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Ao. Univ.-Prof. MMag. Dr. August Reinisch

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UN IMMUNITY AND ACCESS TO DISPUTE SETTLEMENT

Mag. Max Wälde-Sinigoj

Matriculation No. 0526633

Course Reference No. A-783

maxwalde@gmail.com

I.	INTRODUCTION	III
II.	UN IMMUNITY	1
1.	UN CHARTA	1
1.	CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UN	1
2.	OBLIGATION TO OFFER ALTERNATIVE DISPUTE SETTLEMENT MECHANISM	2
III.	DISPUTES OF UN INTERNATIONAL ORGANIZATION PERSONNEL BEFORE NATIONAL COURTS	4
1.	OVERVIEW: JURISPRUDENCE OF NATIONAL COURTS	4
2.	IMPLICATIONS OF NATIONAL COURTS ADJUDICATING DISPUTES INVOLVING INTERNATIONAL ORGANIZATIONS	7
3.	PRACTICALITY OF NATIONAL COURTS IN THE DISPUTE SETTLEMENT PROCESS INVOLVING INTERNATIONAL ORGANIZATIONS	8
IV.	UN INTERNAL DISPUTE SETTLEMENT MECHANISMS	8
1.	UN TRIBUNALS	8
	<i>UN internal tribunal until 2009: UN Administrative Tribunal</i>	8
	<i>UN internal justice administration today: UNDT and UNAT</i>	10
	<i>Summary</i>	11
2.	ARBITRATION	12
	<i>Arbitration as only recourse to justice for non-staff members</i>	12
	<i>Arbitration clauses</i>	13
V.	POSSIBILITIES OF FUTURE DISPUTE SETTLEMENT MECHANISMS FOR UN NON-STAFF MEMBERS	14
1.	CURRENT METHODS OF INDIVIDUAL REDRESS IN DEBATE	14
VI.	OUTLOOK	19
VII.	CONCLUSION	20
VIII.	LIST OF SOURCES	22

I. INTRODUCTION

Non-staff members of the UN today exceed 60.000 worldwide.¹

A large part of this undeniably relevant group of working individuals has only very limited means of bringing their claims before a judicial body able to issue binding judgments in disputes involving the UN as respondent.

A purpose of this paper is to analyze the effectiveness of dispute resolution mechanisms available to UN non-staff members from a judicial perspective as well as from a practical viewpoint. Over the last 50 years, national courts have perpetually raised the bar of the required standard of human rights, especially concerning the right of a fair trial. Therefore, this analysis is based upon relevant decisions of national courts as well as upon jurisprudence of standing tribunals of international organizations.

Moreover, the paper will also comment on the ongoing policy deliberations regarding the implementation of a higher standard of judicial redress for non-staff members within the UN judicial system. The 5th and 6th committee of the United Nations General Assembly (hereafter referred to as “**UNGA**”), the Secretary-General of the United Nations (hereafter referred to as “**Secretary-General**”) and the president of the United Nations Appeals Tribunal (hereafter referred to as “**UNAT**”) are the main parties of these deliberations.

¹Administration of justice at the United Nations, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc.A/65/557 of 4 November 2010, para.53.

II. UN IMMUNITY

1. UN Charta

Article 105 (1) of the Charter of the United Nations (hereafter referred to as "**UN Charta**") provides that the UN "...shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."² The object of this provision is to guarantee that the UN is not subject to unilateral control of host states, thus ensuring the objective fulfillment of goals and duties conferred by the Charter.³ The underlying rationale is that the UN will not be able to fulfill its duties unless the member states are convinced about the impartiality of the organization and place their trust in the proper functioning UN.⁴ Moreover, it is believed that different national courts or tribunals would be "...totally unsuited..." for adjudicating disputes to which the subject matter is an international organization's internal administrative law.⁵

The immunity envisioned by the drafters is of functional nature. In essence, this means that the organization enjoys privileges and immunity only for those acts which are closely related to and implied by its organizational purpose.⁶

1. Convention on the Privileges and Immunities of the UN

At the time of the adoption of the Charter, there were little interpretative means available for furnishing this clause contained in Article 105 § 1 of the Charter with more precision in practical application.⁷ The generality of the rule made further provisional specifications necessary.⁸ Thus it was only after the Convention on the Privileges and Immunities of the United Nations⁹ (hereafter referred to as "**CPIUN**") was adopted that those privileges and

² UN Charter

³Waite and Kennedy v. Germany, 30 E.Ct.H.R. 261, Judgment of 18 February 1999, para.63, 72; Miller, *The Privileges and Immunities of the United Nations*, 6 International Organizations Law Review 7, 36 (2009); I. Brownlie, *Principles of public international law*, 652 (6th ed., 2003).

⁴I. Seidl-Hohenveldern, G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 280 (7th ed., 2000).

⁵M. B. Akehurst, *The Law Governing Employment in International Organizations*, 12 (1967).

⁶I. Seidl-Hohenveldern, G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 280 (7th ed., 2000).

⁷Reinisch, *Convention on the Privileges and Immunities of the United Nations 1946, Convention on the Privileges and Immunities of the Specialized Agencies 1947*, 1, in: United Nations (eds.), Audiovisual Library of International Law, available at <http://www.un.org/law/avl/>.

⁸I. Brownlie, *Principles of public international law*, 653 (6th ed., 2003).

⁹Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15.

immunities were further specified and gathered practical momentum.¹⁰ However, this convention not only specified, it also changed the quality of the UN's immunity from functional to *de facto* absolute.¹¹ This change was effected by Article II, Section 2 CPIUN, which reads as follows:

*The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.*¹²

Although host state laws are actually applicable to the UN, national courts are barred from exercising jurisdiction concerning legal disputes involving the UN.¹³ This creates a vacuum of legal remedies available for individuals.

While many national courts are aware of the difficult issue presented by the UN's functional immunity and that such immunity is of limited nature, those same courts refrain from lifting the UN's immunity by relying on the wording of the CPIUN quoted above.¹⁴

2. Obligation to offer alternative dispute settlement mechanism

Particularly important in this regard is the provision enshrined in Section 29 CPIUN, which provides as follows:

The United Nations shall make provisions for appropriate modes of settlement of:

¹⁰Reinisch, *Convention on the Privileges and Immunities of the United Nations 1946, Convention on the Privileges and Immunities of the Specialized Agencies 1947*, 1, in: United Nations (eds.), Audiovisual Library of International Law, available at <http://www.un.org/law/avl/>.

