh the evidence that was presented at the pre-litigation stage.<sup>14</sup>

An internal appeal process also serves another important purpose. It is designed to allow the final decision-maker to take an informed final administrative decision on the disputed matter. Indeed, where an appeal body exists, it is the latter's recommendation that brings the appeal procedure to a close. In this context, the internal appeals procedure may prove helpful in ensuring that the subject matter of the grievance, as well as the author, date and the addressee of the challenged decision are "identified with some particularity."<sup>15</sup> Moreover, the ILOAT has recognized that the purpose of an appeal body, where it exists, is to provide the ultimate decision-maker not only with a coherent presentation of evidence and argument, but also with its views.<sup>16</sup> However, the conclusions of an appeal body are entitled to "considerable deference" only "as long as the Tribunal is satisfied that the appeal body has undertaken a comprehensive and thoughtful consideration of the evidence and the applicable principles and its conclusions are rational and balanced."<sup>17</sup> When a recommendation of an appeal body involves some error or irregularity which has been carried into the final decision of the executive chief of the organization, then the decision will be set aside by the Tribunal.<sup>18</sup> The dealings of the internal appeal body

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<sup>10</sup> Judgments Nos 1317, §31 and 2312, § 5.

<sup>11</sup> Judgment No. 3222, §9 and 10.

<sup>12</sup> Judgment No. 995, §5.

<sup>13</sup> Judgments Nos 1317, §31; and 3435, §4.

<sup>14</sup> Judgment No. 3447, §8.

<sup>15</sup> Judgment No. 3222, §9.

<sup>16</sup> *Ibid.*

<sup>17</sup> Judgments Nos 2295, §10; and 3422, §3.

<sup>18</sup> Judgment No. 63, §4.

must therefore withstand the scrutiny of the Tribunal or, in other words, it has to be “working well.”<sup>19</sup>

*Internal review: Tips for success*

For an internal appeal body to fulfil its role effectively, it must meet some basic requirements of fairness, thoroughness and objectivity. The members of an internal appeal body are required to execute their duties in a “fully independent manner” and have to be impartial and objective not only in fact, but must also be perceived as being so, since this is essential to gain staff confidence.<sup>20</sup> In addition, as noted above, an internal appeal body has broader powers of review than the Tribunal, as it may take into account considerations of expediency, while the ILOAT is confined to determining whether the impugned decision was in conformity with the applicable rules.<sup>21</sup> The appeal body must be aware of its broad power of review and exercise it properly.<sup>22</sup> The ILOAT also considers that, as “a primary trier of fact”, the appeal body has the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said,<sup>23</sup> while it is no secret that the ILOAT hardly ever holds oral hearings.<sup>24</sup> The appeal body must therefore, if the circumstances of the case so require, hear evidence and make its own findings of fact, instead of relying on the assertions of one party.<sup>25</sup> The right to a hearing requires that complainants should be free to put their cases, either in writing or orally; the appeal body is not obliged to offer the complainants both possibilities.<sup>26</sup> Respect for due process includes allowing complainants the opportunity to acquaint themselves with the evidence.<sup>27</sup> For the sake of legal security, in making its recommendations, an internal appeal organ should not only pay due consideration to the applicable rules and general principles, but should also follow the interpretation of applicable normative legal documents decided by the Tribunal.<sup>28</sup>

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<sup>19</sup> Judgment No. 2671, §11.

<sup>20</sup> Judgments Nos 3369, §5; 2671, §11; and 3184, §15.

<sup>21</sup> Judgment No. 158, §4.

<sup>22</sup> Judgments Nos 158, §4; 3032, §10 and 3077, §3.

<sup>23</sup> Judgment No. 2295, §10.

<sup>24</sup> The last oral hearing held by the Tribunal dates back to its 67th Session in 1989.

<sup>25</sup> Judgment No. 3219, §10.

<sup>26</sup> Judgment No. 3023, §11.

<sup>27</sup> Judgments Nos 69, §2; and 3065, §8.

<sup>28</sup> Judgment No. 3450, §8.

However, guaranteeing effective internal review does not only lie with the appeal body itself. The ILOAT considers that organizations need to “play along” and ensure that the conditions for effective review are met, by either actively engaging in or by abstaining from certain types of action. Thus, organizations have a positive obligation to guarantee that internal appeal procedures move forward with reasonable speed, namely by providing the appeals body with adequate staffing and means.<sup>29</sup> Furthermore, the administrations of international organizations have to assist staff in the exercise of their recourse.<sup>30</sup> In this regard, the ILOAT considers that, while rules of procedure must be strictly complied with, they must not be construed too pedantically or set traps for staff members who are defending their rights.<sup>31</sup> For instance, where an internal appeal is lodged within the required time limit, but fails to comply with the formal requirements set down in the applicable rules, it is for the organization, in the exercise of its duty of care, to enable the complainant to correct the appeal by granting him or her a reasonable period of time in which to do so.<sup>32</sup> Organizations must also ensure that administrative decisions are properly supported by reasons, especially where the executive chief of the organization decides not to accept the recommendation of the internal appellate body.<sup>33</sup> In this context, “his duty to give reasons is not fulfilled by simply saying that he does not agree with the appeal body.”<sup>34</sup>

Moreover, an item that forms part of the proceedings that led to the impugned decision may not be withheld from the appeal body’s scrutiny, at least not without providing a reasonable explanation for such a refusal, or the complainant’s appeal cannot be reviewed properly.<sup>35</sup> It is interesting to note in this connection that, should a claim of confidentiality be made, it is for the party making that claim to establish the grounds upon which the claim is based.<sup>36</sup> Such a claim does not prevent evidence from being submitted, but simply means that precautions may be taken to maintain confidentiality. Finally, organizations must refrain from taking any retaliatory action against staff for using internal appeal mechanisms. Such action is considered by the ILOAT as the most serious breach of the rights of international civil servants, warranting severe sanctions.<sup>37</sup>

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<sup>29</sup> Judgment No. 2197, §33.

<sup>30</sup> Judgments Nos 2282, §11; and 2345, §1(c).

<sup>31</sup> Judgment No. 3034, §15.

<sup>32</sup> Judgments Nos 2882, §6; and 3127, §10.

<sup>33</sup> Judgment No. 2278, §9.

<sup>34</sup> Judgment No. 2092, §10.

<sup>35</sup> Judgment No. 3234, §11.

<sup>36</sup> Judgment No. 2315, §28.

<sup>37</sup> Judgments Nos 2540, §27; and 2282, §11.

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It is fairly clear from the above that the ILOAT sees merit in developing effective internal means of redress for all decisions affecting the terms and conditions of employment of staff members. According to an informal survey conducted in July 2014 by the ILO among the organizations participating in the present Conference, most have in place some sort of internal review procedure for staff grievances. For those organizations where such procedures do not exist yet or are ineffective, the guidance offered by the ILOAT, through its jurisprudence, on the administration of internal review provides sufficient elements to establish an effective procedural framework for dealing with grievances. Even in small organizations with more limited resources, the creation of mechanisms oriented towards fact-finding which facilitate informed decision-making should be encouraged. All that is required, in addition to a genuine commitment to transparency, accountability and general good governance of international organizations, is to build the relevant elements of the *corpus juris* of the ILOAT into these mechanisms.

# 4

## **PEER REVIEW OR FIRST INSTANCE TRIBUNAL? CRITERIA FOR AN EFFECTIVE SYSTEM**



## PANEL DISCUSSION – SUMMARY AND INTRODUCTION

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Anne Trebilcock

The panel discussed the criteria, or perhaps better the elements characterizing an effective system of internal dispute resolution.<sup>1</sup> What should an organization look at when deciding whether to set up a first level tribunal or a peer review system? Or to improve its system when earlier possibilities, such as mediation, have not led to a resolution? Which elements are essential? How might effectiveness be measured?

To identify these elements, reference may be made, inter alia, to the principles of public international law,<sup>2</sup> the decisions of international administrative tribunals,<sup>3</sup> the reflections of their members,<sup>4</sup> the newer field of global administrative law, and especially work on indicators<sup>5</sup> and academic wri-

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<sup>1</sup> The panel consisted of Anne Trebilcock (moderator), Jodi Glasow, Jason Sigurdson and Victor Rodriguez. Jason Sigurdson is Chair of the UNAIDS Staff Association and Vice-President of the Legal Standing Committee of the Federation of International Civil Servants' Associations (FICSA).

<sup>2</sup> In relation to international administrative law, a recent Advisory Opinion of the International Court of Justice showed the court's concern for the notion of equality of arms in the proceedings before it: Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development, Advisory Opinion, ICJ Reports 2012, paras 41-47.

<sup>3</sup> For analysis of various aspects of international administrative law see, for example, Elias, O. (ed.), (2012): *The development and effectiveness of international administrative law: On the occasion of the thirtieth anniversary of the World Bank Administrative Tribunal* (Martinus Nijhoff); and Germond, L. (2009): *Les principes généraux selon le Tribunal administratif de l'OIT* (Pedone).

<sup>4</sup> See for instance Gorman, R.A. "The de Merode decision, and its influence upon international administrative law", pp. 15-30; and Zack, A., "The step below: Can arbitration strengthen administrative tribunals?", pp. 265-270, in Elias (2012), op. cit..

<sup>5</sup> See, for instance: Bories, C. (ed.) (2012): *Un droit administratif global? A global administrative law?* (Pedone); and Davis, K., Fisher, A., Kingsbury, B., and Merry, S. (eds.) (2012): *Governance by indicators: Global power through qualification and rankings* (OUP).

tings.<sup>6</sup> However, time did not allow the panel to go into these elements in the discussion, during which emphasis was placed on practical experience. It was emphasized that factors such as the size and culture of an organization obviously also play a role in making a choice between a peer review mechanism and a first level tribunal.

### *Introductory comments*

In his introductory statement, Victor Rodriguez referred to the move away from peer review in the United Nations internal justice system five years earlier in favour of a two-tier independent structure, consisting of the United Nations Dispute Tribunal (UNDT – first instance) and the United Nations Appeals Tribunal (UNAT). After reviewing criticisms of the former arrangement and the genesis of the new system, he compared the first *generation model* (administrative review, peer review and a single judicial body) with the *second generation* (based on early reconciliation, principles of independence, two-tier proceedings and the provision of legal assistance to both staff and management). Both models rely in the initial stages on the Office of the United Nations Ombudsman and Mediation, which have been considerably strengthened in the United Nations system.

While the *first generation* model uses administrative review by management, followed by a panel of peers to examine claims, with varying degrees of independence and neutrality, the *second generation* system dissociates the roles of administrative review and the defence of cases, which is followed by examination by a single judge, whose decisions can be appealed to a three-judge panel. These judges, appointed by the General Assembly upon the recommendation of the Internal Justice Council, are fully independent. They conduct regular public hearings in the first instance and render public judgements. In contrast, peer review bodies composed of staff (sometimes with an external chair) operate confidentially, often in a less professional manner. They make recommendations to management, and the final administrative decision may be appealed to a single body of judges who are appointed by the governing body of the organization. In the view of Rodriguez, the reformed United Nations system has led to greater accountability among managers.

Another important innovation in the United Nations system has been the creation of an office to provide legal aid to staff. This contrasts with an irregular pattern of legal assistance to staff using peer review mechanisms. The final

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<sup>6</sup> See, for example: de Cooker, C. (ed.) (2005): *Accountability, investigation and due process in international organizations* (Brill); and Kryvoi, Y. (2015): “The law applied by international administrative tribunals: From autonomy to hierarchy”, *The George Washington International Law Review*, 47(2), 267-301.

difference noted by Rodriguez is cost, with the financial burden of the United Nations approach being considerably heavier than a peer review system, which is perceived as being less expensive (without, however, taking into account the time of staff members serving as peers).

In her statement, Jodi Glasow noted that peer review mechanisms share the common goal of resolving employment disputes with an organization, but display variation in their composition, formal or informal operation, and powers. Thus peers may make either an advisory recommendation or a final binding decision following fact-finding. Based on her experience of the World Bank, she outlined the advantages for those involved of a credible and robust peer review system: employee participation and empowerment, greater awareness of the organization's policies and procedures, enhanced conflict resolution skills, lessons learned that are fed into 'best practice' and avoidance of costly litigation. She identified several principles of peer review: it is participatory, designed to be efficient, expeditious and easy to use, is based on equity and fair treatment, and focuses on the resolution rather than the adjudication of a dispute. After tracing the history of peer review in the World Bank Group, Glasow recalled several substantive reforms introduced in 2009 to: expand the number of trained panelists (over 100), provide for referral to informal resolution through mediation, and simplify and streamline procedures (with processing time being reduced to three months). The peer review panel's jurisdiction was redefined so that claims of a legal nature may go directly to the World Bank Administrative Tribunal (WBAT).

Glasow detailed how the procedure operates within the World Bank Group, where many employees accept the outcome of peer review without filing an appeal. Since 2009, senior management has agreed with panel recommendations in 96 per cent of cases. She believes that trust and confidence in the system is established through independence, impartiality and transparency (the rules are published), combined with confidentiality (of the peer review itself). Employees serving as panel members go through a rigorous selection process, undergo training and operate independently. Panel members may recuse themselves or be challenged on the basis of impartiality. Panels are assisted in the process by the Peer Review Services (PRS) secretariat, which is not governed by formal evidentiary standards, as well as by the applicable staff rules and procedures.

According to Glasow, the process is guided by principles of procedural justice, with fair procedures being the best guarantee of fair outcomes and their acceptance as such. These principles include applying the same standard of review to all cases under review, treating similar claims alike and ensuring consistent outcomes in terms of recommendations and remedies. Recommendations are based on WBAT precedent, the facts and the policies and procedures of the World Bank Group.

To ensure that all employees have access to the dispute resolution system, the World Bank Group has provided funds for the Staff Association to employ an attorney to offer legal assistance during the peer review process. However, both staff and managers must write their own submissions to PRS. Glasow also described how the Bank ensures access to justice for employees based in the field (reimbursing travel costs, variable location of hearings, videoconferencing, written proceedings in lieu of a hearing). In conclusion, she noted that peer review provides the organization with lessons learned that can help it prevent disputes. The effectiveness of a peer review process requires continuous reassessment, with employee involvement, so that changes can be made when improvements are needed. The particular peer review system chosen should fit the size and culture of each organization. She stressed the human dynamics of conflicts, noting that most disputes do not have legal concerns at their origin and are not by nature complex.

In his introductory statement, Jason Sigurdson referred to his experience as a member of the Executive Committee of the UNAIDS Secretariat Staff Association, which represents 820 staff in over 80 countries, and as Vice-President of the FICSA Standing Committee on Legal Questions and the FICSA Executive Committee Member for Regional and Field Issues. He recalled that, as noted by Chris De Cooker, as a means of resolving disputes, peer review lies at the crossroads between informal and formal processes. He therefore considered that peer review exhibits a tension because it straddles this fault line, while striving for greater accountability by the organization concerned. He described the appetite for discussion of these issues within FICSA, and the important input of the WHO Staff Association. While emphasizing the importance of dispute prevention (which he described as ‘smoke detection’), he noted that every international organization also needs a formal procedure. In that respect, there are two principal challenges: how to support colleagues in managing conflict in the workplace; and how to have a system that works for everyone in an organization, from the manager to the driver.

Jason Sigurdson noted that some staff representatives are wondering whether peer review has had its day. The processes can be lengthy, as well as professionally and emotionally difficult. Are peer review mechanisms delivering for staff under the different models? He suggested that it is time to learn from the first five years of the United Nations Dispute Tribunal as a way of moving forward, and concluded that this could be a galvanizing moment.

*How does an organization build trust and confidence in its system?*

In relation to this question, Jodi Glasow placed emphasis on the methods of selection, training and possible withdrawal of panelists, along with the confidentiality of the process and accountability through lessons learned. Jason Sigurd-

son highlighted the importance of staff knowing their rights, enjoying access to legal counsel, seeing that justice will be done and having confidence that the system will move quickly (“justice delayed is justice denied”). He called for a transparent appointment process for judges, with security of tenure. Victor Rodriguez added that confidentiality is essential, along with independence in relation to the production of documents.

#### *How can access to justice be ensured?*

Victor Rodriguez noted that representation for staff is often a problem, with funding being the main issue. Reviewing the situation in several different settings, he noted that none of the solutions is fully satisfactory from the employee perspective. Jason Sigurdson agreed that effective representation for all staff is needed, which poses a particular challenge in smaller offices. Equally essential in his view is the commitment by senior management to support the use of dispute resolution mechanisms and to protect employees against retaliation. For legal representation, FICSA is looking into collective legal insurance as a way of bridging the critical gap in access to justice. In relation to greater use of technology, Rodriguez also noted that electronic filing should facilitate access to justice. In the view of Sigurdson, facilities such as Skype offer opportunities, but there is still a problem with different time zones and uneven internet access in various locations. Jodi Glasow reported much success with the greater use of technology, e-submissions and hearings held through video-conferencing. However, if staff members wish to be physically present, travel is reimbursed by the World Bank Group. Legal representation in hearings has been eliminated in the World Bank peer review system, largely because in the past outside counsel for staff did not understand the peer review setting and often proved to be a hindrance to their clients. Now staff obtain helpful advice from the Staff Association lawyer, but put their case in their own words, as do managers, who have to defend their actions. The staff of Peer Review Services advise the panel, fostering consistency, avoiding an undue burden on the staff and resulting in a less adversarial and quicker process. At the same time, this means that it is sometimes not until the actual hearing that the panel can understand the heart and soul of a case.

#### *Assessing whether a dispute resolution system is reliable and robust*

On this question, Jason Sigurdson emphasized that quality is the imperative, but that there are different paths for its achievement. Staff associations may feel that organizations are asking how much internal justice can be bought, but there is a good business case for investment in a process that works well. He wondered whether a peer review model, with proper training for panelists, is

actually cheaper if staff release time is taken into account. Moreover, a peer review model can have collateral benefits, such as demystifying and democratizing the system. In terms of quantification, the length of time, the number of cases, and the perceptions of staff and managers can be measured.

Jodi Glasow emphasized the reliability of the result, with fair decision-making and respectful treatment of staff. Procedures should be visible, consistent, impartial/neutral, transparent and should provide a voice for the staff. Victor Rodriguez agreed that the adequacy of the result is paramount. The first instance level has to respect general principles of law, with access to an appellate body in the second instance.

The open discussion included useful reflections on how a dispute resolution system can help an organization fulfil its mandate in the best possible way. Such a system is not an end in itself. Whichever first level system is used, it is clearly important for it to be backed up by a good judiciary (“the upper level”). One participant referred to United Nations resolutions calling on all international organizations to follow the rule of law.

Other important elements include context, and the avoidance of comparisons between apples and oranges. One participant recalled that the United Nations system has almost 75,000 staff members, which argues in favour of a more formal system. Victor Rodriguez commented that in peer review systems it is essential to have a second level that operates as a normal judicial body. Jason Sigurdson observed that how much it takes to make a peer review system work well should not be underestimated. Justice must be seen to be done. If an appellate tribunal relies only on a panel, does the latter not then become a legal proceeding? He added that professionalism is crucial to the process. Jodi Glasow pointed out that the WBAT does not review the outcome of peer review, but focuses on aspects that the peer review did not necessarily think were important.

One participant speculated on how peer review and a first instance tribunal might be combined. However, Victor Rodriguez questioned the wisdom of such a combination. There should either be a system of peer review making recommendations, followed by a tribunal taking a decision, or a two-tier judicial system. Another participant acknowledged that both systems have pros and cons. A good peer review system draws on balanced and wise people who use common sense to gather and understand facts before making a recommendation. They can also advise an administration about issues that need to be corrected. However, he added that when peer review is used as a first instance tribunal, this leads to difficulties and frustration. Jason Sigurdson wondered whether peer review is experiencing an identity crisis in instances where it is in effect serving as a first instance tribunal.

Another participant pointed out that relatively few cases hinge on delicate legal questions. Most of them involve issues such as the non-renewal of contracts

and discipline, which are heavily dependent on facts. He added that it would be desirable for an administrative tribunal to deal only with 'upstream' issues that affect an organization or system as a whole. Jodi Glasow remarked that peer review is here to stay in the World Bank, where it fulfils an important function of prevention. She also described various steps taken by the Bank to ensure confidentiality, the importance of which was also stressed by Jason Sigurdson. During the discussion, it was noted that it is often the staff member him or herself who speaks about a case.

The moderator concluded that the variety of approaches taken by organizations means that different animals were often referred to together during the discussion. She raised a final question and comment as food for further thought by the panelists and participants. Within the context of each organization, with its own culture and size, what are the imperatives for the system to deliver for the employing organization and for the worker? Clearly, the perspectives of both need to be taken into account.



# REFORM OF THE ADMINISTRATION OF JUSTICE IN INTERNATIONAL ORGANIZATIONS: PEER REVIEW OR FIRST INSTANCE TRIBUNAL?

Victor Rodriguez

When identifying the elements of an effective system of internal dispute resolution in international organizations, one of the main questions is what elements should be taken into account when deciding whether to adopt a peer review system or to establish a first instance tribunal. As we know, during the reform of the United Nations internal justice system, the peer review system was replaced by a first instance tribunal. All other international organizations have maintained a system composed of peer review panels and a single tribunal. What are the advantages and disadvantages of these different systems? In this presentation, I draw on my personal experience of the old and the new United Nations systems to give an inside view.

## *Peer review in the United Nations organization*

Prior to the reform, the formal system of administration of justice in the United Nations Organization was based on a preliminary administrative review requested by a staff member to the Chief Administrative Officer and on the recommendations issued by peer review panels to the Secretary-General. The final decisions of the Secretary-General could be appealed before the single judicial body, the United Nations Administrative Tribunal (UNAdT).

From the beginning of my time in 1992 as Secretary of the Joint Appeals Board (JAB) and the Joint Disciplinary Committee (JDC) in Geneva, the many challenges that I faced included, in particular, a very heavy backlog of appeals and, as a consequence, undue delays of far more than two years in the consideration of cases. Gradually, the secretariat was reinforced with new board members and several legal officers to deal with this backlog and reduce delays in the treatment of cases. The Rules of Procedure of the JAB and the JDC were also

drafted. At the same time, a modification of the Staff Rules in 1993 triggered the implementation of new procedures for suspension of action on contested decisions and conciliation. However, the lack of legal assistance for staff members wishing to appeal a decision has been a recurrent problem in the peer review system that has often not been solved.

The reform of the United Nations internal system for the administration of justice gathered pace in 1994-1995 with, among others, the proposal to transform the JAB into an arbitration panel that could make binding decisions. Although the proposal was not adopted, it had an important consequence. In 1995, the General Assembly abolished the possibility to submit a case decided by the UNAdT for review to the International Court of Justice.<sup>1</sup> This removed the possibility for United Nations staff members to appeal against the judgments of the UNAdT.

In the meantime, there had been a clear improvement of peer review in the United Nations in Geneva, with 98 per cent of the recommendations of the JAB and the JDC being endorsed by the Secretary-General, and a considerable reduction in the time taken for the examination of cases, which fell to 12 months between the filing of a case and the submission of the report to the Secretary-General, and to less than nine months in 2008-2009.

In 2004, the Office of Internal Oversight Services (OIOS) undertook the first collective audit of the United Nations Joint Appeals Boards in New York, Geneva, Vienna and Nairobi. Following this audit, in 2005 the General Assembly requested the Secretary-General to form a panel of external experts to consider redesigning the system of the administration of justice.<sup>2</sup> Despite a very tight timeframe, this exercise was completed within six months in 2006,<sup>3</sup> with the finding that the system was outmoded, dysfunctional and neither professional nor independent. The system was also criticized as being extremely slow, under resourced and inefficient, among other problems.

The Secretary-General and the Staff Associations rapidly reached a general consensus on a total reform of the United Nations system of the administration of justice. Beginning in 2007, the General Assembly took the decision to establish a new system of administration of justice that was independent, transparent, professionalized, adequately resourced and decentralized.<sup>4</sup> Infor-

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<sup>1</sup> A/RES/50/54. The General Assembly noted that the procedure under Article 11 of the Statute of the UNAdT had not proved to be a constructive or useful element in the adjudication of staff disputes, and on the contrary had given rise to confusion and criticism.

