

OUTMODED INTERNAL JUSTICE PROCESSES

Most staff appeals within the UN administration of justice system have involved traditional issues of contractual rights, such as renewal of fixed-term contracts or promotions. The homemade system can work relatively efficiently to resolve many (but hardly most) such matters, although it does so very slowly and with only a modest record of success for the appellants.

Many of the "success cases" involve relatively clear-cut, unambiguous, and low-level matters. If endorsed by a JAB panel (a 50 percent chance or less?), and then endorsed by the Secretary-General's representatives, also perhaps a 50 percent chance or less), the staff member may receive some an adjustment of the decision if minor, or some monetary compensation. Fifty percent of fifty percent is only 25 percent, and the process may only partially endorse the appellant's request, or the least important part. In any event, there can be some relief for the determined appellant.

During the decade following the failed 1993 General Assembly management accountability resolution and the countervailing and triumphant "free the managers" measures, UN management reform policies have emphasized issues of management and staff accountability, especially for performance, and broader and much more complex and sensitive issues of waste, fraud and abuse and staff involvement in, or reporting of, those matters.

This should long since have changed the rather mechanical old internal justice appeals process from a focus on narrow administrative decisions, to one that carefully considers and applies the new regulations, rules and guidance concerning broader behavior and performance patterns and obligations under the Code of Conduct of 1998. Under these new elements of guidance and behaviour, any staff member has a much tougher task bring such matters to the internal justice system, but in the absence of serious accountability mechanisms and sanctions in the Secretariat, the staff member has no choice if he or she wants to obtain any justice at all.

However, the internal justice system still seems largely oblivious to the policies, principles, and guidance regarding staff performance, accountability, waste, misconduct, and abuse of recent years, and does not know how to deal with their violation. Such issues are increasingly raised in recent staff appeals to the UN internal justice system, as staff seek to effectively protest grave wrongdoing in their workplace and obtain corrective action and redress.

For instance, the updated UN staff rules state firmly that "any form of discrimination or harassment" is prohibited. But what exactly does that mean in daily practice? Is it in fact enforced by orderly investigation, review, and disciplinary mechanisms in a UN which employs too many autocratic and recently "freed" managers?

Staff Rule 101.2 (d), in "Status, basic rights and duties of United Nations staff members", ST/SGB/2002/13 of **1 November 2002**.

The answer in this case (and, IO Watch believes, for all the other performance and conduct issues noted above) seems to be no. A detailed study by an international law firm of UN sexual harassment policy in March 2001 was quite critical of UN implementation of its anti-harassment policy, and it appears that the Secretariat has still not corrected the problems. The report found that:

"The UN Sexual Harassment Policy, although in some respects reading well on the surface, is deficient when measured against standards presently applicable under host country [US] law. It is not enough to simply have a written policy which prohibits sexual harassment and purports to provide a mechanism for making and resolving complaints ...

... the UN Policy is remarkable for its complete failure to mention retaliation. In addition, it [seems to involve] ... disciplinary procedures which are confusing, cumbersome, bureaucratic and painfully slow. Moreover, because the investigation and determination procedures are adversary in nature and the basis of determinations apparently kept secret, it seems inevitable that employees perceive the process as being unfair and many actions as being retaliatory. ...

... we believe... that the [UN policy] would not meet [US] current standards for an effective anti-sexual harassment policy. ... the 'four P's' are either not sufficiently present or are lacking entirely, i.e., Policy in writing, Prompt investigation, Protection of the victim, Punishment of the harasser."

"Report commenting on United Nations sexual harassment policy", Chadbourne & Park LLP, New York, **March 2001**, to be found at www.un.org/staff/panelofcounsel/shrep.htm .

Another example of the damage done by the outmoded and hopelessly slow internal justice system is that of failed whistleblowers who, far from being protected for reporting wrongdoing in their workplace, can "float" for years unassigned and waiting for resolution of their situation, a very costly

waste of staff resources and funds. This situation occurs too often in the UN Secretariat, but is perhaps best described by a senior whistleblower's situation at the European Commission:

"[Marta Andreasen, the suspended chief accountant of the European Commission, is simply on call and barred from EU buildings in Brussels. She recently accepted an award] ... for 'choosing truth over self' by exposing government wrongdoing. The same week, she was arguing with European Commission functionaries about a disciplinary process dragging toward a September finale. ...