¹¹Reinisch, *Convention on the Privileges and Immunities of the United Nations 1946, Convention on the Privileges and Immunities of the Specialized Agencies 1947*, 1, in: United Nations (eds.), Audiovisual Library of International Law, available at <http://www.un.org/law/avl/>.

¹²Waivers of the UN immunity are practically relevant concerning disputes involving 3rd-party claims, i.e. tort claims. Such claims may arise out of regular UN activities or UN peacekeeping activities. However it is important to note that in most cases the assumption of jurisdiction by national courts regarding claims against the UN depends upon the claimant demonstrating strong *prima facie* evidence of the UN having violated the claimant's rights. For more information, see *Review of the efficiency of the administrative and financial functioning of the United Nations, Report of the Secretary-General, UN Doc. A/C.5/49/65 of 24 April 1995, paras 9-24*; Miller, *The Privileges and Immunities of the United Nations*, 6 *International Organizations Law Review* 7, 104 (2009).

¹³Miller, *The Privileges and Immunities of the United Nations*, 6 *International Organizations Law Review* 7, 96, 98 (2009).

¹⁴Wouters, Schmitt, *Challenging Acts of Other UN Organs, Subsidiary Organs, and Officials*, in *Challenging the Acts of International Organizations before National Courts*, 77, 89 (A. Reinisch, ed. 2010).

(a) *Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;*

...

This provision obliges the UN to create a platform for dispute settlement with regard to claims of private entities, which would otherwise, due to the *absolute* immunity of the UN, have no legal means of pursuing their interests.¹⁵ However, while it is true that this clause accords mildness to the daunting jurisdictional bar of absolute immunity¹⁶, it is predominantly accepted that non-compliance with this obligation does not dilute or repeal the immunity granted to the UN.¹⁷ A Belgian court noted as early as 1966 that, although the UN had adopted the Universal Declaration of Human Rights providing for an individual's right of due process, the UN's immunity would not be affected even in the case that it would not provide for such a remedy.¹⁸ However, it may become increasingly difficult for the UN to rely on immunity in proceedings before national courts if individuals thereby suffer a complete denial of justice. Thereby it depends how far the right of access to court is considered a human right law.¹⁹

Thus, the compliance with this provision is mostly dependent upon the political good-will of the Secretary-General of the UN. However, it is undeniable that failure to comply with the basic purpose of this provision, e.g., absence of adequate legal remedies to non-staff members, adds political momentum to the process within the UN which aims at improving the internal system of such remedies offered to individuals.²⁰ This ongoing process is referred to as "*Administration of Justice at the United Nations.*"²¹

¹⁵*Difference Relating to Immunity from Legal Proceedings of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, I.C.J. Reports, 1999, para.66.

¹⁶Reinisch, *Convention on the Privileges and Immunities of the United Nations 1946, Convention on the Privileges and Immunities of the Specialized Agencies 1947*, 1, in: United Nations (eds.), *Audiovisual Library of International Law*, available at <http://www.un.org/law/avl/>.

¹⁷Miller, *The Privileges and Immunities of the United Nations*, 6 *International Organizations Law Review* 7, 98, 100(2009); *Bisson v. The United Nations, the World Food Programme & ABC Organization*, 2007 WL 2154181, at II, Slip Op., US District Court, Southern District of New York.

¹⁸*Manderlier v. United Nations and Belgian State*, 45 *International Law Reports* 446, Belgium, Brussels Court of First Instance (1966).

¹⁹Reinisch, *Immunity of International Organizations*, 7 *Chinese Journal of International Law* 85, 291 (2008); relevant treaties include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights. For more information see *ibid.*

²⁰6th Committee, Summary record of the 4th meeting, A/C.6/65/SR.4 of 25 October 2010, para.64, 78.

²¹ See, *inter alia* United Nations General Assembly resolutions 64/119 of 15 January 2010, 64/233 of 16 March 2010, 63/253 of 17 March 2009.

III. DISPUTES OF UN INTERNATIONAL ORGANIZATION PERSONNEL BEFORE NATIONAL COURTS

1. Overview: Jurisprudence of national courts

Moreover, there are signs of sporadic emergence of jurisprudence, serving towards the belief that the ability of international organizations to effectively assert their immunity from jurisdiction in national courts is conditional upon the availability of adequate alternative dispute settlement procedures available to the claimant. Some scholars describe this ongoing process as “*radical approach*”, probably because such courts awarded meticulous consideration towards the examination of “*the human rights impact*.”²²

The judgment in the case *Siegler v Western European Union*²³ stands at the summit of this human rights approach. Apart from requiring from the international organization the existence of an alternative dispute settlement mechanism as a prerequisite for not waiving its immunity, it based that immunity to be conditional upon the offered dispute settlement process meeting certain standards of due process. In this regard the court noted that any limitations to the right enshrined in Article 6 (1) European Convention on Human Rights²⁴ (hereafter referred to as “**ECHR**”) may not “...*restreindre l'accès offert à l'individu d'une manière ou à un point tels que le droit s'en trouve atteint dans sa substance même et qu'en outre pareille limitation ne se concilie avec l'[article] 6, § 1 que si elle tend à un but légitime et s'il existe un rapport raisonnable de proportionnalité entre les moyens employés et le but vise.*”²⁵ Thereby, the court underlined that any confinements of the rights enshrined in Article 6 (1) ECHR must be undertaken in a way which is proportional to a legitimate aim thereby pursued. The court confirmed that the concrete dispute settlement mechanism in place did not meet the standards enshrined in Article 6 (1) of the ECHR.

In other judgments, national courts left the respective international organization’s immunity untouched with regard to the actual case, but voiced the opinion that an international

²²Reinisch, *Immunity of International Organizations*, 7 Chinese Journal of International Law 85, 295 (2008).

²³*Siegler v. Western European Union*, Brussels Labor Court of Appeal, Judgment of 17 September 2004, Journal des Tribunaux 2004, 617, ILDC 53 (BE 2003).