<sup>2</sup> A/RES/59/283.

<sup>3</sup> A/61/205, Report of the Redesign Panel on the United Nations system of administration of justice.

<sup>4</sup> A/RES/61/261.

formal resolution was to be a crucial element and there would be a totally new formal system consisting of a two-tier tribunal with a decentralized first instance and an appellate instance. The peer review system that had been in force since 1953 would therefore be abolished. In December 2007, the General Assembly decided upon the future organizational structure of the new system,<sup>5</sup> including the Internal Justice Council, the Office of the Administration of Justice, a new single decentralized Ombudsman's Office and a Mediation Division, the Management Evaluation Unit (MEU),<sup>6</sup> and a two-tier formal system composed of the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), and their registries. Finally, in December 2008, the General Assembly determined the date of the implementation of the new system, the transitional measures and the Statutes of the two tribunals.<sup>7</sup> Over this period, between 2007 and 2009, the JAB team in Geneva contributed to the introduction of the new system, and at the same time reduced the number of appeals to a minimum, as well as the time taken for the consideration of cases, which fell to eight months in the final year.

*Launch of the new United Nations system for the administration of justice  
(1 July 2009)*

Between January and May 2009, the General Assembly appointed judges for the UNDT and UNAT, on the recommendation of the Internal Justice Council, and the Secretary-General appointed the staff of the Office of the Administration of Justice. In June 2009, the new judges were introduced to the system and discussed and adopted the Rules of Procedure of the UNDT and UNAT. By 1 July 2009, although everything was ready in Geneva, New York and Nairobi, it was necessary to start from scratch. All of the new judges, eight for the UNDT and seven for the UNAT, not only came from outside the United Nations, but also from totally outside the sphere of international civil service law. Moreover, the vast majority of the judges proposed by the Internal Justice Council and appointed by the General Assembly represented only one legal system, which is still the case today.

The UNDT started in July 2009 with several requests for suspension of action involving the application of a new practice under the same applicable law. It very quickly became apparent that there was a need for coordination between the judges, as well as between the three registries in New York, Geneva and

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<sup>5</sup> A/RES/62/228.

<sup>6</sup> The roles of review (MEU) and defence (Office of Human Resources Management - OHRM) are now dissociated. The MEU conducts an impartial and objective evaluation of the administrative decision, with a significant number of cases being resolved at this stage.

<sup>7</sup> A/RES/63/253.

Nairobi, requiring weekly and even daily teleconferences. The greatest challenges therefore consisted of the judges being new to international civil service law and the need for coordination between the three sites. Nevertheless, the holding of regular public hearings, the clarification concerning the production of documents (the disclosure of confidential documents) and the public judgments of the first instance tribunal, in comparison with the confidential proceedings of the peer review system, have improved the administration of justice in the United Nations. The backlog of cases from the previous system has been fully absorbed and a significant number of oral hearings have been held and judgments issued. The new system constitutes an important step in ensuring the independent administration of justice with the creation of the Internal Justice Council and the Office of Administration of Justice, and the establishment of the right of both parties to appeal first instance judgments to the UNAT.

## Conclusion

The new United Nations system for the administration of justice has now been in operation for five years, which is a relatively short period. Several years will still be needed for its consolidation and before firm conclusions can be drawn. However, the introduction of the new system is irreversible and constitutes important progress for international civil service law.

However, the vast majority of international organizations still have an internal system of justice based on peer review and a single judicial body. This type of system is based on the model developed by the League of Nations in the 1930s. With the introduction of a new system of internal justice based on the principles of independence and two-tier proceedings, the United Nations has adopted a model that could be described as *second generation*, in contrast with the model developed by the League of Nations, which may be labelled *first generation*.

## Peer Review Panel and First Instance Tribunal

### Elements of comparison

Strengths	Weaknesses
<p><b>Peer Review Panel:</b></p> <ul style="list-style-type: none"> <li>■ Panel of peers: staff participation offers knowledge from inside the system, and panels are very often provided with legal support (secretariat);</li> <li>■ Advisory panels issuing non-binding recommendations are more flexible and better adapted to the specificities of each organization;</li> <li>■ Costs: perceived as being less expensive.</li> </ul> <p><b>First Instance Tribunal:</b></p> <ul style="list-style-type: none"> <li>■ The independent administration of justice through the Internal Justice Council and the Office of Administration of Justice;</li> <li>■ Early informal resolution is a crucial element of the system, with emphasis on early reconciliation, the strengthening of the Office of the Ombudsman and the creation of a mediation division;</li> <li>■ Dissociation of the roles of administrative review (MEU) and defence of cases (OHRM). The MEU conducts an impartial and objective evaluation of the administrative decision, with a significant number of cases being solved at this stage;</li> <li>■ Clear improvement of the system through: <ul style="list-style-type: none"> <li>– public judgments;</li> <li>– regular public hearings at first instance;</li> <li>– production of documents (disclosure);</li> </ul> </li> <li>■ Legal Assistance to applicants: the Office of Staff Legal Assistance (OSLA) has contributed to raising the level of the assistance provided;</li> <li>■ The level of submissions from both parties is generally more professional and there is a clear change in the attitudes and levels of accountability of managers;</li> <li>■ First instance judgments can be appealed by both parties;</li> <li>■ Judges appointed by the General Assembly on the recommendation of the Internal Justice Council.</li> </ul>	<p><b>Peer Review Panel:</b></p> <ul style="list-style-type: none"> <li>■ Independence and neutrality: <ul style="list-style-type: none"> <li>– concerns remain regarding the independence of the panels and the</li> <li>– strength of the position of the chief administrative officer of the organization;</li> </ul> </li> <li>■ Administrative review by human resource services: the same department often performs the administrative review of the case, is responsible for the defence as respondent and drafts the final decision, which marks the end of the exhaustion of internal remedies;</li> <li>■ Advisory panels are often criticized for the lack of objectivity and/or uneven quality of the reports, and also sometimes for their lack of neutrality;</li> <li>■ Slow and cumbersome proceedings (unreasonably long delays) and the level of submissions from appellants is sometimes poor;</li> <li>■ Confidentiality: The confidentiality of the whole procedure results in a lack of transparency;</li> <li>■ Legal assistance to appellants is a recurrent problem that is often not solved, as there are few specialists in international civil service law and lawyers outside the system have a poor knowledge of the applicable law;</li> <li>■ In a system with a single judicial body, there is no appellate body. The exhaustion of internal remedies should not be considered as a first instance tribunal, as it has an advisory function, issuing non-binding recommendations.</li> </ul> <p><b>First Instance Tribunal:</b></p> <ul style="list-style-type: none"> <li>■ The vast majority of UNDT/UNAT judges proposed by the Internal Justice Council and selected by the General Assembly represent a single legal system;</li> <li>■ The first instance tribunal has a single judge (the proposal of a panel of three judges was rejected by the General Assembly), and the existence of three branches of the UNDT in New York, Geneva and Nairobi, combined with single judges, means that there are almost three different cultures;</li> <li>■ Costs: creation of an important administration of justice “machine.”</li> </ul>



## PEER REVIEW: A MECHANISM TO RESOLVE EMPLOYMENT DISPUTES

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Jodi T. Glasow

**M**y objective in this presentation is to explain peer review as a mechanism for resolving employment disputes in international organizations. In so doing, I place particular emphasis on the evolving role of peer review in the World Bank Group.

### *What is peer review?*

The concept of peer review for resolving employment disputes has different meanings for different people, depending on their background and experience. For the purposes of this presentation, peer review may be defined as an internal dispute resolution mechanism which utilizes peers or co-workers in an organization to review a grievance or workplace concern. The peers make either a final binding decision, or an advisory recommendation on how best to resolve the matter.

Although many international organizations have peer review mechanisms, no two mechanisms are alike. There is a general lack of uniformity among peer review systems, not just in their titles (for example, peer review boards, appeals committees, conciliatory committees, or grievance committees), but also in their establishment and operation (in such areas as the composition of panels, appointments of internal/external chairs, how and when staff can access them, and whether they play a binding or advisory role in the organization). Some peer review systems are more legal and adjudicatory in their nature, while others are more informal. Notwithstanding the different designs and compositions, the common objective of peer review is the resolution of employment disputes by peers within an organization.

### *The purpose of peer review*

International organizations recognize that workplace conflict is inevitable, and that it often comes with a high cost for the organization. When conflict is handled poorly, it can affect employee morale and productivity. To deal with these human resource concerns, organizations have established multiple internal channels to resolve grievances. One such channel is peer review. A peer review mechanism for resolving employment disputes can provide management with an opportunity to evaluate a grievance before it is referred to judicial scrutiny, for example by a tribunal. It can also offer a necessary forum for employees to be heard and an opportunity to resolve their concerns.

There are many positive results of including a peer review mechanism in an organization's internal justice system. Specifically, a credible and robust peer review mechanism facilitates the participation of employees in the resolution of workplace concerns through recommendations based on their review of a case. Peer review boosts morale and empowers employees as they become part of the decision-making process for resolving conflict in the workplace. As a consequence of serving on a case, employees become more educated and aware of the organization's policies and procedures. Their conflict resolution skills are enhanced as they learn first-hand the difficulties that arise when conflict is not addressed and issues are not handled properly. Peer review also ensures best practices in institutions, as employees offer "lessons learned" and recommendations to improve policies and procedures based on their review of cases. Finally, peer review avoids costly litigation, as it offers management an opportunity to resolve disputes before they are taken to adjudicatory bodies, such as tribunals.

### *The general principles of peer review*

A peer review mechanism is defined by many principles, the most common of which is that it is a participatory process through which a panel of peers (employees) engage in fact finding and make recommendations. A second principle is that peer review mechanisms are designed to be efficient and expeditious. They should be easy to use, understand and access regardless of an employee's level or location. A third principle is that peer review is based on the principles of equity and fair treatment. Finally, a key principle is that peer review focuses on resolution, not adjudication.

### *History of peer review at the World Bank Group*

The World Bank Group believes that good governance is essential in working towards its development goals. To support good governance within its own

institution, the Group has established an extensive workplace dispute resolution system that includes both informal and formal channels for resolving employment disputes. One of these channels is peer review.

In 1976, the World Bank Group established peer review, in the form of the Appeals Committee, as one of the first channels for the resolution of workplace disputes. Shortly after its inception, the Appeals Committee evolved into a quasi-judicial body with lengthy legal documentation, lawyers representing both parties and intense hearing sessions. As early as 1978, some staff were calling for a review of the peer review mechanism on the grounds that it had become too judicial in nature. Over time, there were many critiques of the system, but two central concerns stood out. First, users of the process expressed concern about the tension and hostility embedded in a process that was designed to resolve employment disputes between staff and managers who, in the majority of cases, had to continue working together after the conclusion of the process. Second, most of the cases presented before the Appeals Committee did not have their origins in legal questions, but rather in an ambiguity in policies and procedures, or their misinterpretation or misapplication. Personality conflicts also contributed to the majority of grievances. After many reviews, it was determined that the fundamental cause of tension was that the Appeals Committee straddled a fault line between a peer review body and a quasi-judicial body, and was being pulled in both directions. To resolve this tension, measures were adopted to return the Appeals Committee to its roots as a true peer review body and to shift judicial processes to the World Bank Administrative Tribunal (WBAT).

#### *The reforms of the peer review process*

In addition to a change of name from the Appeals Committee to Peer Review Services (PRS), many substantive reforms were introduced in 2009 which have changed the manner in which peer review is conducted in the World Bank Group. For example, the composition of panel membership was broadened to ensure a larger, more diverse and representative group of employees, including country office panelists. The World Bank Group currently has over 100 employees trained to serve as panelists. Processes and procedures were streamlined and simplified. As a result, PRS has experienced a significant reduction in the processing time of cases, from an average of 12 months under the former Appeals Committee to three months for PRS.

Another notable change was to the jurisdiction of peer review. PRS still retains broad jurisdiction to review managerial actions, inactions and decisions that employees assert are not consistent with their contracts of employment or terms of appointment. However, the types of cases that PRS can consider were

redefined to ensure that staff members may pursue claims of a legal nature directly with the WBAT. Reforms were also introduced to level the playing field between staff and management. For instance, the parties to a case, both staff and managers, have access to in-house attorneys for counselling, guidance and advice. The World Bank Group has placed emphasis on resolving cases early and informally. For example, PRS adopted mechanisms to refer cases for informal resolution to other channels of the internal justice system, such as mediation. As a result, staff members resolve disputes earlier and informally without having to go through the entire peer review process. To enhance managerial accountability, the decision-maker for the panel's recommendations was changed to include the line vice president of the parties. As a consequence of these many changes, it has been found that many employees accept the outcome of peer review and do not proceed to file an application with the WBAT.

### *How does peer review work?*

Employees of the World Bank Group who wish to avail themselves of peer review must do so within a specific period of time. They have to submit their request for review within 120 calendar days of receiving notice of the disputed employment matter. Once an employee submits a request for peer review, the Chair of PRS reviews the claims to ensure that they are timely and that PRS has the authority to review them. The Chair often refers claims for informal resolution to the mediation office at the outset of the process. If the claims are timely and within the purview of PRS, and the Chair has not opted for informal resolution, the manager responsible for the decision or action at issue is asked to submit a written response to the claims. A panel of three peers is designated to review the claims. Both parties, the staff member and the manager, have the right to raise concerns relating to the designation of the panel.

Once a panel has been designated, it meets to review the written submissions of the parties. If the staff member has elected to have the merits of the claims reviewed through a hearing, the panel decides on the witnesses it wishes to hear. The panel may also ask the parties to produce additional documentation. A hearing is then held, during which the panel questions the parties and the witnesses. Within approximately 21 calendar days of the hearing, the panel submits a written recommendation to the decision-maker (typically the vice president of the parties) on whether the decision or action at issue was consistent with the staff member's contract and terms of appointment. The panel may recommend the award of relief and/or take other corrective measures. The decision-maker then has 30 calendar days to review and take a decision on the panel's recommendation.

If the staff member has elected for the merits of the claims to be reviewed based only on the written submissions of the parties, then each party has the

opportunity to submit an additional final reply/response. The panel does not conduct a hearing and renders its recommendations based only on the written submissions of the parties.

### **Concluding remarks**

Perhaps the first conclusion that may be drawn is that peer review has proven to be an innovative and effective mechanism for resolving employment disputes in international organizations. Given the unique nature of international organizations, it is beneficial for there to be a place in their dispute resolution systems where employment concerns can be reviewed by persons with knowledge, experience and a practical understanding of the organization's rules and policies. Peer review not only fulfills this role, but also acts as an important catalyst for policy changes and improvements. By providing the organization with lessons learned from the review of cases, peer review helps to shift the emphasis of dispute resolution away from cure to prevention. Second, peer review mechanisms are evolving. To be effective, it is important for an organization to reassess continuously the effectiveness of its peer review process and to introduce modifications when improvements are needed. It is essential for an organization's employees to be involved in the planning, development and implementation of peer review to ensure its success. Finally, one size does not fit all. To be successful, each organization must tailor an individualized peer review system to fit its own corporate or organizational philosophy of employee relations. Organizational size and culture play an integral role in determining the type of peer review system that will be best suited to the organization.



# 5

## **ADMINISTRATIVE REVIEW AND MANAGEMENT REVIEW: THE CULTURAL CHANGE TOWARDS EFFECTIVE MANAGERIAL ACCOUNTABILITY**



# THE EXPERIENCE OF THE UNITED NATIONS

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Linda Taylor<sup>1</sup>

**O**n 1 July 2009, the United Nations introduced a new system of administration of justice following a review of the old system by an independent panel of experts (the “Redesign Panel”), which had found that the system was outmoded, dysfunctional, ineffective and lacking independence. In the view of the Redesign Panel, a new redesigned system would be far more effective than an attempt to improve the existing system. It considered that effective reform of the United Nations could not happen without an efficient, independent and well-resourced internal justice system to safeguard the rights of staff members and ensure the effective accountability of managers and staff members.<sup>2</sup>

The Redesign Panel found, *inter alia*, that there was a “prevailing perception” that the old system shielded managers from accountability. It therefore recommended that, to achieve an effective change in management culture, managers and staff members should be held personally accountable for their decisions and actions.<sup>3</sup>

In 2007, the General Assembly decided to establish a “new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.”<sup>4</sup>

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<sup>1</sup> The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

<sup>2</sup> A/61/205, Report of the Redesign Panel on the United Nations system of administration of justice, Summary.

<sup>3</sup> *Ibid*, paras. 121 and 159.

<sup>4</sup> A/RES/61/261, para. 4.

In subsequent resolutions on the administration of justice at the United Nations, the General Assembly has emphasized the importance of developing a culture of dialogue and the amicable resolution of disputes, the importance of good management practice to promote a positive and transparent work environment in order to address the underlying factors that give rise to disputes in the workplace, and the desirability of avoiding unnecessary litigation.<sup>5</sup> The General Assembly has also emphasized the importance of holding individuals accountable where violations of the Organization's rules and procedures have led to financial loss.<sup>6</sup>

### *Management evaluation*

The first step in the formal system of administration of justice in the United Nations is now management evaluation.<sup>7</sup> Except in disciplinary cases, staff members cannot file an application with the United Nations Dispute Tribunal (UNDT) to contest an administrative decision<sup>8</sup> unless they have first requested management evaluation of that decision.<sup>9</sup>

Management evaluation consists of a review of the administrative decision to assess whether it was properly made. The Secretary-General has described management evaluation as “an essential management tool for executive heads to hold managers accountable for their decisions, including in cases where an improper decision has been taken. It will give management an early opportunity to review a contested decision, to determine whether mistakes have been made or whether irregularities have occurred and to rectify those mistakes or irregularities before a case proceeds to litigation.”<sup>10</sup>

In the United Nations Secretariat, management review is conducted by lawyers in the Management Evaluation Unit (MEU) of the Department of Management.<sup>11</sup> The MEU was established by resolution 62/228, in which the Gene-

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<sup>5</sup> See, for example, A/RES/68/254, paras. 13 and 17; A/RES/67/241, paras. 22 and 24; and A/RES/66/237, paras. 11, 16 and 17.

<sup>6</sup> See, for example, A/RES/68/254, para. 42.

<sup>7</sup> Approximately 74,000 staff members have access to the formal system of internal justice, together with former staff members and persons making claims on behalf of an incapacitated or deceased staff member.

<sup>8</sup> What constitutes an administrative decision depends on the nature of the decision, the legal framework within which it was made and its consequences: see, for example, Judgment No. 2010-UNAT-058. The key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms or conditions of appointment: see Judgment No. 2014-UNAT-457.

<sup>9</sup> ST/SGB/2013/3, Staff Rule 11.2

<sup>10</sup> A/61/758, Note to the General Assembly, para. 29.

<sup>11</sup> Separately administered funds and programmes have their own management evaluation procedures.

ral Assembly reaffirmed the importance of the general principle of exhausting administrative remedies before formal proceedings are instituted.<sup>12</sup> The core functions of the MEU include: conducting an impartial and objective evaluation of administrative decisions contested by staff members to assess whether the decision was made in accordance with the rules, regulations and administrative issuances; making recommendations to the Under-Secretary-General for Management on the outcome of management evaluations and proposing appropriate remedies in the case of improper decisions made by the Administration; communicating the decision of the Under-Secretary-General for Management on the outcome of the management evaluation to the staff member within 30 calendar days of receipt of the request if the staff member is stationed in New York, and within 45 calendar days if the staff member is stationed outside New York; proposing means of informally resolving disputes between staff members and the Administration; monitoring the use of decision-making authority and making recommendations to the Under-Secretary-General for Management to address any discerned trends; and assisting the Under-Secretary-General for Management to strengthen managerial accountability by ensuring the compliance of managers with their responsibilities under the internal justice system.<sup>13</sup>

Requests for management evaluation must be filed within 60 days of the date on which the staff member received notification of the administrative decision.<sup>14</sup> Upon receipt, the MEU provides a copy of the request to the manager who took the administrative decision and requests his/her written comments.

The MEU may recommend that the administrative decision be upheld, or reversed in whole or in part, that the request be deemed moot or not receivable, that the matter be settled or referred to the Office of the Ombudsman and Mediation Services.<sup>15</sup> In cases where the MEU recommends that an administrative decision be upheld, a written reasoned response is sent to the staff member setting out the basis for the management evaluation, including a summary of the relevant facts of the request, the comments on the request provided by the manager, the relevant internal rules of the Organization, the relevant jurisprudence of the UNDT and of the United Nations Appeals Tribunal (UNAT), an explanation of why the MEU considers that the administrative decision comported with the rules, and the decision of the Secretary-General on the request.<sup>16</sup> Where the

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<sup>12</sup> A/RES/62/228, paras. 51 and 52.

<sup>13</sup> ST/SGB/2010/9, Organization of the Department of Management, section 10

<sup>14</sup> Staff Rule 11.2

<sup>15</sup> ST/SGB/2010/9, section 10; see also, for example, A/69/227, Report of the Secretary-General on administration of justice at the United Nations, Table 1, which sets out the disposition of management evaluation requests filed in 2013.

<sup>16</sup> See, for example, A/69/227, para. 29.

administrative decision is upheld or the request for management evaluation is deemed not receivable, the staff member has a statutory right to file an application with the UNDT.<sup>17</sup> Either the staff member or the Secretary-General may appeal a judgment of the UNDT to the UNAT on the grounds enumerated in the Statute of the UNAT.<sup>18</sup>

Experience of the first five years of operation of the new system is that management evaluation is an effective mechanism to redress poor administrative decisions and reduce the number of cases that are taken to the UNDT. In a recent report, the Secretary-General observed that a majority of administrative decisions which were upheld or deemed not receivable upon the recommendation of the MEU were not appealed to the UNDT. He also noted that, with respect to the funds and programmes, most cases were resolved at the management evaluation stage.<sup>19</sup>

In 2013, the MEU received 933 requests for management evaluation, of which 818 were closed by the end of 2013.<sup>20</sup> Of these 818 requests, 227 (28 per cent) were resolved through the efforts of the MEU, the manager or with the involvement of the Office of Staff Legal Assistance (OSLA) or the Office of the Ombudsman and Mediation Services. In at least 72 per cent of these requests, the administrative decision was not reversed or modified. The MEU recommended formal settlement for 11 of the 933 requests. With respect to all requests that were not withdrawn, deemed moot or settled, the administrative decision was upheld following a recommendation by the MEU that the decision was consistent with the rules and jurisprudence of the Organization.<sup>21</sup>

Only 127 of the 933 requests received in 2013 (about 14 per cent) had been challenged before the UNDT by 30 June 2014. As at that date, the UNDT had disposed of 87 of the 127 applications, and the position taken in management evaluation was consistent with the disposition by the UNDT in 79 of them (91 per cent).<sup>22</sup>

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<sup>17</sup> Article 2(1)(a) of the Statute of the United Nations Dispute Tribunal (A/RES/63/253, Annex I) provides that the Tribunal is competent to adjudicate applications filed to appeal administrative decisions that are alleged to be in non-compliance with the terms of appointment or the contract of employment.

<sup>18</sup> A/RES/63/253, Annex II, Article 2(1) and (2).

<sup>19</sup> A/68/346, Report of the Secretary-General on administration of justice at the United Nations, para. 12.

<sup>20</sup> A/69/227, Table 1.

<sup>21</sup> *Ibid.*, paras. 33, 34 and 37.

<sup>22</sup> *Ibid.*, paras. 35-36.