[She] has reduced the essence of her eurocratic story into a [public] speech of 7 minutes 35 seconds: New job. Seek reform. Encounter resistance. Public exposure. Suspension. Limbo.

[In] May 2002, ...she began alerting her bosses ... to [risks of] error and fraud just five months after she started her job. 'Had they followed my advice, today ... the funds would be protected. Instead, I was suspended, and the EC said they already knew about the problems.'

Today, the commission is hard pressed to explain precisely why disciplinary proceedings have lingered. The accusations are also a little complicated. She was not suspended because of her withering criticism, which gathered support ...

... but for violating [EU] ... staff regulations: failure to show sufficient loyalty and respect ... by expressing her concerns directly in letters to the commission's president and 10 legislators. ..."

Doreen Carvajal, "The EU and blowing the whistle", The International Herald Tribune, **July 28, 2004**.

UN staff members who appealed against workplace problems already faced a daunting task in past decades under the internal justice processes, but they confront even greater problems versus the "freed" UN managers of the 21st century. As a 1984 article observed, and as still applies:

"If the complaint has to do with management direction, all hands in OPS [Personnel] and its affiliates close ranks to gather material to *fashion as strong a personnel case as possible, and no recognition whatsoever is made of the key management issue.*OPS has scant choice but to bypass the administrative implications of the case and propel it rapidly to the quasi-legal restraints of the Joint Appeals Board where it can be confined. *The upshot is that a staff member must sue to force a management director to do his administrative duty.*

The guilty persons can get away with this kind of irresponsible performance more readily in the bureaucratic system of the UN than in any foreign office, however small. There is no really effective vertical responsibility upwards within the UN table of organization, nor effective direction downward ..."

Donald Dunham, "Management by personnel action", Secretariat News (New York), **November 30, 1984**, p. 11. [emphasis added]

These questions, of course, lead back to the entire issue of proper conduct and integrity within the UN Secretariat. It is interesting that in 2003, 58 years after the UN Charter called expressly for "the highest standards" of integrity in staff matters, the Secretariat finally launched its grand three-year "integrity initiative", as already discussed.

The new focus on integrity, of course, is better late than never, but it would be nice if it would deal as its top priority with the grave day-to-day "integrity deficit" in UN operations. Despite all the Code of Conduct and other exhortations, IO Watch believes that UN staff are still woefully exposed when they attempt to seek justice before a recalcitrant internal justice system that will not address management accountability abuses.

For the past decade those staff who believed that accountability existed in the UN Secretariat as Secretary-General Annan confidently stated in 2000 (and before and since), have been punished severely for their trust in official policy statements, most notably the overall assessment by Secretary-General Annan in 2000 that:

"...the Secretary-General is confident that the comprehensive system of accountability now in place ensures that accountability mechanisms are effectively used, are seen to be used, and ensure that staff at all levels are held accountable for their actions and inaction."

The General Assembly may wish to take note of the mechanisms in place since 1994, including those discussed in the present report, which together constitute the comprehensive system of accountability for the Organization."

"Accountability and responsibility: Report of the Secretary-General", A/55/270 of 3 August 2000, Summary, paras. 1-2, 47-48. [emphasis added.]

The ICSAB standards of 1954 express the integrity concept much more clearly, eloquently, and broadly than does the "Code of Conduct" duties document promulgated in 1998. The ICSAB began by stating, as the very first of its "Basic Considerations", that:

"One of the fundamental, if not paramount, standards of conduct derives from the requirement of integrity, underlined in Article 101 of the United Nations Charter ... Integrity, while perhaps not subject to exhaustive and precise definition, must be judged on the basis of the total behaviour of the person concerned. Such elemental personal or private qualities as honesty, truthfulness, fidelity, probity and freedom from corrupting influences, are clearly included. For the international official, however, the Charter also requires integrity as a *public official*, and especially an *international official*, ... [who] has dedicated himself to regulate his conduct with the interests of the international organization only in view."

"Report on the standards of conduct in the international civil service 1954", International Civil Service Advisory Board, included as Annex V, para. 4, of the

"Status, basic rights and duties of United Nations staff members", ST/SGB/1998/19 of 10 December 1998.