²⁴European Convention on the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 of 4 November 1950.

²⁵*Siegler v. Western European Union*, Brussels Labor Court of Appeal, Judgment of 17 September 2004, Journal des Tribunaux 2004, 617, ILDC 53 (BE 2003).

organization was under the obligation to provide a reasonable legal remedy for aggrieved individuals in absence of an effective dispute settlement mechanism.²⁶

In *Trempe v. ICAO*, a Canadian court held that in the event that an international organization had not provided for dispute settlement mechanisms concerning its commercial relations, this would be a reason for denying it absolute immunity.²⁷ The court did not further commit itself to assessing what procedural standards such dispute settlements would have to fulfill in order to qualify as adequate in the sense of Article 33 of the ICAO headquarters agreement.

In the case *Waite and Kennedy*, the European Court of Human Rights (hereafter referred to as “**ECtHR**”) voiced the opinion that a material factor in determining whether granting immunity or not was conditional upon the applicant having “...*available to them reasonable alternative means to protect effectively their rights...*”.²⁸ Substantive to the reasoning of the court was the idea that states should not be able to absolve themselves from basic responsibilities of human right law simply by hiding behind the organizational construct of an international organization.²⁹

Concerning the actual case, the court noted that the applicants seeking redress should have addressed the ESA’s internal appeals board which is authorized to hear disputes of staff members. The court further held that whether the applicants would qualify as staff members or not would depend on the ruling of the tribunal.³⁰ Therefore, whether an individual may seek redress against an international organization in a national court also depends on the claimant’s factual exhaustion of the remedies provided by that organization.³¹

The exhaustion of local remedies rule originates from the thought that an individual who encounters legal hardship in another *state* should first exhaust all available legal possibilities before the individual’s host state would be willing to afford diplomatic protection to that individual [emphasis added].³² Moreover, the underlying rationale is that an individual’s right

²⁶Waite and Kennedy v. Germany, 30 E.Ct.H.R. 261, Judgment of 18 February 1999.

²⁷Gérald René Trempe v. The ICAO Staff Association and Wayne Dixon, Canada, Province of Quebec, District of Montreal, Judgment of 20 November 2003, No. 500–05–061028–005 and No. 500–05–063492, 2003 United Nations Juridical Yearbook 585, 597.

²⁸Waite and Kennedy v. Germany, 30 E.Ct.H.R. 261, Judgment of 18 February 1999, para. 68.

²⁹Waite and Kennedy v. Germany, 30 E.Ct.H.R. 261, Judgment of 18 February 1999, para. 67.

³⁰Waite and Kennedy v. Germany, 30 E.Ct.H.R. 261, Judgment of 18 February 1999, para. 69.

³¹Ibid.

³²I. Brownlie, *Principles of public international law*, 473 (6th ed., 2003).

is only violated if that individual has undertaken every reasonable legal step in that state to counter that violation.³³

As far as such remedies are theoretically available, it might be argued that available *internal* dispute settlement mechanisms must not be exhausted if they do not offer a reasonable possibility of effective redress.³⁴ For example, the rejection of a UN non-staff member's claim by the United Nations Dispute Tribunal (hereafter referred to as "UNDT") may be assumed beyond the shadow of doubt.³⁵

Also significant concerning the immunity issue of international organizations is the legal subject matter from which the claim originates. Concerning claims related to the administrative employment relationship between an international organization and its staff members, a court noted that "...the relationship of an international organization with its internal administrative staff is non-commercial...", and therefore "...such claims may not be a basis of an action against the organization..."³⁶ Here, the court took special regard towards the fact that the administrative nature of the law which governs the relationship of the UN and its staff-members is at the core of the organizations functioning and should never be subjected to interference from national courts. In a similar judgment, a US District Court held that the relationship of staff of an international organization with the organization itself is not to be considered as *commercial* relationship [emphasis added].³⁷ Thereby the court addressed a legal issue which arose in another US court case in relationship with the question whether an international organization's immunity could be waived for, e.g., damages which resulted from acts *iure gestionis*.³⁸

According to this more recent line of jurisprudence a national court may disregard an international organization's immunity if the following prerequisites are cumulatively met: The organization does not have adequate dispute settlement mechanisms in place for the settlement of non-administrative disputes of commercial nature.

³³Ibid.

³⁴Report of the International Law Commission, Draft articles on diplomatic protection, UN Doc. A/58/10 of 5 May-6 June and 7 July-8 August 2003, p. 81, Article 10 lit. a.

³⁵See *infra*, notes 51 to 53.

³⁶Broadbent v. Organization of American States, 628 F.2d 27, 202 U.S.App.D.C. 27, Judgment of 8 January 1980, para. 32.

³⁷Boimah v. United Nations General Assembly, US District Court EDNY, 24 July 1987, 664 F Supp 69 (EDNY 1987).

³⁸Wouters, Schmitt, *Challenging Acts of Other UN Organs, Subsidiary Organs, and Officials*, in *Challenging the Acts of International Organizations before National Courts*, 77, 89 (A. Reinisch, ed. 2010).

Interns of the UN may neither seek judicial redress by institution of arbitration proceedings nor from the UN internal judicial system. At the moment, interns are only granted access to some sort of remonstrative recourse mechanism to contest administrative decisions, the management evaluation procedure.³⁹ This is an internal UN administrative dispute settlement mechanism, however without the guarantee of a fair trial, especially concerning the impartiality of the personnel involved in the decision making process.⁴⁰

There seems to be an ongoing development: In national legislation the doctrine of UN immunity is evolving from absolute towards being conditional upon available dispute mechanisms. More recently however this view has further shifted towards the position that available dispute mechanisms should also guarantee the claimant basic procedural guarantees.⁴¹

2. Implications of national courts adjudicating disputes involving international organizations

This ongoing development regarding national courts has positive and negative effects: On one hand, claimants have a stronger procedural stance against illicit acts of the UN administration. On the other hand, as reasonable as shielding the weaker individual against overwhelmingly superior entities may seem, the object and purpose of an international organization's immunity should neither be underestimated nor fully forgotten. Moreover, the choice of national courts as "venue" for disputes of non-staff members seeking relief from the UN will most probable lead to a fragmentation of jurisprudence, especially with regard to the different material statutes and laws of the respective countries. The court in *Siegler* confirmed that an IO was subject to mandatory provisions of national employment law (*loi sur le contrat de travail du 3.7.1978*).⁴² However, this "appropriation" of jurisdiction by national courts might expedite the ongoing process within the UNGA about providing effective legal remedies for non-staff members.