*Managerial accountability*

In his 2010 report “Towards an accountability system in the United Nations Secretariat”, the Secretary-General indicated that he had instructed the Department of Management to explore ways and means to relate the findings and decisions of the new system of administration of justice to the performance assessments of managers and staff at all levels, and indicated that he also hoped to use that information to identify and address systemic managerial issues affecting the performance of the entire Organization.<sup>23</sup>

To those ends, the core functions of the MEU include monitoring the use of decision-making authority, making recommendations to the Under-Secretary-General for Management to address any discerned trends and assisting the latter to strengthen managerial accountability by ensuring compliance by managers with their responsibilities under the internal justice system.<sup>24</sup>

The Secretary-General may take concrete measures to actualize managerial accountability as a result of the management evaluation process. These measures have been described in the Secretary-General’s annual reports on the administration of justice at the United Nations, and may include: modifying or changing a contested decision if a manager has improperly exercised his/her delegated authority, thereby withdrawing the decision-making authority of the manager for that particular decision; explaining to the manager why the decision was improper and discussing the lessons learned; referring a case for investigation where the improper exercise of delegated authority by the manager might rise to the level of possible misconduct; placing a note on the manager’s official status file referencing the improper decision (subject to the relevant provisions on filing adverse material in personnel files); introducing specific performance evaluation objectives for the manager where the decision was taken as a result of poor management; requiring the manager to take performance management training; or referring to a poor administrative decision in assessing the performance of the manager.<sup>25</sup>

The MEU may make accountability recommendations respecting requests for management evaluation that are settled, and sometimes also respecting requests in which an administrative decision is upheld or is deemed not receivable, but the manager otherwise caused potential risks for the Organization. In 2013, the MEU made 12 accountability recommendations.<sup>26</sup> In all settled requests, including where monetary compensation was paid, the matter was analysed

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<sup>23</sup> A/64/640, para. 37.

<sup>24</sup> ST/SGB/2010/9, section 10(f) and (g).

<sup>25</sup> See, for example, A/69/227, para. 186.

<sup>26</sup> Ibid, para. 187.

individually to establish whether there was a managerial failure and, if so, how serious it was, whether there was “intent” and the appropriate accountability measures.<sup>27</sup>

### *Lessons learned*

The MEU, in consultation with other offices, has prepared guides for managers on the lessons learned from the jurisprudence of the UNDT and UNAT to support good managerial decision-making. To date, three guides on lessons learned have been disseminated on non-renewal and termination of appointments, the staff selection system and disciplinary matters.

### *Referral for accountability by the Tribunals*

Pursuant to Article 10(8) of the Statute of the UNDT and Article 9(5) of the Statute of the UNAT, the Tribunals may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

## **Conclusion**

Five years into the operation of the new system of administration of justice in the United Nations, there is increased emphasis on managerial accountability in the Organization. Managers understand that their administrative decisions may be challenged by staff members, that they may have to explain those decisions to the MEU and before a judge of the UNDT, and that they are ultimately accountable to the Organization for their decisions.

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<sup>27</sup> Ibid, para. 188.

## THE WIPO EXPERIENCE

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Jasmine Honculada

The World Intellectual Property Organization (WIPO) has a long history for an organization that is relatively young. Established in 1970, WIPO's genesis goes back to the late 19th century through its predecessor, the United International Bureaux for the Protection of Intellectual Property (Bureaux internationaux réunis pour la protection de la propriété intellectuelle - BIRPI). As BIRPI and then WIPO, the organization claims a history spanning over 130 years, thereby sharing seniority with only three other intergovernmental organizations (the International Telecommunication Union, the World Meteorological Organization and the Universal Postal Union) out of nearly 20 United Nations specialized agencies. BIRPI started with a staff of seven in the 1880s, reaching a peak of some 80 staff members in the late 1960s. French was the only working language, which made for a relatively homogeneous workforce. Because BIRPI was small, the leadership style was dominantly centralized in one authority, creating a culture, leadership and management style which were basically familial, direct and personal. When WIPO was established, it inherited the corporate culture of BIRPI.

### *Recent challenges*

WIPO's mandate is to promote innovation. It is therefore committed to forward thinking. In the mid-2000s, there were indicators that the Organization was not getting it right internally and that change was necessary. Dysfunctions in the internal system were manifested through cases brought by staff members against the Organization. Between 2007 and 2014, WIPO averaged six cases a year before the International Labour Organization Administrative Tribunal (ILOAT). Before then, the average had been around 1.5 cases a year.

WIPO had an outdated legal framework. Its Staff Regulations and Rules, established around 1970, had never been extensively reviewed. In the meantime, the Organization had undergone a fundamental transformation due to the rapidly-changing externalities that directly affected it as a service provider. The invention of the Internet and the World Wide Web led to the biggest economic expansion that the world has ever seen. The dot-com boom in the late 1990s gave rise to Internet and information technology companies. Patent applications, trademark applications and other intellectual property rights registration services, which WIPO handles, increased exponentially.

Compared to the relatively slow growth in the number of personnel during the first 80 years of its existence as BIRPI, over WIPO's first 22 years, staff numbers increased by 500 per cent (from 80 to 400). The rise in the number of staff members over the subsequent 20 years was equally phenomenal (from 400 to 1,200).

With rapid growth, tensions were bound to arise. The management and organizational culture had continued in a business-as-usual mode in the face of the rapidly evolving realities and vastly changed organizational demographics. The internal policy and legal framework (designed for a fairly small organization) was fast losing relevance. Where tensions exist, conflict is a natural offshoot. The Organization's processes were not able to cope, as indicated by the findings of ILOAT judgments against WIPO concerning process failure.

WIPO had to transform into a 21st century organization with relevant processes, systems and clearly identified linkages. The Organization's new leadership and management embraced this challenge.

### *Conflict resolution*

Part of the change management initiated in WIPO over the past few years has included its system of conflict resolution. The system used to be highly adversarial, with strong emphasis on formal procedures. Duplicate layers had crept into the system, with a structure built incrementally on a patchwork of measures cobbled together over the years. Delays resulted, with procedural errors. The procedures essentially appeared complicated to the staff. Access to information was like going through a historical maze of administrative instructions, information circulars and their amendments over the years. Where conflict resolution was concerned, management was on the periphery and there was no well-defined feedback mechanism. In this context, administrative review (in the sense of the review of administrative decisions performed by officers other than the manager who has taken the decision) was the prevailing approach, rather than management review (defined as the review of an administrative decision by the manager who has taken the decision in the first place).

If the premise is accepted that the most important professional relationship of staff members is with their supervisor, the lack of clear standards for management accountability had become a recipe for frustration and tension in the workplace. In short, WIPO's internal justice system had become complex and difficult to navigate. It was a challenge to comprehend and, at best, had a very porous feedback mechanism to the managers responsible for the challenged decisions.

### *Reform process: The internal justice review*

To jump-start reform of the internal justice system, three review sessions and round-table discussions were held between November 2012 and March 2013. Various players and stakeholders engaged in a robust and lively discussion to brainstorm, identify and prioritize key issues. In parallel, an independent expert consultant helped with the process of reviewing the legal framework, and specifically the Staff Regulations and Rules and their related administrative issuances. The round-table discussions served the added purpose of feeding into the work of the expert to gain a comprehensive understanding of the context in which the review was taking place.

Consultations were critical for buy-in. Alongside formal meetings, conversations were held in groups and bilaterally. The expert met all the actors in the internal justice system individually. Questionnaires were circulated. The Staff Association was invited to engage in the process.

A Consultative Group was established with the joint participation of the staff and the Administration to tackle the drafting of a revised legal framework. The Consultative Group primarily based its work on the extensive report prepared by the expert, his findings and recommendations. In addition, it invited relevant stakeholders to discussion meetings and solicited written feedback on specific issues. At the end of an intensive two-month work schedule, draft provisions of the relevant Chapters of the Staff Regulations and Rules were agreed to by the Consultative Group. Staff briefings and communications followed to ensure the flow of information. A "Wiki-forum" for group discussions proved useful. In October 2013, amendments to the Staff Regulations and Rules were approved and entered into force on 1 January 2014.

### *Cultural change: Where WIPO is heading*

The resulting enhanced WIPO internal justice system is characterized by the following fundamental principles:

- *Streamlined processes:* duplicate advisory or peer review bodies were either abolished or their mandate refocused. The WIPO Appeal Board was strengthened,

with an expanded membership capable of operating in two panels. The key message is the promotion of justice, not processes.

- *Institutionalized informal mechanisms*: the desirability of engaging in informal dispute resolution was formally recognized and codified in the Staff Regulations and Rules.
- *Sharing of challenges by management and staff alike: a rebalancing of the challenges of conflict resolution*: staff members may have recourse to “high-level supervisors” to seek assistance in resolving conflict in the workplace, which implies the formal recognition of supervisory responsibility in conflict management. Rebuttals of performance management appraisals are now systematically referred to supervisors for comment, with increased engagement in soliciting managerial feedback and perspective. On the other hand, staff members have a statutory duty to contribute to a respectful and harmonious workplace.
- *Strengthened support and complementary systems of human resources management*: the Performance Management and Staff Development System is now in its fifth year of implementation, and is gaining maturity and widespread acceptance as a tool, not only for management, but also for the professional self-development of the staff. For the first time in WIPO, a rewards and recognition programme has been initiated to reward talent in the Organization. The system of results-based management underpins Organization-wide goals all the way down to programme planning and the setting of individual objectives. Competency-based recruitment and the professionalization of the recruitment process have created the platform to identify the talent needed by the Organization and the suitability of applicants.

### *Lessons learned/Reflections*

Change is bound to happen, and changes can result in conflict. The regular review of internal conflict resolution processes therefore needs to be incorporated into organizational life. In the case of WIPO, four decades were too long to wait to overhaul the Staff Regulations and Rules, which are after all the single most important instrument regulating staff life in the Organization.

Moreover, change cannot take place in isolation. Linkages exist, and support systems must necessarily form part of any comprehensive review for effective change. A coherent framework is needed and, in the case WIPO’s internal justice system, it encompasses not only the legal framework, but also human resources systems that reflect best practice.

Management engagement is key in any reform process. Invariably, managers serve as role models to staff. Responsibility and accountability go hand-and-hand.

While the staff are the heart of the organization, human resources management is at the heart of the efficient management of the Organization’s human talent. It is

in the front line in motivating collaboration between management and staff. Human resources must rise to this challenge, as dysfunctions in human resources management trickle down into dysfunctions in staff-management relations.



# ARE RULES JUST POOR SUBSTITUTES FOR A SOUND ORGANIZATIONAL CULTURE?

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Yves Renouf<sup>1</sup>

“*La culture, c’est ce qui reste  
quand on a tout oublié*”<sup>2</sup>

## *The case for organizational culture*

When the terms “management review” are mentioned, two definitions come to mind: the review by managers of complaints, disagreements and misconduct, etc.; and the review of managers in order to assess their leadership and management skills, knowledge and conduct. The terms “effective review”, because of their legal tone, refer to what seems to be a dogma among most international organizations that more rules ensure more equal treatment, more fairness and less abuse of power.

International organizations and their administrative tribunals have over time developed extensive bodies of norms, general principles of law and jurisprudence. Yet, the same problems seem to reappear time and again, and the caseload of tribunals constantly increases.

What I have noticed during this Conference is that people seem to want rules everywhere and for everything. Yet, often, when we try to identify the origin of a problem, it is not a legal problem, but a cultural one. For instance, many forms of harassment have their origin in the absence of a common organizational culture that staff have to integrate upon recruitment. Codes of conduct are

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<sup>1</sup> The views expressed in this paper are only those of the author, and they may not be attributed to the WTO, any of its Members or any staff of its secretariat.

<sup>2</sup> Edouard Herriot, *Notes et Maximes* (“Culture is what is left when everything else has been forgotten”).

generally no longer statements of common sets of values to which staff members are expected to adhere enthusiastically. They have become enforceable rules, or in other words, burdens or impediments.

There are several reasons for the constant increase in the number of appeals and it would be ridiculous to try to identify a single cause. Yet, the examples of CERN and the Global Fund to Fight AIDS, Tuberculosis and Malaria suggest that an arms race towards more extensive and sophisticated written rules may not be the solution. Neither CERN nor the Global Fund are known for their extensive bodies of internal regulations.

Indeed, rule-making sometimes looks like a tool to ensure that nothing changes, that discretionary power remains as discretionary as ever, even if exercised differently, while giving an illusion of justice and the rule of law, and feeding armies of lawyers. You look at an issue, slap some fingers, then act as if you are convinced that, because you have this system in place, people will change their attitude out of fear of being caught. However, criminal law studies suggest that sanctions are frequently an insufficient deterrent, unless the prospect of a sanction is quasi-certain.

Just as the development of armoured warships changed naval warfare tactics and triggered the building of increasingly powerful guns in the XIXth century, the adoption of new norms in international organizations ipso facto saw the development of new ways both of abusing them and of circumventing them. Why is that? One reason is probably the lack of a shared organizational culture. The prevailing culture among many individuals working for international organizations seems to have, over time, drifted from the ideal that presided over their creation and to have grown utterly individualistic and self-centred.

Of course, many of our colleagues selflessly risk their health and live in war-torn areas or in regions where diseases decimate populations, and I do not mean to say that commitment to what lawyers drily call “the interest of the organization” no longer exists. What I mean is that we may be putting the cart before the horse by investing large shares of our shrinking budgets and countless hours of work in the endless quest for more legal control and protection, when less money spent upstream in building or re-building organizational cultures might be a more effective move.

I would like to use the concept of “effective management review” to illustrate my point.

### *Review by managers*

Like many intergovernmental organizations, the World Trade Organization (WTO) has a formal system for the internal review of administrative decisions.

It is modelled on the previous United Nations internal appeals system. It is essentially composed of two phases: first a direct review by the Director-General at the request of the staff member concerned; and, second, an indirect review in which a Joint Appeals Board (JAB) addresses the matter on the basis of written submissions by the appealing staff member and the administration, before submitting a reasoned recommendation to the Director-General. The latter then takes a final decision, which may be appealed to the ILOAT.

The JAB itself operates on the basis of a court-like set of rules of procedures, but they are relatively short and leave a lot of room for it to adjust its work to the unforeseen aspects of new cases. The main improvement brought by these rules was probably to stress the statutory independence of JAB members, which boosted their confidence in their role. Another improvement was that Directors-General in practice abandoned their right to disregard JAB recommendations and have over time made a point of systematically accepting them.

This system has been relatively successful in gradually promoting the rule of law in the WTO Secretariat. And yet, it has been criticized: as a system in which the same person reviews his/her own decision which, it is argued, does not make legal sense; and as being too rudimentary and insufficiently protective of complainants. Those criticizing the WTO internal appeals system would like a more judicial system.

The dual structure of *recours hiérarchique* (the request for review to the Director-general) and *recours gracieux* (appeals to the JAB) is perceived as being ineffective because the administration is twice called upon to review its position which, it is presumed, it has no interest in changing. This seems to be directly drawn from Hobbes' pessimist vision of authority. In reality, a dispassionate administration sees the benefits of changing its position if new facts and convincing arguments are brought to its attention. This means saving resources and money, and better morale among the staff. It is also consistent with the general principle that when an administration becomes aware that it has made a mistake, it has the duty to correct it.

The JAB itself seems to be largely happy with the flexible set of norms that it relies on. Some weight should therefore be given to its opinion. It has been using these norms satisfactorily for almost 15 years, and has never felt the need to amend them, even though it has the authority to do so.

When requested to suggest improvements to these rules in the form of amendments, those who criticize the existing rules have failed to identify any serious shortcomings. Might their call for a more judicial system simply be based on the dogma referred to above?

Throughout this Conference, we have been presented with many different ways of dealing with complaints and grievances. Some organizations have

used very sophisticated and constraining bodies of norms over long periods of time. However, do we have compelling evidence that these norms have led to real improvements in the management of the organizations? I do not personally see a surge in cases or in the award of damages as an improvement per se. More in-depth analysis is required. What I note, however, is that at least one major international organization has moved away from the judicial resolution of disputes and, more generally, that all international organizations are developing mechanisms for the non-litigious resolution of disputes.

I think that you can go a long way with a primitive appeals system, provided that everybody more or less “plays by the rules”. It is fine to have administrative review by the head of the organization, provided that he/she is actually ready to reconsider administrative decisions. However, this cannot be achieved exclusively through the adoption of new rules. It requires a change of culture in which the politically-appointed head of an organization does not perceive a change of decision as a weakness or a threat to his/her authority, but sees the benefits to be drawn from developing staff confidence in the management in terms of loyalty and commitment. The mandate of the organization is often used by managers to disregard the legitimate demands of staff members, situations of mismanagement and even harassment, as long as services are “delivered”. The opposite should be the case. A staff member who appeals against a decision that he/she deems illegal or unfair is likely to focus on the appeal, to the detriment of his/her work and the fulfilment of the organization's mandate. In other words, confidence in the management means fewer challenges and allows staff to focus on their tasks.

An administrative review at the level of the Director-General should be performed with the mandate of the organization in mind. For example, does the decision taken by the subordinate further the interests of the organization and its Members, or is it something that was done for other less commendable reasons? In other words, when the head of an organization reviews a decision, it is important for him/her to look at the interests of the organization and consider the most efficient way of addressing the matter, which may not be a judicial dispute. This means being able to question our own judgment and being able to say: “Well, we messed up this time. We are going to be in trouble if we go to the Tribunal, so let's change it, or let's find a mutually agreed solution and learn from our mistakes.” Because when a case reaches the ILOAT, the complainant generally hates the organization and may never again feel loyalty towards it.

### *Review of managers*

The review of the performance of managers has been in fashion for quite some time. It was previously seen as involving a risk of encouraging personality dis-

putes. If a manager mishandled a matter, the organization would take the blame and the hierarchy would deal with him/her later, in a second phase. It would be a matter between the organization and the manager.

In theory, it is good to review managers. In many instances, there are not enough “checks and balances” for management at any level. Delivering is often all a good manager is expected to do. As long as he/she does not defraud the organization, how the shop is run is of limited concern to the hierarchy. A manager must be presumed to do his/her job well, otherwise all authority would go down the drain. But some control has to be exercised, not only against harassment, but also against mismanagement in general, which is a frequent source of problems for subordinates.

The review of managers is another example of how favouring rules at all costs over culture can be counterproductive. More than anybody else, managers should be trained to lead their teams according to the culture of the organization, which they should fully endorse. And this should apply at all levels, from the head of the drivers' unit to the head of the organization. Everyone with management responsibilities should be accountable according to their grade and responsibilities. Indeed, when implementing a management review system, care needs to be taken not to turn it into a way of diverting all responsibility to lower and middle management and creating a class of senior managers with almost total impunity. One of the reasons for being careful is that managers do not always fully control the decisions that they formally adopt or the measures that they implement. Managers are often cogs in a larger decision-making process. It would be easy for senior management to shake down the responsibility to middle or lower management. Nor should management review become a way of sanctioning managers who express views that are not shared by the head of the organization. If such a risk exists in an organization, management review may have to be assigned to an independent oversight officer.

Sanctions may also have to be adapted to the grade and status of managers. A confidential administrative sanction may work with low or middle-level career managers, but political appointees may not be very impressed by many of the sanctions found in the staff regulations and rules of international organizations, particularly if their tenure is limited in time. However, applying different types of sanctions to staff members who are subject to the same norms may constitute discriminatory treatment.

### **Conclusion: There is no need for more rules, but we must (re)build our internal cultures**

Internal appeals systems and the review of managers are two instances in which developing a true organizational culture and requesting full adherence

to it by staff at all levels could save a lot of energy and money. The strength of international organizations is built on cultural diversity. Yet, a shared culture may facilitate the identification of issues at an early stage and promote dispute resolution through means other than quasi-judicial and judicial procedures, such as mediation and conciliation. The review of managers shows the risk of the diversion of useful rules. An organization-wide managerial culture could significantly reduce the risk of such diversions. At this stage, we probably need to truly reconnect with the ideal that was at the origin of our respective organizations. More than new rules, we need staff to share equally the same body of values (honesty, integrity, independence, the acceptance of responsibility for one's actions, etc.) and to work towards the same objective at all levels.

## A CULTURE OF MANAGEMENT

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Oren Ginzburg

Our discussion is about the evolution of reviews towards more *managerial accountability*, and therefore about managers understanding that they own their decisions and could have to explain and defend them. But I want to talk about another aspect of *managerial accountability*, upstream from administrative and management reviews. Building on my experience with the Global Fund to fight AIDS, Tuberculosis and Malaria, I would like to share a few very general thoughts about what a *culture of management* means for an organization, and how it is relevant to conflict resolution.

### *The Global Fund*

The Global Fund to fight AIDS, Tuberculosis and Malaria is an international financing institution created in 2002. It is a Swiss foundation, with immunities of jurisdiction from Swiss courts, which is under the jurisdiction of the ILO Administrative Tribunal (ILOAT).

The Global Fund disburses between USD 3 and 4 billion a year in donor funds to fight the three diseases. Our responsibility is to ensure that the money goes where it will have the highest impact, and that it is managed well. In so doing, we are driven by a number of *core principles*:

- The Global Fund is a multi-stakeholder operation in which the voices of the most at-risk populations count as much as the voices of ministries. To make the best funding decisions, we aim to understand reality as it is.
- We are transparent – you will find almost every result and every discussion on our website, together with every finding (positive or negative) of the Office of the Inspector General.
- As a funder, we work through performance-based or results-based funding.

These principles are part of the organization's DNA. They are part of our funding culture and our management culture.

### *Good management*

Management reviews give managers a greater role, and greater responsibility for their decisions. These reviews are not conducted by an officer external to the decision-making process, but rather by the manager responsible for the decision. This is an important step forward, as it means that *the organization holds managers accountable*.

Introducing and upholding a strong culture of management in the organization contributes to managers holding *themselves* accountable, not only for the administrative decisions that they make, but more deeply for their role in how the organization functions and delivers on its mission. Such a culture allows organizations to prioritize, focus and deliver, and to minimize situations sliding into problems and the escalation of problems into conflicts.

What are the components of such a culture? One of the most important components is clarity concerning the mission and *shared direction*, as well as being able to articulate how every staff member is a key contributor. It is surprising how referring to the organization's goals, when they are clear and shared, puts issues into a different perspective and provides a solid foundation for difficult conversations. This may sound like common sense, but those who have worked in a setting without a *clearly defined mission* will understand what I am talking about. It is therefore necessary to communicate relentlessly and to exchange on the shared direction, to bring people on board and to create a sense of togetherness. Management is about creating conversations on what matters, and it is about aligning on the vision and on the modalities for pursuing that vision. So a strong component of the culture of management is just that: talk, exchange, discuss, listen, address issues and concerns, argue ... and align. It is important, for this purpose, to create mutual understanding and trust. Be predictable, transparent and fair. Take people seriously. And, in this context, make decisions.

Of course, you will be held accountable for those decisions. But I am sure you can see that what we are talking about goes beyond after-the-fact accountability. It is about collective ownership, clarity about the rationale for decisions, clarity about what underpins them and how they are justified. This makes the organization much more effective. It also has a tremendous effect on how problems and conflicts are approached and resolved. You all know the study showing that medical doctors in the United States who are not sued are the ones who talk to their patients;<sup>3</sup> the same applies here. Of course, a doctor who

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<sup>3</sup> Levison, W. (1994): "Physician-patient communication: A key to malpractice prevention", *The Journal of the American Medical Association*, 272(20).

talks *only* to avoid being sued, *will* probably be sued. This is not about pretending to manage: it is about actually managing.

We are talking at the individual level (good managers), but also at the organizational level (a culture of good management). How do you introduce and uphold this?

- There needs to be a willingness from the top to recognize management as an essential component of what the organization is about (once again, if you have ever experienced top leadership that did not see management as an important component of running an organization, you will know that this is not as automatic as it sounds).
- You need to hire good managers, which can only be done through competitive (merit-based) recruitment processes at all levels which pay specific attention to management skills.
- You need objectives that are so clear that they cascade down and people can be held accountable to them. You do not hold people accountable *so that you can tell them at the end of the year that they have not met the objectives*, but so that you can have discussions *during the year* on the best strategies and approaches to pursue and achieve the common mission.
- Some people will require training to become *tougher* managers, and some will require help to become *softer* managers. What matters is that management (and management skills) are seen as a cornerstone of the organization's success.

## Conclusion

A culture of management is established and maintained through hard work. Organizations are made of *chains of teams and individuals* through which decisions are made and actions taken. Some chains are as weak as their weakest link. But luckily many chains are as strong as their strongest link, the link that holds things together, imposes quality standards and adds the ambition that binds the whole chain together.

In a culture of management, it is necessary to pay constant attention to these chains. Are they functioning as well as they could? Are they focused on the mission? Are they struggling? Are they creating obstacles to delivery? Left unchecked, scattered individual weaknesses can reach a critical mass that can threaten the whole operation, which is how organizations fossilize or decay.