Even the UN Secretariat, in its 1994 documents prepared for the working group considering whether to create a new tribunal or "fix" the old one (the latter option won, of course) emphasized a broad definition in dealing with alleged cases of fraud in the

UN. It stated that:

"In the General Assembly discussions ... [of late 1993, leading to the resolution to establish the working group], it was clear that the term 'fraud' was intended to be understood in a very wide sense, whether or not it actually resulted in a financial loss to the Organization or a financial gain to the party committing the fraud. Thus it may entail an attempt by a party to obtain under false pretences an advantage in some other sense than a direct financial benefit."

"Alleged cases of fraud in the UN: Study of the possibility of the establishment of a new jurisdictional and procedural mechanism or of the extension of mandates and improvement of existing jurisdictional and procedural mechanisms; Overview by the Secretariat", UN document A/AC.243/1994/L.3 of **4 April 1994**, para. 4.

[Note: This proposed mechanism is discussed at the end of the discussion of this topic as the "missing process."]

Much more serious cases alleging mismanagement, abuse, misconduct, and severe actions taken against staff are now in the system. They have obvious significance for the staff at large, and they demonstrate that the existing internal justice system does not deal with them properly or effectively, or maintain morale, or establish accountability.

IO Watch concludes that the present internal justice system is not comprehensive or flexible enough (or willing) to enforce the important and specific new staff conduct requirements of a "modern management culture" as established by the General Assembly. The Secretariat has acknowledged, but made no effort to overcome, the widespread feeling among staff that the UN internal justice system favours managers, and protects them. In short, IO Watch believes that the "administration of justice" is probably the weakest link in the Organization's still largely conceptual "management accountability system", although it should be the ultimate cornerstone of that system.

The demands of modern organizational governance, oversight, labor laws, and occupational fraud and abuse processes must force the internal justice system away from its old, narrow focus on appeals against relatively minor, formal, administrative decisions. The JAB, JDC, and UNAT at present do not protect against the much more important and egregious abusive behaviors and mismanagement in the UN Secretariat which violate, often quite flagrantly, the new standards of accountability, integrity, and proper conduct.

Beigbender, Yves, The internal management of United Nations organizations: The long quest for reform, St. Martins Press, New York, **1997**, Chapter 7, "The extent of fraud and losses", pp. 124-128.

As discussed earlier under the subsection on an Inept

"Administration of justice" System, all parties are finally starting to focus on the fundamental changes needed in UN internal justice processes. However, deliberations may drag on for several years at best before any real decisions and actions are taken. Meanwhile, UN managers will continue on with impunity, while staff who have entrusted their fates to the internal justice system will continue to suffer gravely from its debilities.

The old UN internal justice system thus continues along in 2004 with almost all the old flaws. A first IO Watch overview of the weaknesses of the major processes of the system -- with much more information to come -- can be summarized under the three major stages, the JABs, the JDCs, and the UNAT. Oh yes, there was also the special Tribunal that was to be but, like so many other UN reforms, came to naught.

THE FIRST INTERNAL JUSTICE PROCESS, THE JOINT APPEALS BOARD

immediately places any staff member as an "appellant" standing "versus the Secretary-General", a very intimidating position. (It means broadly that he or she stands against the entire organization and specifically against the Secretary-General's entire group of full-time lawyers and personnel people who have played this game for years.) The appellant, meanwhile, must use a UN staff volunteer advisor, often with no real legal background (i.e., there is no legal "parallelism of forms between the parties."). The Administration also creates many procedural delays that make JAB/UNAT cases drag on for three to five years.

The JAB process is costly (it has been estimated at up to \$50,000 per appeal) and time-consuming for all concerned. UN staff who appeal risk career destruction as "troublemakers" (which is why a World Bank survey showed that 95% of its staff decide not to appeal their grievances.) The UN Administration not only makes the contested decisions, but then adjudicates any objections to them. Therefore, there is no separation of executive and judicial functions, and the Administration acts as "prosecutor, judge, jury, and executioner." This heavy-handed process paralyzes "justice," and runs quite contrary to the rule of law and human rights principles.