³⁹Administration of justice at the United Nations, Report of the Sixth Committee, UN Doc.A/65/478 of 25 October 2010, para.78.

⁴⁰Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 189.

⁴¹Reinisch, *Immunity of International Organizations*, 7 Chinese Journal of International Law 85, 305 (2008); *Siegler v. Western European Union*, Brussels Labor Court of Appeal, Judgment of 17 September 2004, Journal des Tribunaux 2004, 617, ILDC 53 (BE 2003).

⁴²*Siegler v. Western European Union*, Brussels Labor Court of Appeal, Judgment of 17 September 2004, Journal des Tribunaux 2004, 617, ILDC 53 (BE 2003).

3. Practicality of national courts in the dispute settlement process involving international organizations

Although there are some cases in which national courts dismissed the immunity of an international organization in favor of claims of non-staff members who had no alternative legal remedy, such fora should not be regarded as an effective dispute settlement mechanism for claims of UN non-staff members from a practical perspective. This is due to the fact that such decisions are still very sporadic. Furthermore, it is likely that the willingness to waive an international organization's immunity differs, according to the nationality of the court involved. Moreover, there is no guarantee that the UN will satisfy the operative part of such judgments. Besides, successful efforts of enforcement against the UN are highly unlikely because the immunity the UN enjoys in this regard.

IV. UN INTERNAL DISPUTE SETTLEMENT MECHANISMS

1. UN tribunals

As abovementioned, the UN is obliged under section 29 of the CPIUN to provide alternative dispute settlement mechanisms to individuals for the purpose of countering lacks of judicial redress which arise in connection with the UN's immunity. A considerable part of claims lodged against the UN are employment related claims, i.e. claims by UN personnel against the UN. In order to accord this group of individuals with a method of dispute settlement, an internal judicial system was created.⁴³

However, it is of paramount importance to note that these internal dispute settlement mechanisms are only accessible to staff members of the UN. The reasons why the internal justice system is only available to staff members is primarily a question of funding.⁴⁴

UN internal tribunal until 2009: UN Administrative Tribunal

Until July 2009, the UN Administrative Tribunal (hereafter referred to as "UNAdT") assumed jurisdiction over disputes between staff members and the administration. The UNAdT's statute did not encompass jurisdiction concerning non-staff members,⁴⁵ although in

⁴³Establishment of a United Nations Administrative Tribunal, A/RES/351 (IV) of 24 November 1949.

⁴⁴See notes 78, 79 *infra*.

⁴⁵Establishment of a United Nations Administrative Tribunal, A/RES/351 (IV) of 24 November 1949, Statute of the Administrative Tribunal of the United Nations, Article 2.

some cases, the tribunal assumed jurisdiction because non-staff members had no other means of remedying their claims.

Some reasons for this were failure of the UN administration to implement arbitration clauses into employment and service contracts or because available fora lacked *ratione materiae* concerning the merits of a claim.⁴⁶ An overwhelming reason for this exceptional assertion of jurisdiction *ratione personae* by the tribunal in question was the otherwise occurring total deprivation of any recourse to justice of respective non-staff members.

In *Chadsey*, the International Labor Organizations Administrative Tribunal (hereafter referred to as “ILOAT”) assumed jurisdiction upon the Respondent’s acceptance of jurisdiction. The tribunal held that “any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure.”⁴⁷ Moreover, the tribunal argued that this was, in fact, a principle of international civil service law.⁴⁸ In the later *Rubio* case, the ILOAT refined this ruling by stating that such an aforementioned appeals procedure should feature an impartial tribunal.⁴⁹

In the case of *Teixeira*, the UN refused to submit itself to arbitration for a prolonged period of time. The dispute concerned recurring chain service agreements, thus the relation to employment claims. The UNAdT awarded damages to the claimant for the period of time in which the UN Administration had refused to arbitrate the dispute. However, the tribunal also offered the Applicant a hearing concerning other merits of the case, should the dispute not be settled amicably.⁵⁰

Important in both cases is the fact that the Respondent always accepted the jurisdiction of the UNAdT, respectively the ILOAT.⁵¹ Therefore, it is not wrong to say that in both cases, the parties of the respective dispute mutually agreed upon jurisdiction of the tribunal.

⁴⁶*Teixera v. Secretary-General of the United Nations*, UN Administrative Tribunal, 14 October 1977, Judgment No. 230; *Irani v. Secretary-General of the United Nations*, UN Administrative Tribunal, 6 October 1971, Judgment No. 150; *Chadsey v. Universal Postal Union*, ILO Administrative Tribunal, 15 October 1968, Judgment No. 122.

⁴⁷*Chadsey v. Universal Postal Union*, ILOAT, 15 October 1968, Judgment No. 122, Considerations, para. 3.

⁴⁸*Ibid.*

⁴⁹Reinisch, *Immunity of International Organizations*, 7 Chinese Journal of International Law 85, 292 (2008).

⁵⁰*Teixeira v. Secretary-General of the United Nations*, UN Administrative Tribunal, 14 October 1977, Judgment No. 230, para. X.

⁵¹*Chadsey v. Universal Postal Union*, ILOAT, 15 October 1968, Judgment No. 122, Considerations, para. 2; *Teixera v. Secretary-General of the United Nations*, UN Administrative Tribunal, 14 October 1977, Judgment No. 230, pleas of the respondent.

These are a few examples of cases where internal standing tribunals of international organizations felt that it would be unfair that claimants who wanted to file employment-related claims would be denied justice either on the grounds of immunity concerning proceedings before national courts or because of the fact that the statutes of the tribunals limited jurisdiction *ratione personae* to staff-members.