A culture of management creates a virtuous circle in which the strength of the whole often lifts the capacity of weaker elements, or creates temporary workarounds to allow the organization to keep up the pace, the sense of mission and delivery. Good management is also a safety net in the face of problems and conflicts, as it provides an environment of trust and shared values to resolve differences and keep on course.





# 6

**THE ROLE OF LEGAL COUNSEL  
IN CONFLICT MANAGEMENT  
AND PROMOTING SOCIAL  
HARMONY IN INTERNATIONAL  
ORGANIZATIONS**





# THE ROLE OF LEGAL COUNSEL IN CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION

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Jennifer Lester<sup>1</sup>

**T**his paper draws on the remarks made during a panel discussion which explored the role that in-house counsel can play in facilitating good employment relationships between organizations and their staff. The paper focusses on the role of legal counsel in the three key areas of preventing, managing and resolving conflict. Lawyers are traditionally brought into disputes late in proceedings to defend in litigation. However, the experience of the International Monetary Fund (IMF) has shown that in-house counsel have a far broader role to play in this regard and in the overall promotion of social harmony in the workplace. I first briefly describe the key elements of the IMF dispute resolution system, before addressing the role and contribution of the IMF Legal Department to conflict prevention, management and resolution.

## *The dispute resolution system and process in the International Monetary Fund*

The IMF offers staff a full range of both formal and informal options for resolving workplace disputes and conflicts. The informal channels include a full-time Ombudperson's office, which has been in place since 1979, and a Mediation Office introduced in 2012.<sup>2</sup> The IMF is continuing to explore new and innovative ways of promoting the informal resolution of disputes at the earliest level.

The IMF's formal channels of conflict resolution consist of two levels of review. The first is the Grievance Committee, which is a three-person committee headed by a professional arbitrator or lawyer and consisting of one staff

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<sup>1</sup> The views expressed herein are those of the author and should not be attributed to the IMF, its Executive Board, or its management. The author would like to thank Melissa Thomas for her valuable inputs and comments on the presentation.

<sup>2</sup> See the intervention by Geetha Ravindra *supra*.

appointee from the Staff Association and another appointed by the management. The Committee makes recommendations to the Managing Director on challenges by staff members to decisions by the Fund. The Grievance Committee, established in 1980, operates under clear terms of reference which set out its jurisdiction, the standard of review and the procedural aspects of its operation. The Grievance Committee has jurisdiction to review challenged decisions to determine whether they were consistent with the applicable rules and regulations and, for decisions taken in the exercise of discretionary authority, whether there was an abuse of managerial discretion.<sup>3</sup> The Committee reviews individual decisions, primarily dealing with career issues, such as performance ratings, promotion, non-selection, non-conversion and termination of employment. It also handles some benefits questions.

Finally, IMF staff may seek a second and final level of review by the IMF Administrative Tribunal (IMFAT), which has just celebrated its twentieth anniversary. The Tribunal is composed of five members who are nationals of a member country of the Fund at the time of their appointment and who possess the qualifications required for appointment to high judicial office, or are jurisconsults of recognized competence. The IMFAT is entirely independent of the Fund, but exercises only those powers conferred upon it by its Statute.<sup>4</sup> The IMFAT has broader jurisdiction than the Grievance Committee, and may review challenges to both individual decisions and regulatory decisions of the Fund, that is the rules and policies concerning the terms and conditions of staff employment adopted by the Fund management or the Executive Board.<sup>5</sup> The decisions of the IMFAT are final and binding on the Fund and staff members. In addition to hearing challenges to individual decisions, much in the same way as the Grievance Committee, the IMFAT has reviewed rules and policies of systemic importance, such as challenges to the IMF's staff compensation system<sup>6</sup> and to the downsizing exercise conducted in 2008.<sup>7</sup>

The Fund also has multiple opportunities to resolve employment disputes both prior to and in the course of the formal review process. Prior to invoking formal dispute resolution mechanisms, and as a condition for availing themselves of the jurisdiction of the Grievance Committee and the IMFAT, staff members must request administrative review of the impugned decision by the Fund.

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<sup>3</sup> IMF General Administrative Order No. 31, Section 5.

<sup>4</sup> See IMFAT Judgment No. 1999-1: "the jurisdiction of the Administrative Tribunal is conferred exclusively by the Statute itself. This Tribunal is not free to extend its jurisdiction on equitable grounds, however compelling they may be." (§96)

<sup>5</sup> The Tribunal does not, however, have jurisdiction to review resolutions adopted by the Board of Governors of the IMF. See Statute of the IMFAT, Article II(2)(b).

<sup>6</sup> See IMFAT Judgment No. 2007-1.

<sup>7</sup> See IMFAT Judgments Nos 2010-2, 2010-3 and 2013-2.

Administrative review is typically conducted by the Director of the Human Resources Department. A very high percentage of disputes are resolved by mutual agreement at the stage of administrative review (currently over 50 per cent). In addition, at any point during the formal dispute resolution process, either the staff member or the Fund may seek mediation, and the matter may be resolved without further need for formal proceedings.

Since its inception, the IMFAT has issued 52 decisions and, on average, receives about two to three cases a year. The Grievance Committee has a slightly heavier docket, which averages around four to five cases a year. The number of conflicts or disputes brought to formal litigation may be considered relatively small in view of the size of the Fund (currently around 2,400 staff and 600 contractual employees). A casual observer might simply view IMF employees as inherently less litigious, but this would overlook the impact of structural factors on constructive workplace relations. In my view, the existence of a broad range of options is an important factor in managing conflict. Another important factor is that the institution approaches rule-making for employment conditions carefully and with awareness, on the one hand, of the important balance of rights and obligations of staff and, on the other, the institution's authority to make and modify rules to ensure its efficient operation. Lawyers play a critical role in ensuring the effectiveness of these efforts.

### *The role of legal counsel*

Lawyers have the opportunity to play a range of different roles in guiding the relationship between employee and employer. First, they act as advisors to management and to departments on systemic issues and best practice. Second, they serve as counsellors to the Human Resources Department and other departments on the correct application and interpretation of the staff rules. Third, they act as facilitators in informal dispute resolution. Finally, they serve as the defence lawyers for the institution in formal litigation of employment disputes. The involvement of lawyers in all aspects of the process demonstrates the multiple opportunities to resolve a dispute before it reaches litigation.

The IMF Legal Department is mindful of its influence in each of these roles. The staff of the Legal Department are involved in advising on the design of Fund rules and policies to try to ensure that they are designed so as to respect the existing legal rights of staff members, and to ensure that they are a proper exercise of managerial discretion (or, in other words, that they are not arbitrary, capricious or improperly motivated). At the same time, the Legal Department is uniquely placed to help managers and departments understand, interpret and apply policies correctly and consistently, so as to prevent and manage potential conflicts at an early stage. Finally, it takes on a traditional role as the Fund's

defence counsel before the Grievance Committee and the IMFAT. It is therefore involved at every stage, from emerging disputes to full-blown litigation. It plays both a responsive and a prophylactic role. In responding to individual grievances, it is able to ensure that lessons learned inform changes to the Fund's policies and practices so as to prevent future conflicts. It therefore serves as the institutional memory and an important resource of learning which informs the Fund's future approach to conflicts. I discuss below the role played by the lawyers of the Legal Department from conflict prevention to conflict resolution.

### *Conflict prevention*

At the IMF, legal counsel are involved in the development of Fund policy and the drafting of rules. They provide advice to the Human Resources Department and to Fund management on the legality of proposed policies, helping them to think through the potential impact and implications of proposed changes and to identify unintended consequences from both a legal and a business perspective. Examples include the critical role played by legal counsel in establishing the Mediation programme in 2012, the design of the Fund's downsizing and restructuring framework in 2008 and, together with the Human Resources Department, the efforts made in 2014 to reform the IMF's categories of employment framework.

In addition, legal counsel also advise the Human Resources Department and other departments on the correct application of the rules and interpret ambiguities. The intention is to seek practical solutions that are consistent with the intent of the rules. It has been found that this practical approach keeps conflicts at bay and helps in the maintenance of good employment relationships. Nevertheless, this involves a delicate balancing act, as inevitably it is also necessary to take into account the Fund's exposure to legal risks.

### *Conflict management*

As noted by Roy Lewis,<sup>8</sup> we all recognize that conflict is inevitable in an employment relationship and, if handled properly, can be productive. We have found that, as lawyers, we can play a unique role in the management of conflict. At the Fund, legal counsel have gained a reputation as trusted advisors and a sounding board for interested parties. In this way, they offer "good offices" to allow managers and staff to manage their disputes in a way that preserves the future of the employment relationship. Lawyers have the ability to recast a dispute in a manner which elides the emotional and personal elements of the controversy and focusses purely on the issue. It has been found that this

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<sup>8</sup> See the intervention by Roy Lewis *supra*.

raises the level of the discussion so that it is more constructive and solution-orientated. In addition, IMF lawyers play a key role in facilitating the informal resolution of disputes. They actively seek ways of resolving disputes at the earliest possible stage. Lawyers sometimes participate in mediation, and also engage in negotiations in non-mediated settlements at all stages of the dispute.

### *Conflict resolution*

Once a formal grievance has been filed, lawyers assume their traditional role as the Fund's defence counsel. Although lawyers have no formal role in the administrative review process, they are often consulted informally to help the relevant departments identify the legal issues and relevant rules, and to focus their diligence and analysis. When presenting the Fund's case before the Grievance Committee and the Tribunal, they also seek to identify scope for settlement so as to avoid unnecessary litigation.

As indicated above, having legal counsel on board during the early stages of policy development helps to raise the awareness of rule-makers that their decisions must be able to pass scrutiny before the Tribunal. Accordingly, the advice provided is very much guided by previous decisions and principles enunciated by the IMFAT, other administrative tribunals and general principles of law. For example, in Judgment No. 2013-2, the IMFAT invalidated a policy adopted by the management which prohibited the re-hiring of former staff who had separated with a package of separation benefits under the 2008 downsizing exercise. The IMFAT concluded that, by its previous actions, management had constrained its discretionary authority to amend the terms of separation of former staff who had separated as part of the downsizing. Following that decision, the Legal Department briefed management and the Executive Board and recommended the appropriate course of action to implement the guidance and instructions provided by the Tribunal.

It should also be noted that the IMFAT provides guidance to management and the Board, not just through the decisions on the legality of impugned decisions, but also in dicta. Even where the Fund prevails on the merits of a particular case, management is very receptive to guidance from the Tribunal on the adequacy of its policies and procedures, and seeks to improve them accordingly. In this respect, the Legal Department plays a crucial role in informing management of the rulings of the Tribunal, identifying lessons learned from Tribunal decisions and Grievance Committee recommendations, and recommending any consequential systemic changes that may be required. The Legal Department also has a crucial voice in discussions to enhance the dispute resolution system, and for the development and simplification of procedural rules, in consultation with all the relevant stakeholders.

*What lessons can be learned from the multiple roles of legal counsel*

Following this examination of the various roles that lawyers can and do play in employment disputes, the question arises as to whether it is indeed sustainable for legal counsel to fulfil these multiple roles. Are the roles inherently contradictory? Can lawyers maintain their credibility at all stages of the process? In my view, there are advantages and disadvantages to lawyers undertaking these different roles. Recognizing that each case turns on its own facts and circumstances, I have set out below a number of considerations which may be relevant to determining the extent to which counsel should be involved in the organization's response to workplace conflicts:

First, the involvement of lawyers in the early stages of conflicts may tend to impart a tone of formality, which may only serve to entrench the dispute between the parties. At the same time, their involvement at an early stage may be helpful in framing the issues and identifying the core of the dispute.

Second, lawyers have to recognize that disputes do not always involve legal questions, but may simply consist of inter-personal conflict. Lawyers may therefore be ill-equipped to address the issues, and other resources, such as the Ombudsperson or Mediator, may be better able to foster resolution at an early stage.

Third, lawyers can also act as conciliators. Although this may appear to be a contradiction in terms, the effectiveness of lawyers in this role depends largely on the level of trust that they engender. If lawyers are seen as honest brokers who help to promote communication, their influence can be very significant in avoiding or resolving conflicts at an early stage. However, it may be difficult to engender such trust, as the primary interest of legal counsel is ultimately to protect the organization.

Fourth, lawyers can serve as "compassionate" litigators. As in-house counsel, even at the formal stage of conflict resolution through litigation, while lawyers have to be strong advocates for the organization, they must also be mindful of the need to resolve conflicts in a manner which seeks, to the extent possible, to preserve the employment relationship, rather than allowing a dispute to become so contentious that the relationship is irreparably damaged. Accordingly, the way that lawyers conduct themselves in litigation is important. In my view, the focus should be on resolving the legal dispute in a respectful manner in even the most contentious cases. Legal counsel ultimately have to be mindful that the goal is not to score points through legal argumentation, but to resolve the dispute in a manner that is least disruptive to the institution and its staff.

Lawyers have much to contribute to promoting good working relationships. But the role that legal counsel can play very much depends on the nature of the dispute, and the way in which lawyers are perceived within the institution. While lawyers do play a role in facilitating the resolution of workplace

disputes, they cannot serve as a proxy for good managers. It is therefore essential to identify where lawyers can usefully add value, and where they may ultimately act as an impediment to the amicable resolution of disputes. Lawyers strive to strike the right balance, but that is not always easy, and there is no bright line to guide their involvement. The right balance will, of course, be specific to the individual and the institution, but continued discussion amongst peers through fora such as the present Conference will hopefully provide useful guidance.



## CONFLICT MANAGEMENT AND SOCIAL HARMONY: THE SITUATION AT CERN

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Eva-Maria Gröniger-Voss

In discussing the role of the Legal Counsel in the management of labour related conflict and in the promotion of social harmony, I would first like to emphasize that I do not speak of myself as an individual, but of the structural role of legal counsel within the European Organization for Nuclear Research (CERN). CERN is an intergovernmental organization (IGO) with a scientific and operational mission. Established in 1954 near Geneva, Switzerland, it lies across the Swiss-French border. CERN is financed by 21 Member States and has, as its mission, fundamental physics research for peaceful purposes through the organization of international collaboration. It is one of the world's largest laboratories and is home to a series of unique scientific installations, including the Large Hadron Collider (LHC). Scientists and their support teams come from throughout CERN's Member States, and indeed the world, to conduct experiments and research.

CERN has two basic categories of personnel. The first consists of the employed members of the personnel, who number approximately 3,000 and include both staff members and fellows of the Organization, who construct and run the laboratory's installations. The second category comprises close to 12,000 associated members of the personnel, who are affiliated to an outside employer or enrolled at a university and come to CERN to execute scientific research work using its installations. Although they are not employed by CERN, they are nonetheless subject to certain of its Staff Rules and Regulations, and have access to internal dispute resolution mechanisms.

At the outset, it should be noted that, despite its large size and diverse body of personnel, CERN has a relatively low number of disputes and, in those that do arise, it sees a high proportion of its decisions upheld.

## Dispute resolution at CERN

CERN has both informal and formal dispute resolution mechanisms, which work harmoniously to limit unnecessary conflict and to respond and process disputes which, despite its best efforts, remain unresolved.

### *Informal process*

In 2010, CERN introduced the function of the CERN Ombud, to provide advice, guidance and informal mediation in interpersonal disputes or conflicts at work. The mandate of the Ombud indicates that:

Ideally, interpersonal issues between persons working at or on behalf of CERN should be resolved between the colleagues concerned. However, sometimes this dialogue is not successful or is not possible. In these cases, the services of an Ombuds may help to resolve disputes in a consensual and impartial manner, thus promoting the good functioning of the Organization.<sup>1</sup>

CERN encourages the resolution of work-related issues through direct dialogue wherever possible, even in such sensitive areas as harassment. The relevant CERN Operational Circular, which covers all persons working at or on behalf of CERN, encourages persons who are recipients of unwelcome behaviour to communicate directly with the alleged harasser. They can request the assistance of their hierarchy, a colleague or another CERN contributor in facilitating this discussion, or initiate an informal resolution process with the Ombud. Of course, CERN is aware that not all cases of harassment can be resolved informally, and has also instituted a formal harassment resolution process applicable to complaints filed by or against a member of the personnel. Other contributors are advised on the options available to them according to their contractual relationship with CERN.

The focus of CERN on effective informal resolution is also intended to guide the formal process, to the extent possible. Open communication with, and access to decision-makers at all levels of hierarchy, including the directorate level, assists in understanding and accepting even difficult decisions. CERN also values open dialogue and critical reflection throughout the informal and formal processes. It is never too late for a decision to be explained, or even revisited.

### *The formal process and the low dispute rate*

With respect to impugned decisions, CERN has a traditional IGO system of administration of justice, commencing with a review procedure and/or internal

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<sup>1</sup> <http://ombuds.web.cern.ch/sites/ombuds.web.cern.ch/files/CERN%20Ombudsman%27s%20mandate.pdf>

appeal, in which a peer review body makes a recommendation to the Director-General for decision. Individuals can then bring a complaint to the Administrative Tribunal of the International Labour Organization (ILOAT).<sup>2</sup>

On average, each year, CERN has two or three matters in the internal process (at either the review or peer review stage). In the majority of cases, the impugned administrative decision is upheld. The fact that CERN has few cases means that it is able to devote the necessary time and resources to understanding the underlying circumstances of each case, which ensures more effective conflict resolution and provides an opportunity to focus on lessons learned. Although individual cases arise (e.g. involving unsuccessful probation periods, impugned performance assessments, disciplinary sanctions and termination of contract), they are relatively rare. Historically, CERN is more likely to face cases brought by one or more staff members, acting with the support of the Staff Association, on matters of general application, such as the adjustment of the salary scale, revised career classification, new contract schemes or other issues relating to general employment conditions.

CERN has historically had a very low number of cases before the ILOAT, totalling 100 appeals over the 60 years of the Organization's existence. Of these, 75 per cent of the impugned decisions were upheld; over the past decade CERN has prevailed in all but three cases. CERN is proud to note that, of the 35 IGOs surveyed by the ILO, it appears to have the lowest number of appeals *per capita*. These statistics relate, of course, to the formal system of administration of justice at CERN. While it is more difficult to compile statistics for the informal system, all the signs also point to effective conflict management there.

### **Social harmony at CERN**

The combination of low numbers of employment-related disputes with generally positive outcomes demonstrates effective conflict prevention and management by CERN, and a relatively high degree of social harmony. But how has that been achieved? While there is probably no single explanation, three contributing elements may be identified: environmental and cultural factors; best practice human resources policies; and the decision-making structures developed in CERN.

#### *Environmental and cultural factors*

The importance of these factors in contributing to a positive and healthy working environment cannot be underestimated. CERN is a research organization

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<sup>2</sup> Direct access to the ILOAT is permitted in certain circumstances, as set out in the Staff Rules and Regulations.

and the majority of its personnel are scientists, engineers and technicians who are passionate about their work and about being part of CERN, the world's largest physics laboratory. They are committed to its mission and to pushing forward the frontiers of fundamental research. The personnel generally feel directly engaged with CERN's mission, and counting working hours and comparing and challenging working conditions is not their first priority!

The working environment is collegial and non-hierarchical, and its appearance and work practices have more in common with a university campus than a 'traditional' IGO with a more political mission. Although employment conditions at CERN may appear to be less attractive than those of other IGOs, there is a high degree of satisfaction among the staff (97 per cent, according to a recent staff survey). Indeed, alumni and retirees can often be found on site continuing their research after retirement. This is not something that CERN takes for granted (or, worse, of which it takes advantage). Personnel are recognized as CERN's most important asset.

### *Best practice human resources policies*

It therefore follows that CERN is not only committed to excellence in the achievement of its scientific mission, but also to excellence as an employer. The Organization is sensitive to the importance of respecting its legal framework and the principles of international administrative law. CERN also attempts to remain up-to-date in matters of employment standards and as a host laboratory.

Dialogue with the staff is key to the human resources strategy. General meetings are held periodically by the Director-General and/or the Head of the Human Resources Department with the staff at large. Regular informal meetings are also held between the management and the Staff Association, at which policy matters as well as individual cases can be discussed, thus avoiding unnecessary escalation.

In 2010, following a democratic reflection and drafting process involving all stakeholders, the Director-General adopted the CERN Code of Conduct,<sup>3</sup> which formally sets out the core values of the Organization and assists all CERN contributors<sup>4</sup> to understand the behaviour expected of them, and which they may in turn expect from their colleagues. In the introduction to the Code of Conduct, the Director-General indicates that:

Integrity, commitment, professionalism, creativity and diversity: five words that each and every one of us at CERN can identify with, because they represent the core values of this Organization. ... CERN's Code of Conduct has been

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<sup>3</sup> <https://cds.cern.ch/record/1273755/files/Codeofconduct.pdf>

<sup>4</sup> Members of the personnel, consultants, contractors working on site or persons engaged in any other capacity at or on behalf of CERN.

developed through a collaborative and transparent process, to ensure a shared appreciation of CERN values and their influence on the way we work. ... it is intended to guide us in understanding how to conduct ourselves, treat others, and expect to be treated in accordance with CERN values. It is designed to help us understand both our rights and our obligations.

I hope that this Code of Conduct will be a valuable tool in the maintenance and development of a workplace marked by mutual respect and understanding.

The CERN Code of Conduct has, indeed, rapidly, become a valuable tool for a respectful work environment. Both the management and the Council appreciate that CERN's scientific pre-eminence is necessarily based on the excellence and motivation of its personnel. As indicated in the introduction to the Code of Conduct, "*CERN's scientific achievements represent the vision and hard work of thousands of individuals*". That hard work is immeasurable, not least because controls on the working hours of CERN staff members are not needed to ensure that they work their contractual hours, but sometimes to remind them to go home.

Recognizing that the passion of its personnel is an asset to be nurtured, CERN is also conscious that good management is the key to limiting and resolving conflict. However, conflict need not be seen as inherently negative, or a failing or weakness on the part of those involved. In this respect, CERN fully adheres to the explanation provided by the United Nations Ombudsman for the Funds and Programmes:

Disagreement occurs even in the best working relationship and challenging another's ideas can strengthen an outcome. Though the claim that well managed conflict automatically results in efficiency gains is challenged by some, it is generally accepted that the right kind of friction and constructive confrontation and arguments over ideas in an atmosphere of mutual respect can help any organization and has the potential to drive greater performance and creativity and help produce major innovations. The question how well conflict is managed and how conflict is addressed can either add to or take away from an organization's bottom line.<sup>5</sup>

## **Decision-making structures**

### *The application of rules*

The decision-making structures in place at CERN are also designed to ensure a democratic approach, in which attention is paid to legality, due process and the 'buy in' of stakeholders. In the application of rules, care is taken to ensure

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<sup>5</sup> Buss, H. (2009): *Measuring and reducing the cost of conflict at work in UNHCR: The business case of conflict management*, available at [http://www.vdbio.ch/downloads/konfliktmanagement/Thesis\\_FINAL\\_180209.pdf](http://www.vdbio.ch/downloads/konfliktmanagement/Thesis_FINAL_180209.pdf)

clarity, legality and equal treatment at all stages. The Human Resources Department has two lawyers and works closely with the central Legal Service, as necessary. Individual decisions are carefully explained (orally, or in writing, as appropriate/requested). In the event of disputes, the Human Resources lawyers analyse the case and represent the management at the internal appeals level. The central Legal Service advises the Director-General and represents the Organization in external litigation.

The goal for CERN at all times is good management. If a decision is considered sound, it is defended. If, however, it is found to have been made in error, is not well founded or is no longer appropriate, it can be remedied through a variety of means, including financial settlement. The Legal Service advises accordingly. There is no focus on face saving, but rather on securing the best outcome for CERN.

### *The legislative and rule-making process*

CERN is not part of a common system, and is therefore responsible for the development of its own internal legislation. In taking general employment decisions, CERN is careful to ensure the legality of both outcome and process. Lawyers participate throughout the discussion and conceptualization stage (from brainstorming to drafting) of all new or changed employment conditions and policies, as well as their implementation protocols. The legislative process in place is transparent and permits a sound outcome.