Mark A. Roy, "For a separate office for administration of justice in the United Nations", UN Staff Report, July 1993.

[Note: the many excellent articles over the decades on the deficiencies of the UN internal justice system are presented at the end of the Inept Administration of Justice System subsection preceding, and more will continue to be added.]

In their operations the JABs present no recognizable judicial process, nor indeed any open discourse and deliberation on the appeal that is underway. As one article summarized it:

"In its operations the Joint Appeals Board deals almost solely with written evidence ... rarely permitting oral testimony or the summoning of witnesses. ...

In fact, those familiar with its modus operandi, say [JAB] hearings constitute a shuffling of paperwork -- almost exclusively a perusal of written documents."

Adversarial proceedings are infrequent, as are opportunities for the aggrieved employee to have his or her 'day in court.'"

Jay Axelbank, "Administrative injustice: Win case but lose job", UN Special (Geneva), **January 1994**, p. 30.

In practice, an appellant can spend a year preparing his appeal and haggling with "the Respondent". Then a JAB panel, in closed session, spends perhaps four hours on it. Months later, the appellant usually learns, in a cryptic judgement, that it was feebly or in part accepted, or rejected, and that he or she can begin a second multi-year journey to the UNAT.

The operations of the internal justice system overall are also very opaque. As observed in 1994:

"Attempts by the *U.N. Staff Report* to obtain any summaries or statistics from the Administration on JAB recommendations proved unsuccessful, since management has not seen fit to release ... reports ... on the nature and disposition of cases.

The atmosphere of virtual secrecy and lack of publicly available data appears to exacerbate the problem by spawning rumours and allegations [--] sometimes admittedly unsubstantiated allegations -- and contributing to the Kafkaesque climate. But, most significantly, it complicates attempts to make completely objective judgments about how justice is, and is seen to be administered in the United Nations."

Jay Axelbank, "Administrative injustice: Win case but lose job", UN Special (Geneva), **January 1994**, p. 30. [excerpted from *U. N. Staff Report* (New York).]

Another staff article agreed that criticism must be leveled at outrageous attitudes, inappropriate review procedures, and also at the severely curtailed means of redress available to UNAT. But it argued also that the problem should be handled by seeking reasoned action (and especially that the few remaining volunteer staff members on the panels [some are chosen by the staff, others by "the Administration] should not be blamed. It also emphasized that the staff member must make a good case and must argue it properly. These points are all valid, but the author then admitted in a succinct summary that:

" ... it must be recognized that appellants may have to face various problems over and above the traps which they have perhaps put under their own feet: an

obstructive respondent, an incompetent or cowardly appeal board, or again, an obstinate executive head."

Andre Heitz, OMPI "Let's do justice to justice", UN Special (Geneva), **September 1994**, pp. 32-34.

Another staff article observed that the Panel of Counsel, composed of volunteers who can aid staff in their appeals, must also struggle to fulfil its functions.

"Its members - who may or may not be attorneys - or other staff members willing to volunteer their assistance ... are seriously compromised [in their work]. ...

The Panel of Counsel deals with 300 to 500 personnel matters or cases a year with limited staff and meager resources. The coordinator's office has insufficient staff, office space, computers and capacity for record keeping. To make matters worse, the Staff Council has asserted that some supervisors only reluctantly recognize the official nature of the duties of the Panel of Counsel and hamper its work."

Jay Axelbank, "Administrative injustice: Win case: Win \$1 in damages", UN Special (Geneva), **February 1994**, p. 30-31 [30.] [excerpted from *U. N. Staff Report* (New York), December 1993.]

The appeals process and its outcomes are indeed daunting, and often only the most stubborn attempt the laborious journey.

"One long-time member of the Panel of Counsel told *UN Staff Report* that when she consults with employees who are about to embark on the appeals process 'right up front' ... [she] virtually tells them 'Abandon hope, all ye who enter here'. [She says] 'I would be less than honest if I did otherwise.'

[There is also] the "fatal flaw" in the process ... [Even when the staff are] ... trying to adjudicate a grievance, particularly non-renewal of fixed-term appointments, [they] can win a binding decision in their favour by the Administrative Tribunal and still not get rehired or regain their [prior] jobs ... Instead, they are awarded minimal or even token compensation."