UN internal justice administration today: UNDT and UNAT

In July 2009, a new, two-tiered internal justice administration mechanism replaced the UNAdT. The UNDT and the UNAT were created, thus establishing a faster, cheaper and more flexible system.⁵² However, while the draft statutes provided for the widening of the scope of *ratione personae*, *inter alia*, to include certain non-staff members,⁵³ the UNGA disregarded this proposal and restricted claims receivable *ratione personae* to staff members only.⁵⁴ Also, the UNAT ruled that this alteration in the final resolution adopting the tribunal's statute shows "*that the limitation of the Tribunal's jurisdiction to persons having acquired the status of staff member, as reflected in the Tribunal's statute, was not unintentional, but the clear wish of the General Assembly.*"⁵⁵ It was clearly stated that "*the UNDT and the UNAT shall not have any powers beyond those conferred under their respective statutes.*"⁵⁶

This change effectively narrows the scope of jurisdiction *ratione personae* in comparison to the former system with regard to UN non-staff members. This is true because the assertion of the UNGA concerning the restrictive interpretation of the statute has led the newly created tribunals to reject all claims of non-staff applicants. These applicants are, or have been, in somewhat comparable positions as those applicants whose claims were sustained under the old judicial system because of the human right considerations applied by the UNAdT mentioned above. Some of the applicants did not have access to arbitration.⁵⁷ Also, the

⁵²Fitschen, Münch, *Besserer Rechtsschutz für UN-Bedienstete*, 58 Vereinte Nationen 69, 69 (2010); Administration of Justice in the Secretariat, A/RES/57/307 of 15 April 2003; Administration of justice at the United Nations, A/RES/61/261 of 4 April 2007.

⁵³Administration of Justice, Report to the Secretary-General, Doc. A/62/748 of 3 April 2008, Annex I, Draft Statute of the UNDT, Article 3/1 lit. d (iv); Reinisch, Knahr, *From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – Reform of the Administration of Justice System within the United Nations*, 12 Max Planck Yearbook of United Nations Law 447, 469 (2008).

⁵⁴Administration of Justice at the United Nations, A/RES/63/253 of 17 March 2009, Annex I, Statute of the UNDT, Article 3.

⁵⁵Gabaldon v. Secretary-General of the UN, 31 May 2010, UNDT, Judgment No. 2010-UNDT-098, para. 31.

⁵⁶Administration of justice at the United Nations, UN Doc.A/RES/63/253 of 17 March 2009, para.28; Onana v. Secretary-General of the UN, 30 March 2010, UNAT, Judgment No. 2010-UNAT-008, para. 18.

⁵⁷Gabaldon v. Secretary-General of the UN, 31 May 2010, UNDT, Judgment No. UNDT/2010/098; Basenko v. Secretary-General of the UN, 13 August 2010, UNDT, Judgment No. UNDT/2010/145.

judgment in *Roberts* rendered by the UNDT portrays a case of considerable individual hardship, much comparable to the decision in *Teixeira*.⁵⁸ However, in this case, the applicant had an arbitration clause in her service contract.

Until today, every judgment of the UNDT which deals with submissions of claims by non-staff members leads to the rejection of the application on the grounds that it is not receivable *ratione personae*. The reasoning is always identical. Also, the considerations of the tribunal always refer to the ongoing policy discussions in the UNGA and the UN Secretariat as to whether non-staff personnel should be granted access to the tribunal or not. The tribunal's conclusion in such cases is that "... *there is however no legal basis to grant access to the Tribunal to applicants other than individuals having acquired the status of a staff member.*"⁵⁹ It is almost redundant to say that such justification, coupled with a reference to policy deliberations, brings little solace to individuals who face a denial of justice.

On the other hand, it is apparent from the judgments in question that the Respondent always submitted that the tribunal should reject the claim because of lacking jurisdiction *ratione personae*. This is not true for the decisions in *Teixeira* and *Chadsey* of the UNAdT respectively the ILOAT, where the Respondent accepted the jurisdiction of the tribunal. However, it is questionable whether this fact would lead to a different result when comparing old UNAdT decisions with new UNDT decisions. The omission to assert that a claim is not receivable, or even the acceptance of jurisdiction concerning non-staff members by the Secretary-General today would probably fail to establish jurisdiction *ratione personae* with regard to non-staff members. Because of the strict approach taken with regard to the interpretation of the statute, and because the statute does not provide for a jurisdictional clause, the tribunal would probably have to dismiss a claim *sua sponte* as not receivable.⁶⁰ This argument is made even more convincing by the fact that the statute and the rules of procedure do not provide for a mode of *prorogation fori*.

Summary

While the old, now abolished UNAdT has assumed jurisdiction for non-staff member disputes in some cases (e.g. when claimants had no other means of available dispute settlement

⁵⁸*Roberts v. Secretary-General of the UN*, 9 August 2010, UNDT, Judgment No.UNDT/2010/142.

⁵⁹*Gabalton v. Secretary-General of the UN*, 31 May 2010, UNDT, Judgment No.UNDT/2010/098, para.32; *Basenko v. Secretary-General of the UN*, 13 August 2010, UNDT, Judgment No.UNDT/2010/145, para.16; *Roberts v. Secretary-General of the UN*, 9 August 2010, UNDT, Judgment No.UNDT/2010/142, para. 15.

⁶⁰*Onana v. Secretary-General of the UN*, 30 March 2010, UNAT, Judgment No. 2010-UNAT-008, para. 18.

mechanisms), the new jurisprudence of both the UNDT and the UNAT are very unambiguous: In four judgments, the tribunals have perpetually held that the statute limiting the jurisdiction to staff members is to be interpreted in a strict way;⁶¹ However, the tribunals acknowledge in their considerations the ongoing discussion in the UNGA concerning the exploration of alternative and more effective means of dispute resolutions for non-staff members, yet with no satisfying legal effect to the respective claimant.