The adoption of new or revised employment conditions at CERN involves a democratic process, which ensures the strong engagement of all contributors. Extensive consultation and debate is undertaken with the Staff Association in an inclusive legislative process, which is a statutory obligation under the Staff Rules and Regulations. In addition, there is regular direct interaction between the senior management and the Staff Association, and a conflict resolution process is in place to permit arbitration by the Director-General in the event of disagreement. Ultimately however, the Director-General retains the final decision-making power and can impose the management's decisions. Finally, all new and revised employment conditions are thoroughly communicated to the personnel, as formal texts complemented by online admin e-guides and FAQs, as appropriate. All documents are made available in English and French, and there are also regular public meetings conducted in both languages to ensure that all members of the personnel understand the outcome.

### **Conclusion**

In her intervention, Geetha Ravindra referred to the ideal of a model of conflict competence. This fits well with the CERN model. While conflict competence is

an aspiration for all IGOs, and CERN does not claim to have found the magic formula, I believe we have identified and value many of the key components. CERN's track record in managing conflict and promoting social harmony is based on factors such as inclusiveness, transparency, efficiency, equity, accountability and credibility, which are integral to the achievement of conflict competence.

Neither the Legal Counsel nor the legal function in general constitutes the sole factor in achieving conflict competence, but they can play an important role in ensuring fair and just decision-making. Ultimately, mutual respect and constructive dialogue are essential to the healthy and transparent management of any organization, as are solid working relationships within the administration and with staff representatives. It is in this realm that I see an essential and constructive role for legal advisors. The involvement of legal counsel upstream assists in achieving healthy decision-making, and in avoiding and managing conflict, and any resulting litigation.



# THE INTEGRATION OF A PERSPECTIVE OF PRIOR LEGAL REVIEW INTO HUMAN RESOURCE PRACTICES: OR HOW AND WHY THERE SHOULD BE COLLABORATION BETWEEN HUMAN RESOURCE AND LEGAL SERVICES

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Eric Dahlen

**T**he evolving principles, practices and tools of human resource management, as well as the changing socio-economic and political environment in which the organizations in the United Nations common system operate, have modified the conditions under which human resource management is carried out. These changes have resulted in and call for a reinforcement of collaboration between the human resource management and legal services of international organizations.

## **A result of both choice and necessity**

Such reinforced collaboration is a result of both a conscious and an assumed choice by human resource services based on a dual objective, namely to ensure that decision-making processes are more secure in the fields in which human resource services intervene, and to respond to the increasingly judicial nature of human resource decision-making and the context surrounding such interventions.

### *A choice: Greater security of human resource procedures*

The choice of ensuring greater security in human resource procedures is based on several factors. Firstly, there is a need to reinforce the feeling among personnel that there is an objective, transparent and solid basis for decisions in conformity with the regulatory framework. Secondly, it responds to the introduction of stronger measures to review decision-making processes and the increasing levels of internal and external control (such as internal and external auditors, control groups established by member States and ethics units). It also reflects the constraints under which human resource services operate, as they

are both partners in the process of developing the management strategy and policies of organizations, and also the operational managers of the decisions taken by the executive bodies of the organizations.

The constraints imposed by the implementation of these decisions are sometimes similar to required outcomes, which human resource services must endeavour to achieve within the framework of absolute legality. Human resource services need to respond to management imperatives by determining the legal framework within which the resulting measures can and must be implemented. Moreover, the financial constraints faced by many organizations in the United Nations common system are resulting in the implementation of programmes to optimize the use of resources and to contain or reduce spending. These programmes inevitably include staff reduction plans. These plans impose objectives on human resource services to contain social and human costs, as well as legal risks.

The demands made by member States of organizations, directly through their executive or governance bodies, or through the bodies of the United Nations common system, certain of which are decision-making (such as the Fifth Committee of the United Nations General Assembly, the International Civil Service Commission (ICSC) and the United Nations Joint Staff Pension Fund), currently operate according to a logic of the rationalization of management tools and regulatory frameworks, combined with cost-containment objectives. The resulting decisions and the conditions for their implementation come up against the legal principles established by the rules and regulations that are in force, the case law of administrative tribunals and, more generally, the general principles of rights and jurisprudence. For example, the conditions governing the implementation of a decision to modify the statutory retirement age or, anticipating decisions that are in the pipeline, those which may arise from the current review by the ICSC of the compensation package provided by organizations applying the common system, need to be evaluated in the light of these principles, and particularly the maintenance of acquired rights.

*A necessity arising out of 'greater judicial control of human resource procedures'*

In addition to the factors referred to above, increased collaboration between human resource and legal services has also become indispensable in view of changes in the nature of administrative disputes and trends in the legal strategies adopted by complainants and/or by some legal advisors in the context of these disputes, particularly during the internal redress phase.

The tribunals established within the framework of the United Nations common system, such as the ILOAT and the former United Nations Administrative Tribunal (prior to the reform of the United Nations internal justice system) show

in their decisions a development in both the nature of the disputes that they are called upon to examine and the legal strategies adopted by complainants.

From disputes of a more strictly administrative nature, as illustrated by the titles given to these bodies, intended to protect the economic rights of staff members, the work of tribunals has developed to cover broader fields, including the protection of social, and even moral rights, encompassing issues related to industrial relations, as well as collective rights. In other words, the cases relate less to failure to comply with terms and conditions of employment, particularly in the application of rules and regulations, than to claims for the protection of more generic rights that are not necessarily covered by the provisions of the staff rules or regulations of the international organization employing the staff member.

For example, in the case of recruitment procedures, disputes relating to selection decisions, and in particular decisions not to select certain candidates, now tend to refer less to legitimacy in the assessment of qualifications and competences, and are more likely to challenge certain elements of the procedure (the time taken for the various stages, the composition of committees, etc.). The legal strategy chosen by staff members and their advisors includes, and on occasion emphasizes the identification of procedural flaws, relegating to a level of lesser importance any potential substantive prejudice. Such procedural flaws may not result in the decision being set aside by the administrative tribunal, but in the granting of moral damages.

### **Impact on the methods of work of human resource managers**

These trends, and the increased integration of the legal dimension into human resource procedures, whether or not it results in strengthened collaboration with legal services, has a clear impact on the methods of work of human resource managers. A reform of the work context (rules and procedures) is required, together with the development of new legal competences and the implementation of processes of collaboration with legal services.

#### *Strengthening of procedures*

Human resource processes are framed by a regulatory system (staff rules and regulations) which does not systematically include provisions governing the stages of the various processes.

The changing environment described above is leading to the formulation and implementation of procedural rules that determine the manner in which each stage of the decision-making process is carried out, including processes of an advisory nature involving bodies that make recommendations to the decision-

making authority, such as disciplinary procedures and selection processes carried out through selection and promotion committees.

The review procedures undertaken by such bodies, which are advisory and not judicial in status, therefore have to be regulated, even though this may appear to be a contradiction in terms. Where bodies have an advisory, rather than a judicial status, this facilitates solutions which, although not ‘amicable’, are at least ‘in the interests of social harmony’. The principle of ‘peer review’, rather than review by legal practitioners, leaves room for the individual assessment of situations, which encompasses the dimension of equitable assessment, rather than a legal judgement, but also involves a high risk of procedural and legal flaws that may result in judicial challenges to the whole decision-making process, of which the ‘consultation’ forms part.

The case law of administrative tribunals therefore includes judgements that set aside decisions on the basis of procedural or legal flaws in the various stages of processes carried out by non-judicial advisory bodies. As a result, these advisory bodies are no longer free from the constraint of ensuring compliance with basic principles, such as due process, the right of defence and an adversarial procedure.

*Preparation of partners (such as human resource managers, administrators and participants in advisory procedures)*

This global series of constraints is not without incidence on the work of the human resource managers and staff members called upon to participate in advisory procedures. It implies the provision of appropriate information, both to raise their awareness of this new environment, and to ensure that they endorse these principles and comply with the respective constraints.

*Achieving endorsement and compliance with established procedures*

It is in the very nature of the human resource function that it is based on the need to use discretion in decision-making processes on matters that cannot by their nature be resolved through the application of mathematical algorithms, but through the assessment of human factors (for example, a decision determining the location of home leave may be the outcome of an examination of a combination of family, cultural, financial and religious factors based on an assessment that includes a subjective element). Similarly, participation in an advisory process by its nature calls as much for the exercise of the well-known virtues of ‘common sense’ and ‘judgement’ by participants as for objective assessment of the facts.

In addition to the influence that such constraints may exert upstream in the process of selecting human resource managers (a professional background

involving a legal dimension in their training or experience may be an advantage) or the choice of the members of an advisory board, they therefore require the establishment of prior information and training procedures. Decisions or recommendations have to be viewed from a new angle, as the outcome of a constellation of ‘details’ that need to be monitored and preserved, including acknowledgements of receipt, e-mails, reports of discussions and the notes taken. This is a dimension that changes the nature of the work carried out and, it has to be recognized, may not be well accepted by those involved.

*Requirement for decisions to be objective and for the reasons to be indicated*

Over and above compliance with established procedures, where they exist, and with the fundamental principles referred to above which, as noted, are not necessarily covered by the framework of rules and regulations governing decision-making, one of the requirements that needs to be fulfilled by human resource managers and participants in advisory procedures is to ensure objectivity, particularly by giving reasons for decisions or recommendations, as appropriate. A decision, whether it is taken by human resource managers in the context of their duties, or ultimately by the decision-making authority, may be subject to a review process, particularly in the form of a judicial procedure. Consequently, even a decision relating to ‘human elements’ cannot escape the requirement to be objective and for the reasons to be indicated.

*Integration of lawyers in all stages of decision-making*

One of the responses adopted, among those available, with a view to managing these new constraints has been the establishment of a close relationship of constant collaboration with lawyers, not only for the purposes of review or ‘supervision’, but also to establish a process of assistance for decision-making. There are many options for such collaboration, ranging from the integration of a legal function in human resource services to the strengthening of collaboration with legal services, or both. Whichever option is chosen, collaboration has to be based on a relation of mutual trust and understanding of the respective constraints of each partner.

**A conclusion in the form of a question: Have human resource processes become a means of anticipating dispute procedures?**

Any decision can be subject to a dispute procedure. While this is not new in the international public service, what has changed is the new orientation, which is leading to the detailed examination of all the elements in the processes leading up to the taking of decisions. “Anticipation, foresight, prevention” are

therefore becoming the key words determining the actions of human resource managers. This is introducing an increasing element of 'risk management', for which those involved in the field of human resources are not always prepared. It is therefore necessary to manage the resulting reactions, which may lead to the feeling that these changes have diminished the role of human resource managers by reducing the human dimension of their work. And the question also arises of whether this has resulted in their role becoming dehumanized?

# FREE ADVICE AND REPRESENTATION FOR STAFF MEMBERS: THE ROLES OF THE OFFICE OF STAFF LEGAL ASSISTANCE IN THE UNITED NATIONS INTERNAL JUSTICE SYSTEM

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Robbie Leighton

**T**he Office of Staff Legal Assistance (OSLA) is, if not unique, certainly an unusual office in its context. So I would like to take the opportunity to explain a little about the work that OSLA does and the value that I think it adds to the United Nations internal justice system.

OSLA provides free and independent legal advice and representation for staff members falling within the jurisdiction of the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), representing a client base of approximately 74,000 staff members. OSLA was born out of the Panel of Counsel, a group of staff members who provided legal advice and representation on a voluntary basis under the old internal justice system. Recognizing the value added by that sort of assistance to staff members, OSLA was created five years ago during the reform of the United Nations internal justice system.

The advice provided by OSLA covers a wide variety of issues dealt with by the internal justice system, including disciplinary matters, benefits and entitlement cases, appointment-related matters and separation from service. In 2013, OSLA received 762 requests for advice, filed 114 requests for management evaluation (of which 33 were settled at that stage), filed around 71 applications to the UNDT and 33 cases with the UNAT.

## *Funding*

OSLA currently has seven legal officers funded from core General Assembly funds. In addition, a further three administrative staff are based in New York. The Department of Peacekeeping Operations provides an additional post in Nairobi. Through resolution 68/254, the General Assembly established a

voluntary payroll deduction on an experimental basis to supplement OSLA funding. The deduction is on a sliding scale, representing 0.05 per cent of the salary of staff members. The deduction is voluntary, but is on an opt-out basis, so that staff members need to fill in a form if they do not wish to make the contribution. Whether or not staff members contribute in no way affects their right to advice and representation by OSLA. If successful, the deduction scheme will fund additional posts in OSLA.

### **The different roles played by OSLA**

It may seem surprising to those outside the system that the United Nations funds an office of professional lawyers whose role is, in part, to sue the Organization. Although this reaction is perhaps understandable, the fact that the United Nations is immune from legal action in national jurisdictions puts the need for the provision of legal assistance in a very different light. It is no doubt clear that OSLA represents a benefit for staff members. What I would like to outline are some of the benefits OSLA offers the internal justice system and dispute resolution in the United Nations as a whole.

#### *Navigator/information office*

OSLA is a source of information for staff members. The internal justice system is complex, and there are a number of different mechanisms available to staff members to address the various types of grievance. Some elements of the Staff Rules read like a tax code and can be somewhat impenetrable for lay staff members who are trying to focus on other important work. Individuals without a clear understanding of their rights and the mechanisms available to them often knock on every door available when seeking redress. This is frustrating for the staff member, as well as representing inefficiency in the system, which does not create the outcomes for which it was designed.

OSLA provides advice to all staff members. It informs them of their rights in any given situation and identifies the most suitable mechanism to seek redress or resolution. It gives staff members an idea of what to expect from formal and informal mechanisms, helps to manage their expectations about what may be achievable and assists them in deciding upon the most appropriate mechanism to use. Informed decisions on how to seek resolution make the system more efficient and more likely to achieve the outcomes for which it was designed.

#### *Filter*

Litigation clearly represents a cost to the Organization and should be a recourse of last resort. It sometimes arises simply because staff members have

misunderstood their rights in a specific situation. And there are often other bars to successful litigation, such as deadlines which are strictly enforced, or the absence of evidence to support the cases of staff members.

For staff members seeking representation in the formal system, OSLA conducts an intake procedure. A legal officer reviews the case in light of the rules and the available evidence and makes an analysis of whether it has a reasonable chance of success. This analysis is then considered by the Chief of OSLA, and representation is only provided where it is considered that a case has a reasonable chance of success. This essentially mirrors the type of merit test that would ordinarily be applied in a national legal aid system. Staff members sometimes find this test problematic and feel that OSLA should represent all those who request assistance. However, OSLA does not have the resources to do this, and it would not in any case be desirable for the staff member or the system. Litigation is not only a cost to the Organization, but also a stressful experience for staff members. Advising staff members to pursue a case with no reasonable chance of success would not be acting in their best interests.

When OSLA declines representation, the staff member receives a reasoned explanation of its decision. For many staff members, this explanation is sufficient, and litigation is therefore avoided, which represents a significant saving for the Organization. Where appropriate, staff members who are denied representation may be assisted in seeking redress through some other mechanism. Inevitably, a number of staff members do not accept OSLA's advice and proceed with a formal challenge, either representing themselves or instructing private counsel. OSLA has sought to follow up these cases, and its record in accurately predicting outcomes in the formal system is good.

### *Settlement facilitator*

It is widely agreed that the informal settlement of disputes is desirable, wherever possible. OSLA therefore prioritizes informal settlement where possible at all stages of the process. Moreover, OSLA's situation assists in obtaining informal resolution. As it works constantly in the United Nations system, OSLA staff have the opportunity to develop relationships of trust with their interlocutors in the various departments, including human resources, the Management Evaluation Unit and the legal representatives of the Administration. This facilitates the sort of frank discussions necessary to settle matters in good faith.

OSLA assists staff members to understand what is and is not likely to be achievable through the settlement of a case, and how long it is likely to take. OSLA can also assist staff members to gain an objective view of their situation. Staff members often come to OSLA feeling quite rightly aggrieved and wanting to fight back. For persons in that situation, settlement may not at first feel sufficiently

close to winning to be attractive. Professional legal advice can take some of that emotion out of the argument. This is helpful in ensuring staff members are able to make the sort of pragmatic compromises that are required to reach a settlement.

Staff members can be assisted by OSLA in the informal system in a number of different ways. Depending on the situation, the direct involvement of OSLA may or may not be of assistance, which means that OSLA sometimes provides support behind the scenes, and sometimes formally represents a staff member in mediation or negotiation. In all cases, OSLA can assist in ensuring that the legal argument underpinning a staff member's position is properly articulated. And in all cases, OSLA can assist staff members to ensure that they preserve their rights under the formal system while exploring the possibility of informal settlement.

One of the questions raised during this Conference is how to ensure that managers take mediation seriously. In a perfect world, this would be automatic. But it is often the case that a clear articulation of the Organization's exposure in the formal system can be helpful in bringing the Administration to the table and achieving informal settlement. This is something that OSLA can and does do to assist staff members.

### *Litigation streamliner*

Staff members who approach OSLA are often in very complex and difficult work situations, in which a number of different things are going wrong and there are a number of different grievances. They often instinctively consider that taking the situation to a tribunal will ensure that the matter is resolved. OSLA's advice often involves explaining that formal legal systems are largely corrective, but not preventive, and that they are not well adapted to dealing with situations holistically. Legal advice can assist staff members to analyse their cases and discard irrelevant elements, or those that cannot be dealt with in the formal system. These are the sorts of things that come quite naturally to a lawyer, but are not always clear to a lay staff member who has been experiencing a difficult situation for a significant period of time. Legal advice can unpack a case and present it to a tribunal in digestible form. At the end of the day, the cost to the Organization of OSLA doing this for staff members is significantly lower than if the work is done by a judge, assisted by legal officers, with representations from the Administration's counsel.

Unrepresented staff members constitute a cost to the system that can be mitigated by the provision of legal advice. OSLA is not the only source of legal advice for staff members, as there are a number of private lawyers who advise clients in the United Nations system. However, in a jurisdiction that exists around the world with no mechanism for awarding costs, it is unrealistic to consider that private lawyers are an option for many staff members.

*Robust staff champion*

The points made above largely coalesce around the advantages to the Organization of the provision of free legal advice and representation to staff members. But it is also a matter of principle. The United Nations works to promote access to justice around the world, and it is important to afford its own workforce the same right. For example, a locally recruited staff member in a conflict-affected area simply would not have access to private representation. The absence of a service such as OSLA would therefore risk the exclusion of some staff members from the system and would make representation the preserve of those who can afford it and who have access to it.

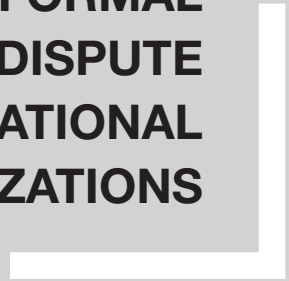
The internal justice system has no mechanism for recovering costs and there are thresholds to the compensation that can be awarded. It may therefore be considered that, as a matter of fairness, free representation should be provided to all eligible staff members. Taking on the United Nations as an employer is a daunting prospect. Much has been said about the fear that it can engender in staff members. Indeed, many staff members, without access to representation, would be dissuaded from bringing a case for just that reason. If this means that unlawful decisions remain uncorrected, then the system is not achieving the outcomes for which it has been designed. There is also the issue of equality of arms. The Administration has an extensive team of lawyers to respond to applications. The provision of legal advice is therefore important in achieving a level playing field and ensuring that the decisions of the tribunals are adopted in full knowledge of all the relevant arguments and evidence in each case.

OSLA has a good track record in the formal system. It has assisted a large number of staff members and has been involved in certain landmark cases, which I hope have improved the system for staff members as a whole.





**THE ROLE OF INFORMAL  
AND ALTERNATIVE DISPUTE  
RESOLUTION IN INTERNATIONAL  
ORGANIZATIONS**





## THE PERSPECTIVE OF THE UNITED NATIONS WORLD FOOD PROGRAMME

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Francisco Espejo

When analysing the role of informal and alternative dispute resolution (IADR) in international organizations, it is important to bear in mind whose perspective we are considering. Is it the organizational (management) perspective? Is it the viewpoint of employees? Or is it the perspective of formal dispute resolution mechanisms?

If the expectation is that IADR adds value to the whole system, the most likely answer is that the role of IADR should be equally relevant for the organization, employees involved in disputes and formal conflict resolution channels. This analysis therefore uses the information available from the practice of the Office of the Ombudsman and Mediation Services of the World Food Programme (WFP) to explore the expectations that can be identified from the perspective of the three stakeholders mentioned above, and the evidence of the contribution made by IADR to fulfilling these expectations.

What might these expectations be? Based on interviews with managers and employees, the answer could be that the organization expects IADR to contribute to achieving a quite unique combination of “happy-happy-happy” (satisfied) actors. Indeed, for the organization it is important that, following IADR, the affected party is “happy”. But the organization would also expect that, whenever possible, the other party involved in the dispute is also “happy”. And the organization may expect its mission to be fulfilled better because the two parties are satisfied after dealing with a dispute through IADR. Their productivity, engagement and commitment will be recovered/increased.

From a more general perspective, the organization would also expect workplace conflicts to be prevented and employees to adhere to the ethical vision

and to practice the values and standards of conduct of the organization. An additional expectation would be that the organization's liability is safeguarded and costs attributable to workplace conflicts are reduced.

An employee may expect to remain engaged and motivated by the organization's goals, without experiencing psychological distress due to workplace conflict. The employee may also wish to feel considered and recognized, protected and supported by the organization when experiencing a problem.

The formal system may try to ensure that IADR reduces the number of workplace disputes that are formally filed.

How far does IADR meet these varied expectations? A thorough answer is beyond the scope of this analysis. But some meaningful elements can be drawn from statistics of the activities of the Ombudsman.

A first consideration is that, while "happy-happy-happy" dispute resolution can be achieved in a variety of situations, this kind of outcome is not feasible in all types of disputes. Indeed, disciplinary actions or rejected appeals imply that one of the parties will not feel happy with the outcome.

The scope of the issues reported to the Ombudsman of the WFP in the 356 cases opened in 2013 shows that the portfolio of problems is quite specific and differs from the problems addressed by formal mechanisms. In the same year, 79 per cent of the issues identified fell into three broad categories:<sup>1</sup> evaluative relationships between supervisors and supervisees; career progression and development; and organizational, strategic and mission-related issues. In one third of all cases, the employee was experiencing harassment or abuse of power. The workplace issues were having a strong impact on the people affected. Indeed, the productivity, health and engagement of over 50 per cent of the employees who contacted the Ombudsman were affected simultaneously. This finding indicates that the Office offers services to employees who are profoundly affected by workplace conflicts or grievances.

The effectiveness of IADR is not easy to measure. However, a proxy for success could be self-assessment of the level of resolution by the persons affected after the problem has been addressed. An anonymous survey undertaken by the Office after the closure of each case shows that, of the 50 per cent who answered the survey, 60 per cent indicated that their conflict or grievance had been fully or partially resolved following their contact with the Ombudsman. Resolution was through a non-adversarial process, so it is likely that the other party to the dispute also felt satisfied. Furthermore, 84 per cent of respondents were satisfied or very satisfied with the services received, and 80 per cent indicated they had learned tools that would help them to resolve future conflicts.

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<sup>1</sup> Based on the categories defined by the International Ombudsman Association.

Finally, it should be noted that 26 per cent of respondents to the survey strongly agreed that the solution generated through the Ombudsman eliminated the need to take formal measures, such as appeals or investigations, to address the grievance or conflict.

In terms of promoting adherence to ethical standards and equipping employees with tools to prevent or manage conflicts early, the Office of the Ombudsman offers 12 workshops to country offices covering some 500 employees each year.

The evidence described, although limited, seems sufficient to suggest that IADR mechanisms perform a role that is relevant to the organization as a whole, to employees and to formal mechanisms. This role does not replace formal channels, but complements them with actions that may be beneficial for a wide variety of stakeholders and cheaper for the organization.