Jay Axelbank, "Administrative injustice: Win case but lose job", UN Special (Geneva), **January 1994**, p. 31. [Excerpted from *U. N. Staff Report* (New York).]

The appeals process is not only slow, ineffective, and inherently limited as a "judicial" process. It is also costly.

"Each case that is not resolved through informal mediation and must be appealed to the [JAB] and the {UNAT}, costs thousands of dollars. One estimate is \$50,000 per case before an appeals body; even if it were a half or a third of that, such a cost would still be unacceptable."

Jay Axelbank, "Administrative injustice: Win case: Win \$1 in damages", UN Special (Geneva), **February 1994**, p. 30-31 [31.] [excerpted from *U. N. Staff Report* (New York), December 1993.]

Most significantly, after all the above disorder and oddities, the report of the JAB is a mere advisory paper for the Secretary-General to endorse or reject. The staff appellant only

(and often considerably) later receives a copy of the JAB report (including, for the first time, a look at "the facts" as determined by the JAB Secretariat) with the Secretary-General's decision thereon.

The 1974 FICSA report provided a very incisive analysis of key deficiencies in the appeals system [which remains fully applicable three decades later]. It cited *inter alia* the:

"Appellant as Trouble-maker: Challenging an administrative decision, no matter what, by and large, is still regarded with suspicion ...

Weakness of Internal Boards: Probably [their] weakest point is that an executive head sits as prosecutor and judge ... [particularly] in smaller-sized duty stations ...

Pernicious doctrine: ... after all evidence is presented and weighed and abuse or misuse of power is proved -- and thus the administrative decision is not, as frequently claimed, "in the best interest of the organization" -- then it is indefensible to deprive an appellant of remedy sought. ...

Either/Or Judgement: When administrators have been found guilty ... [of misconduct] tribunals, without notable exception, give an executive head a choice -- the remedy sought ... (say reinstatement) or compensation ... appellants ... may win their cases, but still lose their jobs.

Just Handouts or Just Compensation: The tribunal's known practice of mendacity in cash settlements ... makes it easier for an administration to pay. But for most administrations, the choice is not saving money, but saving face. The choice is made easier because the 'fine' that is paid comes out of the pocket of member governments ... How are these expenses shown on an organization's books?"

"Appeals procedures for international civil servants, Federation of Civil Servants Associations (FICSA), FICSA Studies and Policies NO. 2, of 1974, as quoted and discussed in Ozorio, Peter, "Tribunal trouble: Legal rights revisited", UN Special, October 1992, pp. 25-26.

The General Assembly tried in the mid-1980s to reform the internal justice system, but encountered only foot-dragging and disputes. An opening staff salvo is typical of the hopes that staff have maintained for decades to reform the system and match its judicial work to standards found in the rest of the world:

"... just over six years ago [i.e., in 1978]... a former justice of the [International Court of Justice reviewed a staff dispute with management] ... the material which he collected has never [appeared]. I would like to quote [several passages therefrom]

'The problems ... have accumulated over a long period owing to the failure and inability of the existing machinery to find and implement solutions to staff grievances.'

' ...complaints pile up, and staff members become increasingly bitter and resentful. a formal grievance procedure ... should be speedy, ... encourage settlement .. at the working level, [have clear and publicized procedures] ... be a process of negotiation ... [with] Any bargain ... or agreement equally binding ...

.... dealing on a basis of equality with staff representatives will [be difficult for] a number of [management] officials

Nevertheless, thousands of managements and unions have gone this road before us, many of them in the public service sector. We have their experience to draw on. ...

How long are we going to pretend that the United Nations is so different from the

rest of the world that we cannot learn and profit from others' experience?"

"Bill Bailey" [a "senior official at Headquarters], referring to a **1978** expert opinion of the appeals system, in "Appeals or redress of grievances?", Secretariat News [New York], November 1984, pp. 8-9.

Not surprisingly, even determined staff members usually lose in this onerous process, and the "winners" may well get negligible or no damages from the JAB or the UNAT for a career seriously or fatally damaged. The success rate for staff members who request the essential and initial goal -- reversal of an administrative decision -- is essentially zero.