2. Arbitration

Arbitration as only recourse to justice for non-staff members

This leaves non-staff members with limited possibilities to approach possible conflicts with the administration of the UN. It is standard procedure for the UN to include arbitration clauses into commercial contracts. Should no arbitration mechanism be in place, it is general practice of the UN to negotiate an agreement with the affected party by virtue of which the dispute will be subjected to arbitration.⁶²

While it is general practice today to include arbitration clauses referring to the UNCITRAL arbitration rules, it is a fact that such arbitration, compared to other settlement procedures, bears a considerably augmented risk of cost. Therefore it is important to differentiate between institutional contractors who are sufficiently funded to enter into arbitration proceedings with little fear of a costly defeat and individuals who, by virtue of service agreements, are comparable to staff-members and thus are comparable to an employee. While it might be adequate to expect a large institutional service provider to bear a higher risk of costs incurred through litigation or arbitration in the event that a dispute arises, it seems inequitable to impose such a burden to non-staff members with a field of duty that consists of the accomplishment of small services. Therefore, it might not be that hard to see why arbitration may stand in conflict with substantial interests of a claimant, even if such arbitration is carried out according to internationally recognized rules.⁶³

⁶¹Gabalton v. Secretary-General of the UN, 31 May 2010, UNDT, Judgment No.UNDT/2010/098, para.31; Roberts v. Secretary-General of the UN, 9 August 2010, UNDT, Judgment No.UNDT/2010/142, para.14; Basenko v. Secretary-General of the UN, 13 August 2010, UNDT, Judgment No.UNDT/2010/145, para. 15.

⁶²Review of the efficiency of the administrative and financial functioning of the United Nations, Report of the Secretary-General, UN Doc. A/C.5/49/65 of 24 April 1995, para. 8.

⁶³Miller, *The Privileges and Immunities of the United Nations*, 6 International Organizations Law Review 7, 101 (2009).

This is also the overwhelming opinion of members of the UNGA 6th committee.⁶⁴ Arbitration as a method of dispute settlement is unattractive to parties with low financial resources and thus, the likelihood that non-staff members who have been treated unfairly by the UN will dare to institute proceedings through such a forum is low. Naturally, this leads to a *higher* number of unreported cases or claims [emphasis added]. The question remains whether *de facto* coercion to arbitration represents a legal remedy which fulfills the basic standards required by human rights law. This is especially relevant if it is evident that the claimant's lack of financial resources and the risk of overflowing costs render the initiation of arbitration proceedings improbable.

Besides, arbitration is a dispute settlement method generally tailored to the settlement of commercial disputes between parties of more or less equal bargaining power. Accordingly, the arguments included in the Secretary-Generals report⁶⁵ commenting on the lack of suitability of administrative law judges adjudicate disputes involving non-staff members may be equally applied with regard to arbitral tribunals adjudicating disputes which involve an employer-employee relationship and thus a strong gradient of bargaining power.

Arbitration clauses

The standard arbitration clauses utilized by the UN always provide for the respective tribunal to render a final and binding award, thereby finally settling the dispute.⁶⁶ Moreover, arbitration clauses used by the UN restrict an arbitral tribunal's power of awarding punitive damages. Furthermore, limits are placed upon the amount of interest a tribunal may award.⁶⁷ This is applicable to the arbitral clause used in service contracts with consultants and individual contractors.⁶⁸

The possibility to recover punitive damages is acknowledged as to go beyond the jurisdiction normally attributed to arbitral tribunals and is also nonexistent in many jurisdictions

⁶⁴Sixth Committee, Summary record of the 4th meeting of 25 October 2010, UN Doc. A/C.6/65/SR.4, paras. 77, 78.

⁶⁵Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 179.

⁶⁶Miller, *The Privileges and Immunities of the United Nations*, 6 International Organizations Law Review 7, 102 (2009).

⁶⁷Administrative instruction ST/AI/1999/7/Amend.1 of 15 March 2006, Annex "Contract for the services of a Consultant or Individual Contractor", Attachment "General conditions of contracts for the services of Consultants or Individual Contractors, para. 16.

⁶⁸Ibid.

worldwide.⁶⁹ However, the fact that no higher interest than the current LIBOR⁷⁰ rate may be awarded in absence of any other stipulation may constitute an imbalance in favor of the UN, if compared to provisions governing interest rates in national civil law.⁷¹ If a tribunal to which this clause is applicable renders an award, the prevailing party will still sustain a disadvantage compared to ordinary litigation before national courts. This clearly represents a disadvantage of a claimant who seeks redress against the UN through arbitration. However, it is of paramount importance to note here that such a restriction on the amount of interest awardable applies for both the claimant and the respondent.

V. POSSIBILITIES OF FUTURE DISPUTE SETTLEMENT MECHANISMS FOR UN NON-STAFF MEMBERS

1. Current methods of individual redress in debate

So far, there are no recourse mechanisms available to non-staff members within the justice system of the UN except submitting claims to arbitration. However, the UNGA requested the UN Secretary-General to analyze and compare different dispute resolution methods and assess their financial implications.⁷² Proposals for such non-staff member dispute resolution mechanisms include the establishment of an expedited special arbitrations procedure for claims under 25,000 USD by personal service contractors, the establishment of an internal standing body using streamlined procedures and capable of issue binding decisions which would not be subject to any further appeals procedure, the establishment of a simplified procedure before the UNDT without the possibility to appeal the tribunals decisions, and finally, the granting of access to the UNDT and the UNAT under their current rules of procedure.⁷³

⁶⁹T. Van Boven, Study on Restitution, Rehabilitation and Compensation for Gross and Systematic Violations of Human Rights, UN Doc. E/CN.4/1990/10 at 6; D. Shelton, *Remedies in International Human Rights Law*, 128 (1999).

⁷⁰London Interbank Offered Rate; interest rates depend on duration of loan and other factors; however the interest rate is considerably lower than interest demanded for an individual's loan. At the moment, the LIBOR interest rate for loans over a period of 12 months is around 1,5 %.

⁷¹According to § 1000 (1) and § 1333 (2) Austrian civil code, the benchmark interest rate is 4 % per year concerning claims of natural persons not engaged in business operation and 8% above the base interest rate concerning claims related to commercial transactions.

⁷²Administration of Justice, UN Doc.A/RES/64/233 of 16 March 2010, para. 9.

⁷³Ibid.