## REFLECTIONS ON FAIRNESS AND INFORMAL DISPUTE RESOLUTION IN INTERNATIONAL ORGANIZATIONS

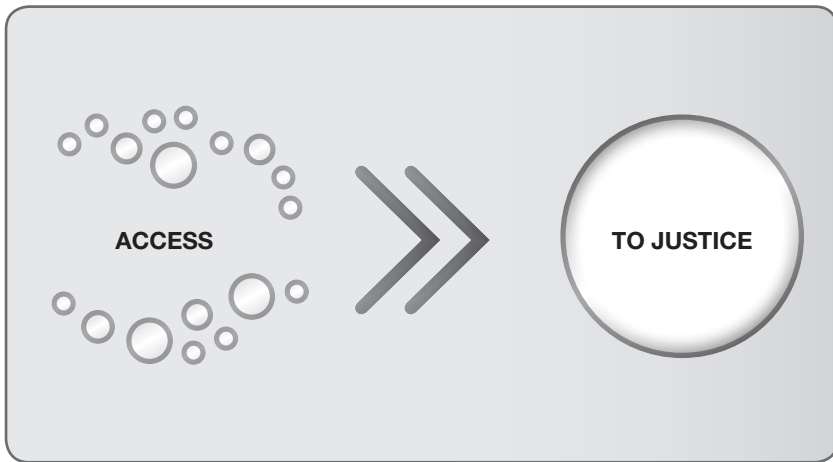
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Indumati Sen

“Fairness” and “justice” are expectations commonly associated with formal bodies that administer justice and make determinations to settle disputes. The recent ILO Conference on Best Practices in Resolving Employment Disputes in International Organizations helped to shed further light on fairness as also being an essential element for informal dispute resolution systems, such as Ombudsman and Mediation programmes. In short, in informal dispute resolution, it may be said that fairness is justice, and the nature of organizational Ombudsman and Mediation programmes can help surface the different faces of fairness and their importance for individuals, groups and institutions. The aim of informal dispute resolution is that, through accessible, balanced and trusted processes, the parties are empowered to become informed, evaluate options for resolutions and resolution pathways, and where appropriate, reach an agreement that will satisfy various needs and interests. While fairness is an essential component of any dispute resolution experience, informal systems expand the space to make the process more human and one of learning. For organizations with an Ombudsman programme, the ability of the Ombudsman to raise questions based on fairness regarding organizational expectations, systems and processes contributes to organizational and managerial self-evaluation and opportunities for change. The discussion below briefly reflects on several ways in which informal dispute resolution systems in organizations can promote fairness.

### *Increasing the opportunity to access resolution processes to address disputes*

Formal systems of dispute resolution may be important options for those in a conflict, but some may avoid them or perceive them as inaccessible based on

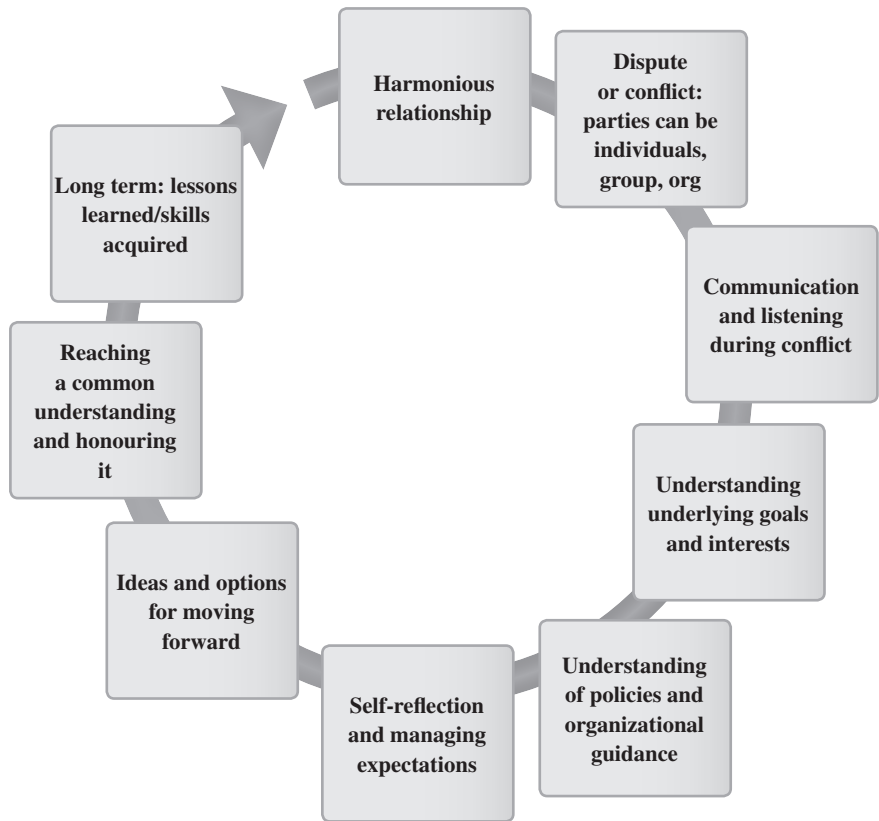


personal preference, needs, or organizational culture. Informal systems can serve as counterparts to formal systems of justice in encouraging a holistic approach to addressing conflict. They encourage reflection on how an organization can adapt to the dispute resolution needs of its population, systems and culture, as well as on the nature of the disputes that occur. Informal systems can create greater access to justice by not only considering a rights-based approach, but also by being attentive to the underlying interests and needs of the individual parties, as well as to the issues that surround and are at the heart of a conflict. In most international organizations, the intersection of languages, identities, relationships, hierarchies, communication and interpersonal styles, backgrounds and cultures, values and experiences makes for a rich and complex environment. It serves such an organization well to have different types of pathways to dispute resolution, especially based on the diversity of people and the needs that emerge.

In addition, the disputes that arise may have their origins, or exist, in larger, hidden and more complex conflict contexts. Because informal systems can help parties to explore issues of almost any nature at almost any stage, they not only create more access to opportunities for resolution, but can also help to reach the roots of larger conflict contexts and questions of fair processes and systems. During this exploration, confidentiality serves as a vital component for parties to comfortably and trustingly undergo a more in depth search for information to help themselves.

A justice or dispute resolution system that makes informal mechanisms available enhances access to fairness and justice. A justice system where further links are created and understood between the formal and informal systems to facilitate and nurture the most suitable pathway option for the parties is likely to create even more seamless access for the parties.

*Fairness through active participation and empowerment in an informal process*



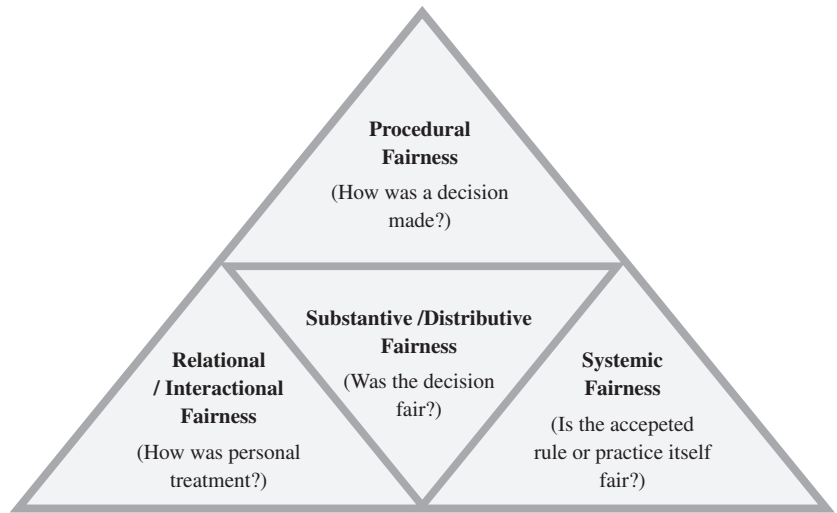
(The diagram above represents an example of what an informal process might look like in an Ombudsman's Office.)

The experience of the parties and the manner in which they encounter fairness in an informal dispute resolution process, such as in the Ombudsman's Office or the Mediator's Office, mainly occur as a result of participation and the balance reached through a more party-empowered and party-driven process. Informal processes are "party-centric," or centered around understanding and agreement about what will work for the parties, namely those in conflicts whose needs, interests and rights are impacted. The Mediator or Ombudsman serves as an impartial and independent third party to guide a confidential process in which one or more parties has the opportunity to share information with a view to exploring options for resolution. The process offers the chance to reflect conflict as a human experience, and informal conflict resolution offers a space in which a person may be vulnerable but safe, and where individuals and groups can be

listened to and heard more directly, become engaged and be informed about possibilities and limitations, reflect and think creatively about how to reach a solution, either on their own or with the help of the Mediator or Ombudsman, and move on from the situation in practical and emotional terms. Self-empowerment and participation in the dispute resolution process and its outcome also help to encourage the parties to take responsibility for the dispute and its resolution, think in terms of fair treatment themselves, and they diminish fear of the resolution process by giving the parties voice in its design and outcome.

The informal process also may create an opportunity to develop an outcome that satisfies very human needs often not possible through formal systems, such as voluntarily acknowledging the impacts of actions taken that may have caused harm, making an apology, extending forgiveness, improving communication, sharing lessons learned and even reconciling broken relationships. Enabling a conversation between disputing parties to take place can be an immense feat in itself: a conversation may seem simple enough to those outside the conflict, but the parties have to work hard to sit at the same table again. These opportunities can have a significant impact on the personal experience one has in relation to fairness while going through and looking back on a dispute resolution process.

*Questions of fairness for an organizational Ombudsman when examining an issue*



(Graphic adapted from Moore, C. (2012), *The mediation process: Practical strategies for resolving conflict*, Jossey-Bass, San Francisco; and Ombudsman of Saskatchewan (2007), *The fine art of fairness: A guide for fair practice*; see also Avgar, A.C. (2011): “The Ombudsman’s ability to influence perceptions of organizational fairness: Toward a multi-stakeholder framework”, *Journal of the International Ombudsman Association*, 4(1), 7-17)

A guiding principle for an organizational Ombudsman is to advocate for fairness and serve as a source of organizational conscience. What does this mean in practice? While there will be variations from one organization to another, the independence, impartiality and mandate of an organizational Ombudsman is ideally strong and broad enough to enable her/him to raise questions on the basis of fairness effectively. The purpose of the questions raised is not to dictate organizational action, but to draw attention to issues, provoke thought, dialogue, review and other steps that could ultimately lead to thoughtful change by decision-makers. Recalling that an organizational Ombudsman does not make decisions on cases, formally investigate matters, enforce or overturn management decisions or those made by the formal justice system, there are typically four windows through which the Ombudsman can look at an issue and raise questions of fairness with the organization.

(1) *Procedural fairness*: while informally looking at a case, an Ombudsman may perform an analysis of the applicable rules, policies and procedures involved to see whether there are any questions of fair and equitable process. That is, the Ombudsman may enquire into what steps were involved and how they were followed in a specific case. For example, if a staff member complains that her manager reviewed her performance, but did not follow the necessary steps, part of the Ombudsman's role would be to review the appraisal procedure and gather information on how the process was applied in that case. If steps were missed or there are other questions, the Ombudsman could informally raise them on the basis of procedural fairness with the manager, with the permission of the complaining staff member, so the issue receives due attention and options may be developed to alleviate it.

(2) *Substantive/distributive fairness*: even where there are no procedural issues or questions, there may be times when it would be appropriate for an Ombudsman to informally enquire regarding how a decision was reached if there are claims of an unfair decision. For example, perhaps the manager followed all the steps to review performance, but a complaint suggests s/he has given salary increases that are disparate and inconsistent within her department. In such an instance, the Ombudsman could gather more information regarding the reasoning behind the decisions and could discuss the fairness concerns, perception and impact of different outcomes with the manager. Again, raising the issue brings attention to it so it may be reviewed and addressed.

(3) *Relational/interactional fairness*: another aspect of fairness and related to procedural fairness, which is not always clearly considered through that lens, is the human relational aspect that occurs during personal interactions, or in other words how a person is treated during a process. This means that in addition to checking the boxes to complete steps in a process, there is value placed on factors such as relationships, respect in communication, attentiveness and many

other relational needs that recognize the importance of human dignity during a process. For example, if the staff member feels that her manager has been disrespectful, angry or intimidating in addressing an issue raised, the Ombudsman could assist both the staff member and manager to identify and promote understanding of expectations around personal treatment and their relationship.

(4) *Systemic fairness*: an organizational Ombudsman provides upward feedback on trends and systemic issues based on the complaints that are made, and also makes recommendations as appropriate. In the context of systemic fairness, if, an organizational system is implicated as potentially leading to complaints of unfair process, treatment or outcome, the Ombudsman could provide upward feedback to raise the question of whether the organizational system or practice is itself fair. Therefore, along the lines of the examples cited previously, if there was sufficient basis, the Ombudsman could question whether the policy regarding performance appraisals itself is leading to complaints of unfairness, and could recommend that it be reviewed by the organization.

International organizations with internal justice systems have a wonderful opportunity to think broadly and progressively about the needs and pathways around “fairness” in the context of conflict resolution. Fairness has many faces, and is recognized as essential in any dispute resolution system that values justice, equity and dignity. A system of justice that provides space for well thought-out informal mechanisms also allows for greater access to dispute resolution, more self-empowerment, participation, and fair treatment. It also promotes more opportunities to evaluate broader, systemic questions of fairness in an organizational setting. Such a system of justice recognizes the human side of conflict, and the great individual and institutional learnings that can come from it.

# CREATING A MEDIATION PROGRAMME IN INTERNATIONAL ORGANIZATIONS: LESSONS LEARNED

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Camilo Azcarate

**T**he use of informal dispute resolution services to address workplace conflicts in organizations is still relatively new, particularly compared with adjudicative mechanisms, such as administrative tribunals. The two most common informal services used by international organizations are Ombuds and, more recently, mediation services. Both have gained in strength and popularity in organizations over the past two decades, particularly in the United States and Europe, and mostly, and although not exclusively, in academia, health care and financial institutions. These services are regulated by standards of conduct and ethical codes created by professional associations, such as the International Ombudsman Association (IOA)<sup>1</sup> and the American Arbitration Association, American Bar Association and Association of Conflict Resolution.<sup>2</sup> Similarly, the predecessor of the Association of Conflict Resolution (the Society of Professionals in Dispute Resolution - SPIDR) published recommendations for the design of effective conflict management systems, which are also relevant for the creation of any mediation service.

The purpose of this presentation is to provide guidance and practical tips to international organizations considering the creation of a mediation service. I will use the metaphor of a tree to explain the different elements and steps that need to be considered, starting with the foundations (roots) of the mediation

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<sup>1</sup> International Ombudsman Association, Standards of practice, at <http://www.ombudsassociation.org/About-Us/IOA-Standards-of-Practice-IOA-Best-Practices.aspx>

<sup>2</sup> American Arbitration Association (AAA), American Bar Association (ABA) and Association of Conflict Resolution (ACR), *The model standards of conduct for mediators*, at [http://www.mediate.com/articles/model\\_standards\\_of\\_conflict.cfm](http://www.mediate.com/articles/model_standards_of_conflict.cfm)

service, followed by the type of support needed for its survival and growth (the trunk) and, finally, stating the expected benefits (fruits) of a professionally designed and well-run mediation service.

## **The roots**

### *Design quality*

The quality of design of a mediation service can be divided into two areas. First, the quality of the design process itself, that is the way in which the organization approaches the creation of the mediation service. This process requires a balance between the inclusion of key stakeholders and the use of professionals who can apply best practices during the design process. The second area is the actual design, which also needs to balance the creation of an effective normative framework, that is the rules that provide the structure and protect the service, while maintaining an appropriate level of discretion for administrators. Rules are the bones of the service, while appropriate administrative discretion is its muscle. A healthy balance between the two is necessary for a well-functioning mediation service.

### *Quality of administrators*

Once the design is completed, the next step is the selection of experienced and knowledgeable administrators who have the skills and integrity to run the mediation service with independence and integrity. Administrators must have a personal and professional commitment to the core values of the mediation service, including its confidentiality and impartiality. They also need to be responsive and flexible so that they can adapt these principles to the specific characteristics of each case.

Administrators provide coordination, guidance and process advice to parties and mediators. They may be the main point of intake and are responsible for collecting the necessary data to measure and evaluate the quality of mediation, that is whether it is being conducted using best practice principles, such as independence, confidentiality and impartiality.

### *Quality of mediators*

The next step in the creation of the mediation service is the recruitment and training of mediators. In mediation programmes with low case loads, administrators may be able to conduct mediation themselves. However, in organizations expecting larger case loads, the creation of a roster of mediators is a cost-effective alternative that also has the benefit of providing diversity and flexibility to the process.

The selection of mediators should take into account their level of knowledge and experience, as well as their commitment to core values and best practices. Some organizations use peer mediators (staff members selected and trained to conduct mediation as volunteers), while others use professional mediators from outside the organization. Both models have advantages and drawbacks. For instance, peer mediators are more familiar with the rules and culture of the organization. However, they have to be trained as mediators, which can be an important continuing cost for the mediation service. Moreover, the quality and consistency of peer mediators varies greatly, which can make a programme that uses peer mediators challenging to manage. On the other hand, while professional mediators require additional funding and initial training in the organization's rules and culture, they also tend to be more consistent and professional in their performance.

Regardless of the model used, mediators must follow standards of conduct, such as those provided by the AAA/ABA/ACR. These standards require mediators to conduct services with independence, impartiality and confidentiality, and to respect the self-determination of the parties. They also need to be diligent and respectful in their handling of communications with the parties and with others.

The selection of a roster of mediators is complicated by the fact that the certification of mediators is still in its infancy and does not provide sufficient assurances about their quality. The selection of mediators should therefore include a demonstration of the practical skills necessary to conduct the mediation process. This can be achieved through a performance-based selection process, in which candidates conduct a mock mediation that is recorded and evaluated by professionals.<sup>3</sup> Once the mediators have been vetted, they can be trained in the specific rules and culture of the organization. It is also advisable for new mediators to conduct their initial mediation as co-mediators with persons who have greater experience of mediating in the organization. This role can be played by administrators, who can provide new mediators with additional guidance and support.

## **The trunk**

### *Organizational support*

Mediation services, particularly newly established ones, require a good deal of support. This not only includes adequate funding, but also a high level of respect and protection for their role as independent and confidential resources.

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<sup>3</sup> For further information, see Honoroff, B., Matz, D., and O'Connor, D. (1990, reprinted in 2007): "Putting mediator skills to the test", *Negotiation Journal*, 6(1), 37-46.

It is important to understand from the outset that the characteristics of mediation are not always well understood or accepted by other parts of the organization. The creation of the programme may signal an actual or desirable culture shift in the organization, in which good faith dissent and the resolution of all types of conflict is encouraged at the lowest possible level. Mediation is an interest-based process in which rules may just be part of the background information. The interests and needs of the parties are used as the basis for discussion. Some parts of the organization may not be used to handling conflicts in this way, and may resist the way in which mediation approaches workplace conflict. It is therefore very important to provide the mediation service with the respect, protection and time that is needed to produce the desired results.

### *Integration*

New mediation services need to link effectively with other parts of the organization's dispute resolution system, which in international organizations may include an administrative tribunal, an Ombuds office and/or a peer review service. New mediation services also need to connect effectively with other systems, such as human resources, legal and health services, as well as the institutions representing the staff (such as the staff association).

According to the SPIDR guidelines for the design of integrated conflict management systems in organizations,<sup>4</sup> such systems should be readily available to everyone and have multiple points of access to different services that address all types of conflicts at the lowest possible level. A new mediation service can contribute greatly to the realization of the larger goals of such systems.

### **The fruits**

#### *Quality of outcomes*

*Flexibility:* like all interest-based processes, mediation opens up many possibilities for dispute resolution, including some highly creative options that may not have been considered without the deep communication fostered by mediation. Mediation agreements can be customized to adapt to the specifics of each case and the needs of the participants.

*Effectiveness:* mediation agreements have a very high level of compliance, as the parties have reached the agreement voluntarily. The implementation of mediated agreements tends to be straightforward and collaborative.

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<sup>4</sup> SPIDR, *Guidelines for the design of integrated conflict management systems within organizations: Executive summary*, Mediate.com: <http://www.mediate.com/articles/spidrtrack1.cfm>

*Confidentiality:* mediated agreements are shared with others on a need to know basis only, which allows agreements to be crafted that are specific to the circumstances of the case and the needs of the parties.

#### *Benefits for participants*

*Satisfaction/voice effect:* the parties derive more satisfaction from dispute resolution processes which provide them with ample opportunities to speak and to be heard. Indeed, the evaluation by participants of the fairness of the process (procedural justice) depends in large part on their belief that they had an opportunity to be heard. The voice effect is probably the best documented phenomenon in procedural justice research.<sup>5</sup> Mediation provides participants with ample opportunity to express their views, which impacts the sense of procedural justice and overall satisfaction.

*Self-determination:* the participants in mediation are ultimately in complete control of the outcome of the process. Participants are not pressured into signing agreements. This is an important characteristic of mediation. The principles of self-determination and confidentiality contribute to reducing the stress of the process, which in turn facilitates effective communication between the parties.

#### *Benefits for the organization*

*Flexibility:* mediation services allow organizations to approach individual cases as such, offering flexibility of outcome based on the specific characteristics of each case.

*Costs:* mediation services tend to cost less and take less time than adjudicatory processes.

*Risks:* the confidentiality of the mediation process reduces the reputational risks created by other non-confidential processes. Moreover, mediated agreements do not create precedents.

*Relationships:* mediation has the potential to address conflicts while maintaining, and in some cases improving the quality of the relationship between the parties.

*Learning:* mediation can offer an invaluable learning opportunity for participants, including with regard to the impact of behaviour and styles of communication on other people in the organization.

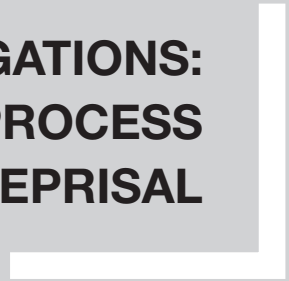
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<sup>5</sup> Thibaut, J., and Walker, L. (1975): *Procedural justice: A psychological analysis*, Laurence Erlbaum Associates.





**INTERNAL INVESTIGATIONS:  
ENSURING DUE PROCESS  
AND NON-REPRISAL**





# MISCONDUCT INVESTIGATIONS AND THE DISCIPLINARY PROCESS: BALANCING COMPETING CONSIDERATIONS OF DUE PROCESS

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Joan S. Powers

A perennial subject of discussion among administrative lawyers in public international organizations is the handling of misconduct investigations and the disciplinary process under their respective internal justice systems. In this intervention, I explore some of the reasons why this topic continues to present challenges to lawyers and other stakeholders involved in the process, and offer suggestions on how to avoid or mitigate these difficulties.

## Background

*Ethical values.* Public international organizations have typically expressed their ethical values through standards of conduct for staff. While there may be a wide variety in the mandates and missions of these organizations, their standards of conduct are remarkably similar. They all basically reiterate the core values of integrity, impartiality, discretion, and the duty of exclusive loyalty to the organization. Such values are also reflected in the Standards of Conduct for the International Civil Service (2013).

*Conduct-related policies.* In order to give content to these rather abstract ethical values, most international organizations have addressed specific aspects of workplace ethics (such as harassment and conflict of interest) in their staff rules. Many organizations have also made an explicit commitment to zero tolerance of the most egregious types of misconduct, such as sexual harassment, theft and fraud. Staff rules typically provide that these types of actions, if substantiated, may result in termination of employment.

*Enforcing standards of conduct.* In order to apply and enforce standards of conduct and related policies, most organizations have adopted some type

of protocol (such as an investigations manual) setting out a “roadmap” for conducting a misconduct investigation, as well as a process for deciding whether to impose disciplinary measures. The stages of this end-to-end process typically include: an initial review of an allegation of misconduct to see if a formal investigation is warranted; and, if so, planning and preparing for a formal investigation, including how to gather relevant information, whether inculpatory or exculpatory; notifying the staff member who is the subject of the investigation of the nature of the allegations, and interviewing him/her early in the process; interviewing others, including the complainant (if any) and witnesses, as well as persons suggested by the subject of the investigation; presenting the findings of the investigation to the decision-maker (typically the Human Resources Department or management, depending on the rank of the subject and/or whether the matter may result in termination of employment); conducting a disciplinary process, in which the subject is formally charged with misconduct and given the opportunity to be heard before a decision is taken; deciding whether disciplinary measures are warranted and, if so, the appropriate sanction, taking into account the principles of proportionality and any mitigating circumstances; and the subject’s right of review under the internal justice system.

Although, on paper, this process may seem fairly straightforward, the handling of a misconduct investigation is rarely straightforward in practice. This is because these cases require the balancing of a number of different, and often competing considerations that are difficult to reconcile.

## Analysis

Six examples come to mind of the competing considerations that are inherent in the internal investigation and disciplinary process.

- (1) *On the one hand, an investigation needs to be thorough while, on the other, it needs to be completed within a reasonable time.* It goes without saying that an internal investigation of misconduct must be thorough and fact-based, especially given the need to withstand scrutiny in the event of a legal challenge. As a result, investigations often take a very long time, particularly where the facts are complex. At the same time, administrative tribunals have repeatedly emphasized that there should not be undue delay in the process, as it may give rise to reputational and other types of intangible injury to the subject of the investigation. In several instances, tribunals have awarded substantial moral damages to staff members in situations where, even though the tribunal acknowledged that the case was ‘complex’ and ‘sensitive’, the time taken to complete it was considered excessive. Damages have been awarded against the organization as a result. It may therefore be difficult to conduct an investi-

gation that is sufficiently thorough to satisfy due process, and yet to complete the investigation with “all due speed”, to paraphrase the International Labour Organization Administrative Tribunal (ILOAT). The right balance will depend on the facts and circumstances of the particular case.

For example, in Judgment No. 2773 (§11), the ILOAT observed that, although the organization’s conduct of the proceedings was regrettably slow and had dragged on for almost four years in total, this was explained in part by the time needed to thoroughly check the validity of the charges and to study the “particularly abundant” documentation submitted by the complainant. Accordingly, the ILOAT rejected the applicant’s contention that the Food and Agriculture Organization (FAO) had not made any effort to examine the documents submitted, and it dismissed his challenge to the organization’s decision to terminate him for serious misconduct. In comparison, in Judgment No. 2698, the ILOAT concluded that the Director-General of the World Intellectual Property Organization (WIPO) “did not conduct the investigation with ‘all due speed’ as required by ILOAT case law and by the circumstances of the case, and he thus caused an unjustified delay in the handling of the case.” As a result, USD10,000 was awarded in “moral damages” to the complainant because of what the ILOAT regarded as “the unjustified delay in the handling of the case – which took about a year – thus placing the staff member in “a situation of uncertainty over his further career.”<sup>1</sup>

- (2) *A staff member who is under investigation should be given early notice of the allegations against him/her; at the same time, there is a need to preserve evidence and protect the integrity of the investigation.* The tribunals have emphasized that due process requires early notification of staff who are under investigation so that they may defend themselves in a timely fashion.<sup>2</sup> On the other hand, there may be a risk that, once the subject has been notified of the allegations, he/she may try to destroy or tamper with the evidence or approach key witnesses and try to influence them before they are interviewed. This clearly creates a dilemma for the organization in deciding the optimal time to inform the subject.
- (3) *Although a staff member under investigation is entitled to a presumption of innocence while the investigation is pending, it may be potentially disruptive if the subject remains at work during this period.* It is widely accepted that the

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<sup>1</sup> §13-14. There are similar findings by the World Bank Administrative Tribunal (WBAT) in Decision No. 426 and the United Nations Appeals Tribunal (UNAT) in Decision No. 2012-UNAT-194.

<sup>2</sup> The WBAT found in Decision No. 426 (op. cit) that “not informing the [subject] of the preliminary inquiry transgressed due process because she was not offered the opportunity to defend herself in a timely fashion against damaging allegations. It resulted in unfair treatment as it unnecessarily prolonged her anxiety and obviously compromised her effectiveness.”

subject of an investigation/disciplinary process must be presumed “innocent” unless and until the charge of misconduct is duly established. Nevertheless, there may be risks in simply maintaining the status quo while an investigation is pending, for example by allowing the subject to continue working and/or to have access to the office premises and IT systems. On the other hand, it may be risky to suspend the subject from active duty, particularly for a lengthy period, as the tribunals have held that subjects of investigations should be suspended from their duties only in compelling circumstances.<sup>3</sup>

Such circumstances have been found to exist where the subject of the investigation sent written threats to the organization,<sup>4</sup> or was responsible for IT systems. For example, in Judgment No. 3035, the ILOAT, citing the applicable staff rule, concluded that there was a sufficient basis for suspending the staff member from work, given that the extremely sensitive nature of his duties as a senior e-mail administrator, and that his continuation in the office pending the results of the investigation could be prejudicial to WIPO’s interests. The ILOAT held that “when an IT administrator is suspended from duty on the grounds that he may have undermined the integrity and security of the Organization’s IT systems, withdrawing his right of access to its premises is a necessary and unavoidable measure.”<sup>5</sup>

- (4) *The subject of an investigation is entitled to know who his/her accusers are; at the same time, “whistleblowers”, victims and witnesses are entitled to protection against retaliation.* Administrative tribunals have held that staff members who are charged with misconduct have a fundamental right to be adequately informed of the basis of the charge and to confront their accusers. This normally means that the identity of those who have reported the misconduct, including victims of harassment, and the information they have provided in the

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<sup>3</sup> See, for example, ILOAT Judgment No. 3035, §10, holding that, while suspension is an interim measure that does not necessarily need to be followed by a decision to impose a disciplinary sanction, it must be “legally founded, justified by the requirements of the organisation and in accordance with the principle of proportionality...” and “will not be ordered except in cases of serious misconduct.”)

<sup>4</sup> See ILOAT Judgment No. 3366, in which the Tribunal concluded that the Administration’s decision to bar the subject from the building was justified, given the threats he had made. Although it may have been an affront to his dignity to have his photograph posted at various security checkpoints, this was necessary to prevent him from gaining access to the workplace.

<sup>5</sup> §21. The ILOAT nevertheless concluded that, although the initial suspension of the staff member was a valid measure, its continuation for over 13 months was not justified. In this case, the Director-General had not accepted the recommendation of the Appeals Board to allow the staff member to return to the workplace or work from home pending the outcome of the investigation, basing his decision on unspecified “operational and security reasons”. The ILOAT concluded that this decision had “extended the duration of the suspension beyond the reasonable limit accepted by the case law and thus caused the complainant moral and professional injury” (§18), and awarded him USD10,000 “to redress the injury suffered.”

investigation, must be disclosed to the subject.<sup>6</sup> At the same time, staff who report misconduct in good faith are entitled to protection against any form of retaliation (so-called “whistleblower” protection). This need is particularly compelling for victims of sexual harassment and other personal misconduct, who may be quite vulnerable to reprisals by the accused, particularly if the accused is in a position of authority over them. The natural reluctance to come forward and report wrongdoing is even greater in situations where staff have a genuine fear of reprisal, which can take many forms, ranging from “pariah” treatment in the workplace to non-renewal of contracts.

Many organizations require staff to report misconduct and to cooperate in the resulting investigation. For example, the World Bank requires staff members to report suspected fraud or corruption to their line management or to the Office of Internal Investigations. Staff are encouraged, but not required, to report all other types of misconduct.<sup>7</sup> Regardless of whether staff are required to report misconduct, most organizations have adopted some type of anti-retaliation or whistleblower policy to protect those who do so. These policies typically provide that staff who believe they have been subject to adverse action as a result of reporting misconduct may report those concerns for follow-up and, possibly, a new investigative/disciplinary proceeding. However, according to a recent decision of the UNAT (*Wasserstrom*), if the retaliation claim is not substantiated, the whistleblower may not be able to pursue the matter further.<sup>8</sup> The repercussions of this decision are still unfolding.<sup>9</sup>

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<sup>6</sup> See ILOAT Judgment No. 3200, §11, in which the ILOAT held that the accused has a right to know the identity of her accusers except where disclosure could “undermine the integrity of the investigation”. It found that the organization had violated due process in failing to provide her with the names of witnesses interviewed and information about the context of their statements. On this basis, the Tribunal set aside the decision to demote her and awarded moral damages and costs.

<sup>7</sup> World Bank Staff Rule 8.01, Sec. 2.02.

<sup>8</sup> See UNAT Judgment No. 457. Mr. Wasserstrom served with the United Nations Interim Administration Mission in Kosovo (UNMIK) from 2002 to 2008. After he had reported fraud and corruption on the part of senior UNMIK officials to the United Nations investigative unit, his contract was not renewed and his office was closed. He then lodged a complaint of retaliation under the United Nations whistleblower protection policy with the United Nations Ethics Office, which concluded that there was a *prima facie* case of retaliation and forwarded the matter to the investigative unit for an internal investigation. The investigation did not substantiate the claim of retaliation, and the Ethics Office accordingly decided not to forward the matter to the Secretary-General. Mr. Wasserstrom brought an action before the United Nations Dispute Tribunal (UNDT), which concluded that he had been the victim of retaliation and awarded him damages. Both sides appealed the matter to the UNAT which, in a 2-1 decision, concluded that Mr. Wasserstrom’s claim was not receivable, in that he was not challenging an “administrative decision” subject to judicial review. On this basis, the UNAT vacated the UNDT’s judgment on liability.

<sup>9</sup> See, for example, “Global Anticorruption Blog: UN, Heal thyself: The UN’s embarrassing failure to protect whistleblowers”, at <http://www.whistleblower.org/multimedia/global-anti-corruption-blog-un-heal-thyself-%E2%80%93-un%E2%80%99s-embarrassing-failure-protect>.

A related question is whether complainants or victims of misconduct have any rights with respect to the investigation initiated on the basis of their allegations, and particularly a right to be informed of the outcome of the process. There does not appear to be a uniform approach on this. The World Bank staff rules do explicitly authorize the Bank to provide periodic updates on the status of the investigation to staff who report misconduct, and to inform them of the outcome of the process, including any disciplinary measures imposed as a result of the allegation, subject to confidentiality constraints.<sup>10</sup> But such provisions are not typically found in other whistleblower policies.

As a related point, in Judgment No. 3065, the ILOAT held that a complainant who alleges harassment has a “right” to be given an opportunity to prove her allegations. This meant that she should have been allowed to review the witness testimony in order to challenge it, including by providing additional evidence or putting her disagreement with the witnesses on record. The ILOAT concluded that, by failing to give the complainant this opportunity, the ILO had breached its duty of care towards her, and it was ordered to pay moral damages (CHF 20,000). So there may be a trend to recognize that organizations owe a duty of care towards staff who make a claim of harassment, as well as to those who are accused.

- (5) *While, on the one hand, it may be advantageous to have a mutually agreed resolution in a misconduct case, on the other, there may be a reputational risk for the organization if no disciplinary measure is imposed on someone who has committed serious misconduct.* A mutually agreed separation in a misconduct case, as in other types of employment dispute, can avoid protracted litigation and uncertainty for both parties, thus saving time and resources. But if a staff member who is suspected of committing serious misconduct separates before any disciplinary action has been taken (possibly under a mutually agreed separation arrangement), this may well create the perception among the staff

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<sup>10</sup> See World Bank Staff Rule 8.02, Sec. 2.06 (Periodic Updates; Notice of Outcome): “Staff members who report suspected misconduct under this Rule *shall be provided with periodic updates* on the status of the Bank Group’s review or investigation into the suspected misconduct ... as well as notice of the final outcome of the review or investigation, including whether misconduct has been substantiated and *whether disciplinary measures, sanctions, or other remedial measures have been taken*. Information regarding disciplinary measures imposed on another staff member shall be handled in accordance with Staff Rule 2.01, ‘Confidentiality of Personnel Information,’ Section 4, ‘Disciplinary Matters.’” [emphasis added.] World Bank Staff Rule 2.01, Sec. 4.01 (Confidentiality of Personnel Information; Misconduct) provides as follows: “A staff member who has brought an allegation of misconduct against another staff member *may be informed of any disciplinary measures imposed... as a result of the allegation*. This includes, but is not limited to, staff members who report suspected misconduct or retaliation under Staff Rule 8.02, ‘Protections and Procedures for Reporting Misconduct (Whistleblowing),’ paragraphs 2.06 and 3.02(c). A staff member informed under this section shall not disclose the information to any other person...” [emphasis added.]

at large that the organization is not aggressively pursuing a “zero tolerance” approach to misconduct, or that it is applying different standards to different types or ranks of staff. If so, it may be difficult for the organization to overcome this perception, particularly since the terms, and even the very existence, of mutually agreed separations must normally remain confidential.

- (6) *A particularly difficult area is whether to deal with a harassment claim as a misconduct or a management issue.* There may be instances where a claim of harassment by a staff member against a supervisor may simply reflect poor management skills or miscommunication (or even lack of communication).<sup>11</sup> Employment-related conflicts are unavoidable and, particularly in international organizations, different cultural styles may also be a contributing factor. As a result, a misconduct investigation may conclude that the behaviour in question is not “harassment” within the meaning of harassment policies. But this may well be a less than satisfactory outcome, as it does not address the underlying problem of interpersonal relationships in the workplace.<sup>12</sup>

Finally, the standard of proof in misconduct cases may also exacerbate the difficulty of navigating the end-to-end disciplinary process. The ILOAT has held that, in order to justify dismissal as a disciplinary sanction, the organization must establish misconduct “beyond a reasonable doubt”.<sup>13</sup> Although the majority of misconduct cases may not ultimately result in dismissal, this standard will inevitably affect the way in which all investigations need to be

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<sup>11</sup> For example, ILOAT Judgment No. 2067, §14.

<sup>12</sup> See ILOAT Judgment No. 3318, where an FAO staff member complained of harassment by his supervisors. The Investigative Unit had concluded that this was a case of poor management, but found no harassment, and no disciplinary action was taken. The aggrieved staff member went to the internal appeals body and then the ILOAT. The ILOAT concluded that the harassment policy had been violated and blamed the organization for not adequately dealing with situation. It awarded USD30,000 in damages to the staff member for the injuries suffered, while making it clear that its findings could not be used against the supervisors accused of harassment.

<sup>13</sup> It has been observed more generally that other administrative tribunals are also setting an increasingly onerous standard of proof and procedural requirements with respect to disciplinary matters. For example, with respect to the WBAT, commentators have noted the transition of the standard of proof over the past 15 years from one of preponderance of the evidence to “higher than a mere balance of probabilities” to “so clear as to generate conviction in the mind of a reasonable person.” Rivero and Grados, “The World Bank Administrative Tribunal and the standard of proof to be applied in investigations of staff misconduct”, in Elias, O. (ed.) (2012): *The development and effectiveness of international administrative law: On the occasion of the thirtieth anniversary of the World Bank Administrative Tribunal*. In their view, this trend reflects “the unpredictability that characterizes the WBAT when it comes to setting standards of review of misconduct cases,” and suggests that it is “imperative” that the WBAT issue clear messages on the scope and application of its rulings in order to provide adequate guidance to the Bank in the handling of misconduct cases.

conducted.<sup>14</sup> This is an extremely high standard, although it is not universally endorsed by administrative tribunals. For example, the UNAT applies a “clear and convincing” standard of proof.<sup>15</sup> Moreover, in cases where the misconduct may be criminal in nature, the organization must consider whether to refer the matter to the applicable law enforcement authorities for possible prosecution. Such cases raise yet another set of issues, involving the implications of such referral for the privileges and immunities of the organization and its staff, as well as the inviolability of its archives.

## Conclusion

*How can these various difficulties be avoided, or at least mitigated?*

Clearly, the key units involved in the process, in particular the investigative, human resources and legal offices, all have a role to play in upholding the ethical standards of the organization. At the same time, each unit wants to protect its autonomy and not be pre-empted by the others. But this should not prevent these units from collaborating from the outset of an investigation in order to anticipate and resolve issues that are potentially problematic (such as whether to suspend the subject while the investigation is pending, complying with protocols to access electronic information, and the timeframe for concluding the process). Early and continuing collaboration would hopefully avoid second-guessing and finger-pointing at the end of the process, when it may be difficult or impossible to correct any procedural flaws. A collective stocktaking

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<sup>14</sup> The difficulties posed by the “beyond a reasonable doubt” standard of proof are apparent in ILOAT Judgment No. 2786. A staff member had been dismissed by the World Health Organization for allegedly submitting several fraudulent medical claims involving medical services for his family members. The ILOAT overturned the termination decision, stating that it was “for the Organization to establish that the [staff member] had knowingly made a false claim”. With respect to the allegation that the staff member had fraudulently obtained reimbursement for surgery performed on his wife, the ILOAT found that the organization had not sufficiently established the misconduct alleged beyond a reasonable doubt, even though the hospital in question had confirmed that it had no record of the patient or the treatment for which the staff member had claimed reimbursement. In the Tribunal’s view, this evidence was insufficient to overcome the staff member’s entitlement to the benefit of the doubt (§16).

<sup>15</sup> See ILOAT Judgment No. 969, §16; see also ILOAT Judgments Nos 2699 and 2849. In contrast, the United Nations Appeals Tribunal has stated: “We will not follow [the ILOAT] in holding that the standard of proof in disciplinary cases is beyond a reasonable doubt. While it is correct that beyond a reasonable doubt is the standard at the ILOAT, this has never been the standard at the United Nations. . . . Disciplinary cases are not criminal. . . . But when termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.” Judgment No. 2011-UNAT-164, §1 and 30 [citation and footnotes omitted].

exercise of lessons learned after the fact is also useful, whether from a particular investigation within the organization or a tribunal decision.

Investigations inevitably involve exercising judgment and making decisions along the way about a variety of competing factors that administrative tribunals have identified as necessary components of due process. No protocol or documentary “roadmap” can ensure an outcome that is foolproof. But, hopefully, awareness that such cases necessarily involve this type of balancing act will itself make the process stronger and more robust.



# **DUE PROCESS DURING INVESTIGATIONS INTO MISCONDUCT: THE APPROACH OF THE INTERNATIONAL ATOMIC ENERGY AGENCY**

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**Jennifer Lusser**

## **Reports of misconduct: Two processes for review**

At the International Atomic Energy Agency (IAEA), there are two ways in which misconduct may be submitted to investigatory scrutiny. Within each of these options, there is a due process framework to protect both the accused and reporters of misconduct.

### *Appendix G to the Staff Regulations and Staff Rules: Procedures to be followed in the event of reported misconduct*

Reports of misconduct under Appendix G to the Staff Rules may be submitted to the Director of the Division of Human Resources, inter alia, by a staff member's supervisor, another staff member, a national authority or the Director of the Office of Internal Oversight Services (OIOS). Upon receipt of a report of misconduct, the Director of the Division of Human Resources undertakes an initial review to determine whether the matter requires additional investigation and referral to the OIOS (if the report was not initially received from the OIOS), and whether there is sufficient information available to warrant presenting the matter to the accused for comment forthwith. If the Director considers that there is enough information to warrant moving forward with the case without referring the file to the OIOS, he or she writes to the staff member accused and asks for comments. The entire dossier, including comments by the reporter and the accused, is reviewed by the Director of the Division of Human Resources, who makes a recommendation to the Deputy Director General, Head of the Department of Management, on one of four possible ways of proceeding with the case: summarily dismiss the staff member accused; forward the matter to the Joint Disciplinary Board so that it can advise the Director General on the

imposition of disciplinary measures; issue a written reprimand that is not a disciplinary measure; or close the case. In this way, it is possible for the Director of the Division of Human Resources to review a report of misconduct without initiating a formal investigation process involving OIOS and to take a conduct-based administrative decision based on his or her own findings.

*Terms of Reference of the Office of Internal Oversight Services (OIOS):*

*Due process framework; Protecting the accused*

While the procedures described above permit the Division of Human Resources to carry out a review that has certain investigatory qualities, it is the OIOS, an independent office that reports to the Director General, which undertakes investigations when there are “indications that the Agency's regulations, rules, policies and pertinent administrative instructions may have been violated or where irregularities in activities may have come to light” (OIOS Charter).

In cases of reported misconduct, the OIOS may carry out investigations as requested by the Director of the Division of Human Resources, if the latter requires additional information after receipt of a report of misconduct. But the OIOS may also undertake investigations of its own accord further to reports that it has received directly from other sources. It may also carry out investigations based on information that it has identified during its regular oversight activities. The OIOS Procedures for the Investigation of Staff Members set forth measures to protect the due process rights of the individual being investigated. The procedures provide that the OIOS must screen reports of misconduct for credibility and a connection to the Agency to see whether the report has sufficient gravity to warrant an investigation and whether investigation is feasible. The OIOS will not proceed with an investigation if there is no *prima facie* evidence of a basis to proceed. In particular, the ability to screen for “sufficient gravity” is a right that is not accorded to the Director of the Division of Human Resources in a review conducted pursuant to Appendix G to the Staff Rules. If a claim is submitted to the Director of the Division of Human Resources under Appendix G, he or she *must* review the claim and submit it to the accused for comment, regardless of how frivolous it may appear to be.

The OIOS Procedures for the Investigation of Staff Members also mandate “fair process”, in accordance with which a staff member who is the subject of an investigation: is notified of the investigation; is given an opportunity to review and comment on the record of his/her interview and is asked to provide a signature confirming the content; may have another staff member present as a neutral observer when being interviewed by the OIOS; and is provided with the draft investigation report for review and response before the final investigation report is issued. An accused staff member also receives information after an

OIOS investigation. If the Director of the OIOS decides that there is insufficient evidence to substantiate a report of misconduct, he or she will order the investigation closed and the accused will be so informed. If the OIOS decides that the report of misconduct is substantiated, a copy of the draft investigation report is provided to the subject of the investigation, who is requested to make comments. The final investigation report is then prepared taking into account those comments. The Head of the Department of the accused, as well as his or her Division Director, are notified of the outcome of investigation on a need-to-know basis.

In addition to these classic means of addressing due process concerns, the IAEA also provides the accused with administrative protection. For example, if the staff member is coming up for an extension of appointment, an administrative extension is offered to ensure that he or she can remain a staff member until the completion of the investigation and the ensuing administrative processes.

*Non-reprisal: Whistleblower policy: Protecting reporters of misconduct*

An IAEA Staff Rule requires anyone who has information indicating the occurrence of misconduct to report the information. Not all reporters wish to be identified. Of those who choose not to be identified, approximately 80 per cent remain completely anonymous, while 20 per cent report under their own name, but do not wish to be identified in the investigation report. The IAEA has a whistleblower policy intended to ensure that reporters of misconduct are protected against negative reprisals and that the due process rights of the accused are respected. The key features of the whistleblower policy include: strict confidentiality – the name of the reporter may not be disclosed without his or her permission; protection of the reporter from retaliation – reprisals should be reported and, if proven, may constitute misconduct; the whistleblower policy applies both to reports made directly to the OIOS and those made to the Director of the Division of Human Resources under Appendix G to the Staff Rules; reporters of misconduct may be moved out of their current division to protect them from reprisals or from the influence of supervisors or colleagues; and, in practice, if the OIOS determines that it cannot protect a whistleblower, it may decide not to go forward with the case, which may occur when it is obvious that the information provided could only have come from one person, making it difficult to protect the identity of the reporter.

In situations where the identity of a reporter of misconduct is protected, a fundamental concern arises for the protection of the right of the accused to due process. To compensate for the inability of the accused to know the identity of the accuser during an investigation, the whistleblower policy requires the OIOS to ensure that it has “sufficient other reliable probative evidence that provides

a factual foundation for the administrative action proposed”. This independent evidence, gathered separately from that reported by the whistleblower, must be disclosed to the accused, who is given the opportunity to respond. In practice, the OIOS does not go forward with a case without independent substantiation of the whistleblower report.

### *Ethics policy*

The IAEA ethics policy, which does not address issues of dispute resolution, focusses on ethical conduct and the disclosure of conflicts of interest. The policy provides that if an individual has a work-related ethical issue, he or she should address that matter to a supervisor, or to one of the Ethics Advisors embedded in the Division of Human Resources. Ethics Advisors provide lectures to newcomers on the ethics policy and are available for guidance. At the IAEA, the OIOS undertakes investigations which at other organizations might be handled by an ethics office, such as harassment cases. If the OIOS identifies an ethics breach, it reports it directly to the Director General.