(a) Establishment of an expedited special arbitrations procedure for claims under 25,000 USD by personal service contractors

Concerning the proposal mentioned under (a), the Secretary-General reported that such a dispute settlement method would incur more costs, including more staff time for handling such kind of disputes. Moreover, only two disputes were submitted to arbitration in a timeframe of 10 years. The reason for this is that most cases involving non-staff members are resolved by the procurement of an amicable settlement.⁷⁴ The Secretary-General reports that the exploration and implementation of arbitration proceedings which offered expedited “fast-track” rules were not achievable or financially viable. Some institution in the US and the EU offered arbitration proceedings in a dense timeframe. It would, however, be impractical to utilize those institutions since the UNCITRAL rules, which exclusively govern UN contracts, were not always accepted by the abovementioned arbitration institutions. Those institutions rather require the use of their own rules.⁷⁵

The report of the Secretary-General does not go so far as to give a detailed overview concerning the nature of the disputes, the original amounts claimed by non-staff applicants and, in due course, the amount for which the non-staff members involved were ready to settle the dispute. These outstanding results with regard to claims settled in an amicable fashion by the UN confirm Office of Legal Affairs’ professionalism and dedication towards the administration of justice within the UN.

However, the high number of claims settled might also be an indicator of the unappealing nature of arbitration proceedings and the applicant’s unwillingness to enter into proceedings which bear a high risk of cost. On the other hand, entering into such arbitration proceedings may also prove expensive for the UN: In one case, the applicant’s claim was denied by the arbitrator; however, the UN had to pay the applicant’s expenses as well as the fees of the arbitrators, which amounted to USD 20,541.00, even though the original claim did not surpass the amount of USD 25,000.00.

In effect, the report indicates that creating the possibility for non-staff members to bring claims under USD 25,000.00 against the UN under the auspices of streamlined arbitration proceedings would not prove financially viable. The main argument against implementation

⁷⁴Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 168.

⁷⁵Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 171.

of such changes is that the costs incurred by such proceedings would be equal to the maximum claim limit of USD 25,000.00, if the costs of staff time and resources are also taken into account.⁷⁶

(b) Establishment of an internal standing body using streamlined procedures and capable of issue binding decisions which would not be subject to any legal remedy

With regard to the UNGA's proposal mentioned above under (b), the Secretary-General notes in his report that such an additional standing body different from the existing bodies would require a substantial increase in financial resources. Additional permanent staffing in different locations would be necessary. Because of all this additional expenditures, this approach would not bear any real improvement compared to the option of granting non-staff members access to a simplified procedure before the UNDT without the possibility of lodging appeals.⁷⁷ Additionally, the Secretary-General voiced reservations with regard to the fact that further streamlining of procedures might stand in contrast with the right of due process.⁷⁸

(c) Establishment of a simplified procedure before the UNDT without the possibility to appeal the tribunals decisions

The proposal mentioned hereunder was criticized by the Secretary-General for representing a dangerous burden for the very young but in its overwhelming caseload challenged new justice system. Moreover, the adoption of this proposal would require the doubling of judges and staff.⁷⁹ Furthermore, the Secretary-Generals emphasized in his report the implications which would arise from the fact that judgments would have to be based on different bodies of law and applicable frameworks with regard to staff members and non-staff members. The Secretary-General defined the subject of law applicable to proceedings involving staff members as belonging to the field of *administrative law*, while proceedings involving non-staff members would rather be governed by *contractual terms* [emphasis added].⁸⁰

⁷⁶Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 172.

⁷⁷Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 175.

⁷⁸Ibid.

⁷⁹Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para.180; Administration of justice at the United Nations, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc.A/65/557 of 4 November 2010, para.52.

⁸⁰Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 179.

The employment of 24⁸¹ new staff members supporting 8⁸² new judges seems very unlikely at the moment; it is momentarily implausible because the draft resolution proposed by the 5th committee will be affirmed by the UNGA with very high likelihood. The president of the UNAT thinks that the staffing situation of the tribunal is “*drastically inadequate*”.⁸³ Concerning the issues regarding the inadequate staffing situation, the phrasing of the draft resolution rejects the situation quite straight-forward:

“...[N]otes with regret that, with the current staffing of the United Nations Appeals Tribunal, the registry faces difficulties in preparing the legal memorandums and summaries of issues according to the requisite standard and with the speed necessary for the judges to carry out their work effectively and efficiently;”⁸⁴

Moreover, of the 27⁸⁵ new posts requested by the Secretary-General, the 5th committee proposed the approval of one.⁸⁶ The fact that the 5th committee is generally responsible for the ongoing development regarding the internal justice system gives cause for concern. It implies that the main focus at hand lies not with the advancement of due process and the promotion of legal certainty, but with the rationalization of funds.⁸⁷

However, the proposal of streamlined UNDT access for non-staff members should not be underestimated, because it bears significant chance for the creation of a consolidated and affordable judicial system within the UN which may equally serve the needs of staff members and employee-like non-staff members. The abovementioned fact that the law applicable in each of the two cases would differ in subject matter only creates an organizational difficulty which may be solved by a thoughtful allocation of duties. Moreover, the need of more judges opens the possibility to require a suitable curriculum in the recruiting process. Furthermore, the broadening of the UNDT’s jurisprudence *ratione personae* would also help to increase

⁸¹Ibid.

⁸²Ibid; The Judges of the UN Dispute Tribunal consist of 3 full time judges, 2 half-time judges and 3 ad-litem judges; more information available at: <http://www.un.org/en/oaj/dispute/judges.shtml> (last visited 25 January 2011).

⁸³Letter dated 5 November 2010 from the Secretary-General addressed to the President of the General Assembly, UN Doc. A/65/568 of 10 November 2010, para. 2.

⁸⁴Administration of justice at the United Nations, Draft resolution submitted by the Chair of the Committee following informal consultations, UN Doc.A/C.5/65L.17 of 28 December 2010, para. 48.

⁸⁵Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 245.

⁸⁶Administration of justice at the United Nations, Draft resolution submitted by the Chair of the Committee following informal consultations, UN Doc.A/C.5/65L.17 of 28 December 2010, para. 49.

⁸⁷The 6th committee (legal) only plays an advisory role in the process of the administration of justice at the UN.

and consolidate the tribunal's jurisprudence and thus promote the predictability and applicability of legal decisions. Besides, such consolidation efforts would counter the fragmentation of disputes in the UN's internal justice system.

(d) Access to the UNDT and the UNAT under their current rules of procedure

What has been mentioned under (c) is equally applicable for this proposal. However, in the event that this proposal should be implemented, the costs would be higher, since non-staff members would also have access to an appeals procedure before the UNAT. Moreover, it is the concern of the Secretary-General that the rules of procedure would have to be modified since some provisions resemble or take reference to UN staff rules only applicable to staff members.⁸⁸

Apart from the obvious higher costs, there are both positive and negative aspects about this proposal when compared to offering non-staff members access to judicial review under the auspices of a streamlined UNDT procedure with no possibility to appeal. For one, the implications of a one-tier judicial system would be detrimental to the UN's from a political perspective. It is generally accepted that the standards of due process require a judicial decision to be appealable at least once.⁸⁹ Because of this and considering that non-staff members and staff-members should be treated equally, full access to the internal justice system would be favorable.

On the other hand, it has already been mentioned that the procedural rules in place at the moment are not to be directly applied to non-staff members. A combination of streamlined procedures modeled after the needs of contractual law governing the relation between the UN and non-staff personnel and such which would provide for access to an appeals procedure has the power to fulfill both the requirement of an adapted legal procedure and consolidate basic rights of due process.

⁸⁸Administration of Justice at the United Nations, Report of the Secretary-General, UN Doc.A/65/373 of 16 September 2010, para. 183.

⁸⁹Reinisch, Knahr, *From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal - Reform of the Administration of Justice System within the United Nations*, 12 Max Planck Yearbook of United Nations Law 447, 459 (2008).

VI. OUTLOOK

After all this said, it is important to note that the newly created UNDT and UNAT have only existed for 2 years.⁹⁰ The Secretary-General and the Advisory Committee share the view that opening the UNDT or even the UNAT to non-staff members would, apart from entailing heavy financial implications, also increase complexity for judges because “...*adding cases that require application of a different body of law would be problematic, particularly at a time when the new system is in its initial stages.*”⁹¹ Also, it is feared that awarding non-staff members access to the tribunals at this early stage would be premature and detrimental to the new justice system, given the challenges it faces now.⁹²

The Advisory Committee therefore recommended that at the time being, no change should be made as to the status quo concerning the integration of UN non-staff personnel into the UN’s internal standing tribunals. The Committee argued that given time, the UN tribunals will settle in and adapt themselves to the workload. Once the UNAT and the UNDT had increased the efficacy in rendering judgments, there would be more flexibility to open these judicial bodies to non-staff members.⁹³

The 6th committee proposed to defer the considerations about legal remedies for non-staff personnel to the sixty-sixth session.⁹⁴ The feeling that the issue of remedies available to non-staff personnel had not been adequately addressed⁹⁵ found its way into the draft resolution, in which the Secretary-General is requested to provide more concrete information about the issue for consideration during the sixty-sixth session.⁹⁶ However, because of the demanding financial implications the implementation of these proposals would entail, it is highly

⁹⁰Administration of justice at the United Nations, UN Doc.A/RES/63/253 of 17 March 2009, para.26.

⁹¹Administration of justice at the United Nations, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc.A/65/557 of 4 November 2010, para.54.

⁹²Sixth Committee, Summary record of the 5th meeting, UN Doc.A/C.6/65SR.5 of 25 October 2010, para. 15.

⁹³Administration of justice at the United Nations, Report of the Advisory Committee on Administrative and Budgetary Questions, UN Doc.A/65/557 of 4 November 2010, para.54.

⁹⁴Administration of justice at the United Nations, Report of the Sixth Committee, UN Doc.A/65/478 of 25 October 2010, para. 10.

⁹⁵Sixth Committee, Summary record of the 5th meeting, UN Doc.A/C.6/65SR.5 of 25 October 2010, para. 1. Mr. Gonzales (Monaco) characterized the process quite strikingly: “*While the report of the Secretary-General highlighted the difficulties inherent in the various options mentioned in the resolution, the basic issue of recourse mechanisms for such personnel remained unresolved.*”

⁹⁶Administration of justice at the United Nations, Draft resolution submitted by the Chair of the Committee following informal consultations, UN Doc.A/C.5/65L.17 of 28 December 2010, para. 55.

improbable that the issues abovementioned will be resolved during the 66th session of the UNGA.

VII. CONCLUSION

In the past, UN immunity was regarded as absolute and unfringeable. However, a slow and creeping process has changed the general understanding of the UN's immunity from absolute to relative upon certain criteria. An important role in understanding this process is the fact that the drafters of the Charter envisioned the UN's immunity to be of only functional nature. In the following process of specification which was inherent to the establishment of the UN, the immunity changed to become of *de facto* absolute nature. While this view is still respected in some jurisdictions and forms the core arguments of some judgments,⁹⁷ the prevailing view today is based upon the consideration of human rights, especially the individual right to judicial redress and the right of due process.⁹⁸

It is partly because national courts have become less reluctant to challenge the UN's once undisputed absolute immunity that the process of judicial reform within the UN has gained considerable momentum. However, the status quo being that non-staff members may only seek legal recourse through rather costly arbitration proceedings, it can be expected that the "*radical approach*" of some national courts will not end abruptly. Rather, it should be expected that courts will continue to hold in favor of individuals who otherwise would be confronted with denial of justice. It is also possible that national courts will continue to erode the UN's immunity in favor of further amelioration of judicial redress for individuals.

The status quo of a two-class system of justice, in which the breadth and quality of legal recourse is dependable upon the status of staff member does not meet the standards of equity and fairness the UN seeks to promote on a daily basis and is therefore untenable. Any efforts made which improve the situation of UN non-staff members should also seek to elevate the standards of judicial redress to a level which represents the one enjoyed by staff members.

Acquiring an adequate amount of funding for financing an internal judicial system which provides such an elevated standard of due process for non-staff members within the UN

⁹⁷Manderlier v. United Nations and Belgian State, 45 International Law Reports 446, Belgium, Brussels Court of First Instance (1966).

⁹⁸Reinisch, Immunity of International Organizations, 7 Chinese Journal of International Law 85, 305 (2008).

however remains the utmost important prerequisite for an effective and consolidated internal system of justice. It remains to be seen if, and how soon this prerequisite will be met.

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