### **Conclusion**

This broad overview is intended to describe how the IAEA approaches due process in the context of reports of misconduct and how it protects victims, reporters and the accused when reviewing and investigating such cases. In all instances, the two main parties implementing the relevant policies, namely the Division of Human Resources and the OIOS, endeavour to respect and uphold the main principles of due process, as elaborated by the International Labour Organization Administrative Tribunal.

# REFLECTIONS ON INVESTIGATIONS IN INTERNATIONAL ORGANIZATIONS

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Jean-Didier Sicault

**T**he excellent interventions by Joan Powers and Jennifer Lusser have focussed on how things happen from the viewpoint of international organizations. I would now like to draw on my experience as a staff counsel to make a number of observations on investigations from the perspective of the staff. To that end, I will cover five issues.

## **Procedural delays and the duration of investigations**

A distinction needs to be made between two situations: the first involving persons who are suspected of violations; and the second staff members who consider themselves to be victims.

In the case of persons suspected of a violation, the essential problem is to ensure that the time limit to respond to questions or charges is adequate to allow the use of legal counsel. Although this may seem to be a simple matter, in practice it is delicate. Sufficient time is not always allowed to find specialized legal counsel who are available so that they can familiarize themselves with the facts and have the time to develop a defence, however sketchy. On the other hand, staff who are under suspicion have no interest in the investigation going on indefinitely, as rumour can sometimes cause devastating harm.

For staff members who are victims, the situation is not the same. It is in their interests for all the facts to be reviewed in depth to provide proof of the prejudice that they have suffered. Under these conditions, the time factor is of less importance. If they feel the need for legal counsel, they often make the necessary contacts before lodging their complaint. On the other hand, it is not

in the interests of victims either for procedures to go on too long. In practice, the longer the case goes on, the greater the risk of it being left aside.

### **How interviews are conducted and recorded**

Here again, it is necessary to examine separately the situation of staff members who are under suspicion and those who are victims. The main concern for suspects is that the questions are posed in a neutral and respectful manner, without aggression or pressure, and that they are relevant to any charges brought against them. For staff who are victims, the essential concern is whether the investigator will show even minimal interest in all the aspects of the prejudice they consider that they have suffered. In particular, it is important that the investigator listens to their grievances and asks questions concerning and based on those grievances.

There is no question in this respect of suggesting that investigators should be confined in an over-rigid procedural corset. As each case is different, they need to have a broad margin of manoeuvre, while complying with the major principles, one of the most important of which is impartiality. Indeed, if it can be demonstrated that an investigation has been carried out in a biased manner, the staff member can envisage a case with a reasonable chance of success. This is so, for example, if it can be proved that an investigator has deliberately sought to direct an investigation towards proving the guilt of an official. It is also the case if a staff member who is a victim is cut off repeatedly when describing the grievances, and no additional questions are asked. Such practices would establish the partiality of the investigator without room for doubt.

That is why another issue, related to the above, is fundamental for officials, even though it may seem to be a matter of detail; and that is the way in which investigations are reported. We may leave aside situations in which an organization has not provided the staff member with any record of an investigation, which is fairly rare. And yet, there is a reference to just such a situation in ILOAT Judgment No. 3099.

Leaving aside such an atypical case, there are two main methods for an organization to report on an investigation. The first consists of drawing up a summary report of the investigation, which has to be countersigned by the official concerned, who may generally add comments when signing. The second consists of preparing a record of the questioning through a transcription of the recording. This method, which is costly for organizations, is however the most effective in terms of the protection of staff members. It can be seen more easily from a transcription whether the interview was conducted with the necessary neutrality and impartiality.

One method which requires fewer resources from the organization is to allow the staff member to record the interview. In the event of disagreement, this

means that the staff member can challenge an assertion by the administration and produce evidence for a judicial body in support of any complaint alleging the partiality of the investigator.

This reporting requirement exists in some organizations, but not everywhere. It is encouraging to note in this respect that, in Judgment No. 3099, referred to above, the ILOAT found that (§ 10):

*“... the obligation to treat staff members with dignity and the duty of good faith required, at the very least, that there be an accurate record of the interviews, which could have been achieved by, for example, the making of a transcript by a competent stenographer.”*

Certain officials who are interviewed, probably in the knowledge that their request will not be accepted, take the initiative of making a clandestine recording. Even where tribunals do not acknowledge the legality of such recordings, the fact that they have received a transcript from the complainant can enlighten them. Under these conditions, the question arises of whether it would be appropriate for case law as a whole to require international organizations to provide records of interviews.

### **The burden of proof**

The burden of proof undoubtedly rests with the organization. However, sadly, it does happen during investigations that investigators require staff members to provide proof that charges are unfounded or, in other words, proof of their innocence. There are at least three examples of this practice in the case law of the ILOAT.

In Judgment No. 1340 of 1994 (§ 11), relating to a complaint concerning termination of employment, the Tribunal found that:

*“... the onus of proof lies on the Organisation to bear out its allegations and insinuations and not, as the Organisation submits, on the complainant to show them to be untrue. In the absence of any proof of their accuracy the assumption must be that they are untrue.”*

In Judgment No. 1384 of 1995 (§ 11), concerning a theft of computer equipment, the Tribunal indicated that:

*“What [the Organisation] did in effect was to reverse the burden of proof by expecting the complainant to show that his conduct was ‘spotless’.”*

Similarly, in Judgment No. 2475 of 2005, relating to a charge concerning the justification provided for the payment of an advance of rental and housing allowance, the ILOAT found as follows (§ 22):

*“The procedure adopted in this case was clearly flawed in that the complainant was denied the opportunity to question any of the persons whose statements were used against him, evidence of little probative value was relied upon and, at least to some extent, **he was required to prove his innocence instead of having the matters alleged proven against him.**” (emphasis added)*

This case law demonstrates the existence of practices amounting to the reversal of the burden of proof, which is a cause of deep concern for staff. Indeed, as this practice has been identified and condemned by the ILOAT in cases which may be described as classic, the phenomenon must be less evident, but just as pernicious, in other more numerous cases. And, in any event, even if the judgement finds in favour of the staff member, the victim of such abusive practices still needs to bring a case, which has a high cost in both financial and psychological terms.

### **Right of confrontation and the right to the hearing of persons indicated by the staff member who is under suspicion**

#### *Right of confrontation*

In investigations, it is particularly useful for staff members who are under suspicion to know the names of the persons giving evidence against them, and to be able to respond to the accusations in a confrontation. Indeed, in my view, the right of staff members who are under accusation to confront their accusers is much more protective than the right to reply in writing to the accusations made against them. Confrontations offer the great advantage of facilitating a process in which the truth can be sought through an exchange of questions and answers.

For example, the silence of the staff member, or embarrassment by the accuser in response to a reaction from the accused, in the well-known phenomenon of the biter bit, can be more effective in eliciting the truth than the wording of a well thought out written reply. This is no surprise, as body language can sometimes be more revealing than words. In practice, body language includes spontaneous emotions, which are often uncontrollable. That is not the case with written submissions, in which logical argument can help to control impulse.

The right of confrontation would therefore appear to offer the most effective means of exercising the right of defence, while facilitating the establishment of the truth. The right of confrontation was set out explicitly in ILOAT Judgment No. 2014, and confirmed very clearly in Judgment No. 2475, referred to above. Unfortunately, the Tribunal adopted a more restrictive approach in Judgment No. 2601. As the right of confrontation is crucial for the right of defence of a staff member who is under suspicion, it would probably be useful for the case law of international administrative tribunals to adopt a firm and uniform posi-

tion upon which staff members who are under accusation and their counsel can rely as solidly as possible.

*Right to the hearing of the persons indicated by the staff member who is under suspicion*

Another point requires examination in relation to the right of confrontation. That is the situation which arises in an investigation when the investigator explicitly or de facto refuses to add to the list of witnesses the colleagues indicated by the staff member under suspicion. The idea is not to increase the number of hearings just for the fun of it. The accused staff member may have an entirely legitimate interest in certain colleagues being heard, particularly when they have witnessed specific facts. In general, this is what happens. However, the regulations are sometimes silent on this matter. Moreover, the only support provided by case law concerns the duty of impartiality of the investigator and the requirement for the organization to conduct an exhaustive investigation.

Of course, it may be argued that a staff member could paralyse an investigation through requests for the hearing of a very large number of officials. This right should therefore be confined to a reasonable number of persons. With this reservation, it could be useful to include the right of an official under accusation to request the hearing of a reasonable number of colleagues in the rules for the conduct of investigations in international organizations.

## **Privacy of correspondence and data**

Difficult issues also arise when it is considered that there is a need, during the course of an investigation, to have access to the electronic mail and professional computer files of a staff member. In theory, the computer equipment of an organization is only to be used for professional purposes. However, reality is very different, and in almost all international organizations there is tolerance of the private use of the computer equipment made available to staff.

What is important for staff members is for their correspondence and personal data to be protected. However, acute problems may arise when seeking evidence. In practice, for reasons of security and effectiveness, organizations may be tempted not to inform staff members under accusation when accessing their professional accounts and the private messages contained therein. Such practices have been the subject of a very clear prohibition by the ILOAT in Judgments Nos 2183 and 2741.

There remains, however, the exceptional circumstance in which the normal and secure operation of the computer system may be endangered, and even that of the work programme, the reason for the organization's existence, which may

be under serious threat. In such cases, the ILOAT, in light of the urgency of the situation and the need to protect the essential interests of the organization, authorizes interventions relating to the personal data of the official. However, it sets a whole series of conditions to protect staff members, including:

- the person concerned must be informed without delay and, if possible, present;
- if the person concerned cannot be present, the information must be gathered by computer experts in the presence of a representative of that person;
- a detailed report of the action taken must be drawn up;
- a protocol for the conservation of the information examined must be strictly followed;
- access to private data must remain within the bounds of what is required for the security of the organization with a view to preventing the disclosure of personal data, etc.

Organizations are increasingly adopting rules on this issue, in an attempt to establish a balance between the professional use of the organization's computer equipment and the reality of its use for private purposes, which must be within reasonable limits and must not prejudice the proper functioning of the organization. These rules often emphasize the need for officials to identify as such, explicitly and unambiguously, any private information that may be contained in their professional account. However, in practice the interpretation and application of these rules sometimes leaves much to be desired. It is therefore not unreasonable to think that significant progress is still to be made in this field to protect the correspondence and personal data of staff members who are under investigation, while at the same time clearly safeguarding the legitimate interests of the organization.

**In conclusion,** the role played by adversarial elements has been fully demonstrated in the conduct of investigations by organizations. The fundamental balance to be sought lies in the effectiveness of investigations and the interests of organizations, on the one hand, and the protection of officials, on the other. It may therefore be of some avail to set out the concerns of staff members. Indeed, a solid social fabric is important for the cohesion and effectiveness of an organization's action, and indeed its success. But an investigation amounts to a 'blip' in social cohesion. For this reason, the broader the consensus on the procedures to be followed, the more rapidly the social fabric will recover, to the benefit of all concerned.

## CONCLUDING REMARKS

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Jean-Claude Villemonteix

**T**he difficult task falls to me of concluding these two days of work at the Conference, which I believe we can say have been very intense.

In the first place, I would like to emphasize that this Conference has been a landmark! For the first time, over 300 participants from 60 organizations have met to discuss the subject of employment disputes in international organizations. This is not only a response that exceeded our expectations for participation in a conference on this subject, but it also exceeded expectations in terms of diversity, as the actors in the field of the prevention and resolution of disputes present over the past two days have included lawyers, mediators, ombudsmen, human resources professionals, staff representatives, judges from administrative tribunals and members of internal review boards. This is something that will be remembered. And we owe this achievement to a colleague who took the initiative, designed it in all its detail, organized it from beginning to end, promoted it and ensured its success. That colleague is Ms Annika Talvik, to whom we all owe a debt of gratitude. Many thanks Annika!

Although it is not easy to draw out the most salient points of our discussions, so rich and full have they been, I nevertheless wish to draw attention to three subjects that held my attention, and which I have already outlined in a 2006 study on dispute resolution systems in international organizations.<sup>1</sup>

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<sup>1</sup> “Quelle place pour la médiation dans le système d’administration de la justice des organisations inter-gouvernementales?” [“The role of mediation in the justice system of international intergovernmental organizations”], dissertation for a university diploma in mediation, University Institute Kurt Bösch, Sion, 2006.

Firstly, *dispute prevention and resolution bodies and mechanisms are not accessible to everyone*. Over the past two days, we have referred on several occasions to the problem of access, which in practice remains limited to staff members, but excludes other categories of collaborators, such as precarious employees, consultants, external collaborators and interns.

These limits to access are not only based on the category of personnel, but are also geographical. Our colleague from the World Bank described the strategies implemented by her institution to ensure links with the field, including the use of telecommunication technologies, such as Skype, video conferencing and e-mail, as well as the organization of field visits to investigate reasons for disputes, even though circumstances sometimes require their last-minute cancellation. It would be interesting to conduct a comparative analysis of the approaches developed by the various organizations to ensure the same level of access to dispute resolution bodies in all duty stations. We could then draw conclusions and assess the success of decentralized approaches to the establishment of such bodies, including that adopted by the United Nations secretariat.

However, limitations of access can also have financial origins. Although this issue was raised during the discussions, it would benefit from further analysis. The system described by our colleague from the United Nations is interesting in this respect.

Finally, the adoption of policies intended to protect access to dispute resolution mechanisms, such as those protecting complainants from possible retaliation, would also merit more detailed comparative discussion.

In addition to the subject of access to dispute prevention and resolution bodies and mechanisms, the question arises of the *integration of these bodies into a global approach to the management of disputes* in international organizations. The subject has been raised on several occasions over the past two days, particularly by our colleagues from the World Bank and the International Monetary Fund. The establishment of dispute prevention and resolution bodies and mechanisms must not be confined to litigation, but also needs to include the various levels of dispute management. The description of the approach adopted by the World Bank to this issue was particularly interesting.

There is a strategic choice to be made, which offers the opportunity to convert dispute prevention and resolution mechanisms into real instruments for the management of organizational life, with the objective of creating productive communication, which would offer real added value to workplace relations! Reference has been made on several occasions during the discussions to the need for dispute prevention. But disputes are inevitable! A dispute may even turn out to be an 'opportunity' to confront ideas. However, it can also degenerate into a devastating confrontation if it involves conflicting emotions.

We therefore need to evolve from the conflict resolution to the mediation of differences!

In this respect, we need to develop integrated approaches to prevention, training for managers in dispute management and awareness-raising for all those involved in the dynamics of disputes. In short, we need to promote a positive culture of labour relations and the management of differences before they become disputes. I can only recommend on this subject an excellent work by Michel Monroy and Anne Fournier, entitled *Figures du conflit: Une analyse systématique des situations conflictuelles* [“Types of conflict: A systematic analysis of conflictual situations”].<sup>2</sup>

What is therefore required is action that reaches out to everyone, prior to disputes, by creating a culture of social relations, a permanent ‘spirit of mediation’ and a desire to work together. Our colleagues in the Global Fund to Fight AIDS, Tuberculosis and Malaria and the European Organization for Nuclear Research emphasized this, and the World Bank is clearly going in that direction. A real process of organizational development is under way. And this has to be done not only for, but also with the users of the dispute management system, including human resources professionals, staff representatives, legal services, mediators and Ombudsmen, as well as programme and team managers.

In this context, the improvement of conditions for social dialogue, which is central to the concerns of the International Labour Office, and increased consultation on issues affecting terms and conditions of employment, are all effective means of dispute prevention and of establishing the essential components of an effective and integrated system of dispute management in international organizations.

Finally, in addition to access to the bodies and mechanisms that have been established, and their integration into an overall approach to dispute management, the issue of the *evaluation of our approaches to dispute prevention and management* is a central concern. Our colleague from the ILO was the first to refer to the need to develop dispute prevention and resolution approaches which respond to our real needs. Our experience, as emphasized in particular by our colleagues from the United Nations Secretariat and the World Bank, gives grounds for believing that the contribution of the mechanisms adopted by most international organizations is globally positive. However, the increased emphasis on good governance, to which international organizations have to respond, requires us to demonstrate more precisely and incontestably the effectiveness of the approaches implemented in this field. We clearly require strong institutional support, including the allocation of resources, means of communication and promotional measures to develop these approaches. But,

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<sup>2</sup> PUF, *Le Sociologue*, 1997.

in exchange, we have to be able to compile reliable data to confirm the positive results, while at the same time, self-evidently, respecting the confidentiality of the facts in individual disputes.

We could perhaps engage in further exchanges on our evaluation methodologies in this field, and work together on comparative evaluations.

As these two days of rich and fascinating discussions come to an end, buoyed by the active involvement of some 300 participants, the question naturally arises of how this initiative, which has clearly been a success, can be followed up. How could we extend this opportunity to come together, offered to us by Annika Talvik and the ILO, which has hosted the conference? It is important to keep alive the network of contacts that we have created through the conference, and which goes beyond natural functional distinctions (lawyers, human resources specialists, mediators, unions, judges, etc.). This meeting of all the actors in the field of the prevention and settlement of disputes has been empowering. And as our dispute management systems are evolving, should we not try to evolve together, rather than in isolation? We can already imagine other opportunities to meet again soon, for example in thematic days to examine the important subjects outlined above, or yet others, such as the amicable settlement of disputes, or the organization of a 'clinic for the re-examination of particularly complex cases'.

Suggestions are welcome!



**APPENDIX**  
**CONFERENCE PROGRAMME**





## APPENDIX

### CONFERENCE PROGRAMME

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#### DAY 1 – Monday, 15 September 2014

- 8:30-9:00      **Registration and Coffee**
- 9:00            **Welcome by Guy Ryder**, Director-General,  
International Labour Office
- 9:15            **Introductory remarks by Greg Vines**,  
Deputy Director-General, International Labour Office
- 9:30            **SESSION 1 – Workplace Dispute Resolution Best Practices  
in National Contexts**
- Moderator:*   **Greg Vines**, Deputy Director-General, International  
Labour Office
- Panellists:*    **Corinne Vargha**, Chief, Fundamental Principles  
and Rights at Work Branch, International Labour  
Office
- Roy Lewis**, Labour Arbitrator, United Kingdom;  
Vice President, Asian Development Bank  
Administrative Tribunal
- Sara Pose Vidal**, Judge, Social Chamber  
of the High Court of Justice of Catalonia;  
Coordinator of the European Association of Judges  
for Mediation (GEMME) in Catalonia
- 11:00-11:30   **Coffee Break**

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**11:30            SESSION 2 – The Need for Effective Individual and Collective  
Dispute Resolution Mechanisms in International Organizations**

*Moderator:*    **Mark Levin**, Director, Human Resources  
Development Department, International Labour  
Office

*Panellists:*     **Anne-Marie Thévenot-Werner**, Teaching  
and Research Assistant at the Université Panthéon-  
Sorbonne (Paris I), PhD Candidate (*Le droit des  
agents internationaux à un recours effectif*)  
  
**Geetha Ravindra**, Mediator, International Monetary  
Fund  
  
**Nicolas Lopez-Armand**, Legal Adviser, ILO Staff  
Union

**13:00-14:30    Lunch break**

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**14:30            SESSION 3 – Internal Justice Systems – a Dynamic Evolution**

*Moderator:*    **Dražen Petrović**, Registrar, ILO Administrative  
Tribunal

*Panellists:*     **Pierre Bodeau-Livinec**, Professor of Public Law  
at the Université Paris 8 – Vincennes-Saint-Denis;  
Managing Editor of *The Law and Practice  
of International Courts and Tribunals*  
  
**Alison Cave**, Coordinator, Internal Justice Services,  
World Bank Group  
  
**Annika Talvik**, Secretary, Joint Advisory Appeals  
Board, International Labour Office

**16:00-16:30    Coffee Break**

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**16:30            SESSION 4 – Peer Review or First Instance Tribunal?  
Criteria for an Effective System**

*Moderator:*    **Anne Trebilcock**, Chairperson, Grievance  
Committee, European Bank for Reconstruction  
and Development

*Panellists:*     **Victor Rodriguez**, Chairperson, Joint Advisory  
Appeals Board, International Labour Office; former  
Registrar, United Nations Dispute Tribunal, Geneva  
Registry

**Jodi Glasow**, Executive Secretary, Peer Review  
Services, World Bank Group

**Jason Sigurdson**, Chairperson, UNAIDS Staff  
Association; Vice-President, Legal Standing  
Committee, Federation of International Civil  
Servants' Associations

**18:00- 19:00    Reception**

**DAY 2 – Tuesday, 16 September 2014**

**9:00            SESSION 5 – Administrative Review and Management  
Review – the Cultural Change Towards Effective Managerial  
Accountability**

*Moderator:*    **Chris de Cooker**, President, NATO Administrative  
Tribunal

*Panellists:*     **Linda Taylor**, Executive Director, Office  
of Administration of Justice, United Nations

**Jasmine Honculada**, Senior Adviser, Human  
Resources Management Department, World  
Intellectual Property Organization

**Yves Renouf**, Legal Adviser, World Trade  
Organization

**Oren Ginzburg**, Head, Grant Management Support,  
The Global Fund to Fight AIDS, Tuberculosis  
and Malaria

**10:30-11:00    Coffee Break**

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**11:00            SESSION 6 – The Role of Legal Counsel in Conflict Management and Promoting Social Harmony in International Organizations**

*Moderator:*    **Tilmann Geckeler**, Principal Legal Officer, Office of the Legal Adviser, International Labour Office

*Panellists:*    **Jennifer Lester**, Assistant General Counsel, International Monetary Fund  
**Eva-Maria Gröniger-Voss**, Legal Adviser, European Organization for Nuclear Research  
**Eric Dalhen**, Head, Human Resources Planning and Policies Division, Human Resources Management Department, International Telecommunication Union  
**Robbie Leighton**, Legal Officer, Office of Staff Legal Assistance, Office of Administration of Justice, United Nations

**12:30-14:00    Lunch break**

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**14:00            SESSION 7 – The Role of Informal and Alternative Dispute Resolution in International Organizations**

*Moderator:*    **Marc Fleggenheimer**, Mediator, International Labour Office

*Panellists:*    **Indumati Sen**, Ombudsman, International Baccalaureate Organization  
**Francisco Espejo**, Ombudsman, World Food Programme  
**David Miller**, Ombudsman, The Global Fund to Fight AIDS, Tuberculosis and Malaria  
**Camilo Azcarate**, Manager of Mediation Services, World Bank Group

**15:30-16:00    Coffee Break**

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**16:00            SESSION 8 – Internal Investigations: Ensuring Due Process  
and Non-Reprisal**

*Moderator:*    **Monique Zarka-Martres**, Ethics Officer,  
International Labour Office

*Panellists:*     **Joan Powers**, former Assistant General Counsel  
of the International Monetary Fund  
**Jennifer Lusser**, Acting Head of General Legal  
Section, Office of Legal Affairs, International  
Atomic Energy Agency  
**Jean-Didier Sicault**, Barrister, Professor  
of International Civil Service Law at the Université  
Panthéon-Assas (Paris II)

**17:30            Concluding remarks by Jean-Claude Villemonteix,**  
Chief, Policy and Social Benefits Branch, Human Resources  
Development Department, International Labour Office

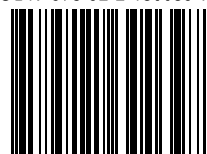
## BEST PRACTICES IN RESOLVING EMPLOYMENT DISPUTES IN INTERNATIONAL ORGANIZATIONS

With a view to ensuring their freedom of action and independence from member States, international organizations are granted immunity from national laws and legal process.

One consequence of this immunity is that international civil servants are not governed by national labour laws and cannot seek redress in national courts against decisions affecting their terms and conditions of employment. The international organizations concerned are therefore under the obligation to establish systems capable of offering their staff members adequate protection in terms of fair employment conditions and effective dispute resolution. However, because of differences in the size, resources, culture and even mandate of international organizations, there is no universal solution to this complex task.

In this book, specialists from different organizations and backgrounds share their experience and identify elements of best practice to help design effective employment dispute resolution mechanisms in the specific context of international organizations.

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