Axelbank, Jay, "Win case but lose job", UN Special, **January 1994**, pp. 30-31 and "Win case; win \$1 in damages", **February 1994**, pp. 30-31,

Andre Heitz, "Lets do justice to justice", , UN Special (Geneva), **September 1994**, pp. 32-33, 35.

Further, a systematic analysis in Geneva by M. L. Fayache of available judgements in 1999 (apparently the only one ever made there) showed that a resounding 97 percent of JAB cases were decided against the staff. JAB officials in Geneva asserted that this sorry record of near-zero success was improving and that their work was very professional, but there is much evidence to the contrary. In New York, the JAB appeal success rate had been closer to 50-50. However, a survey there showed that, at the next step, the Administration (the "Secretary-General") subsequently and discouragingly approves 99.5% of the JAB judgements made against staff members, but only 30% of those decided in favour of the staff.)

M. L. Fayache, "Defense des droits du personnel," UN Special (Geneva), **Fevrier 1999**, pp. 23-25,

Souria, Robert, "The truth about the Geneva Joint Appeals Board," UN Special, (Geneva), **March 2000**, pp.15-16,

Fayache, M. L., "Le systeme des castes se porte bien a l'ONU," UN Special, (Geneva), January 2000, pp. 12-13.

"Frivolous defense," UN Special, February 2000, pp. 25-26, and

"The staff needs the statutory 'administrative review,'" UN Special, (Geneva), **February 2000**, pp. 28-29, and .

"Interview with the President of the Staff Council", UN Staff Report (New York), **November 1996**, p. 3.

One final article from 1999 suggests the ugly realities for "the only means staff have to hold managers accountable." In 1999 M. L. Fayache analyzed a Geneva case of non-renewal of a fixed-term contract in which the main element was the lack of valid performance evaluation reports. The case was lost, but Fayache called to the attention of the Geneva JAB not only the need for training for JAB members in UN administrative law exhibited by the case, but a seemingly total unawareness of UNAT judgments, and therefore precedents, dealing with the PER process. He then listed UNAT judgments dealing with PER,

including *inter alia*:

"138 (PEYNADO): '... 'the right of rebuttal of any part of a periodical report and the procedure prescribed for handling such rebuttals afford a valuable protection to the staff member against prejudicial assessment (VI).'

200 (FRACYON): '... the periodic report ... was prepared after the decision not to renew the Applicant's appointment ... The Tribunal orders ... that the said periodic report be excluded from the Applicant's status file (XXI).'

225 (SANDYS): '... for a supervisor to make periodic reports which describe a staff member's performance in unjustifiably favorable terms, which are subsequently retracted, is ... reprehensible ... [this action] displays a measure of insincerity on the part of the Principal Officer which, if tolerated by the Administration, would undermine the very purpose of the ... periodic reports (IV).'

362 (de FRANCHIS): '... the fair and impartial assessment of performance must be considered an essential right of all staff members and ... consequently, the Administration should not spare any means to secure an unimpeachable report. ... [in this case] to have the Applicant's performance assessed by an officer with whom there existed such an extremely strained relationship seriously affected the Applicant's right to have his performance assessed in an impartial way (VIII).'

457 (ANDERSON): 'The Tribunal attaches great importance to the integrity of the PER system and in particular its candour and honesty ... (III).'

569 (ZOUARI): '... The rebuttal panel ... concluded ... that the rules governing PER's had not been fully observed. The Administration took no action regarding this report. The Tribunal finds that the Applicant has suffered considerably as a consequence of numerous irregularities (VIII.)'

772 (ZEID): 'The performance review process was tainted by the failure to identify those persons consulted. In this respect the Applicant has been denied due process.'

800 (MERA RODRIGUEZ): 'As a matter of equal treatment for all staff, an evaluation system such as the PER is efficient only when everyone complies with its procedures. In terms of accountability, and to avoid any favouritism or arbitrariness, management has the duty to ensure that no decision, such as ... is taken without the assessment of a staff member's performance covering recent years (page 8).'

[This statement is from a memorandum from no less than USG Joseph Connor (then the UN's top manager) himself.]

826 (BELIAYEV): 'Because the evaluation of the Applicant's performance was a factor, it is unacceptable that the decision as to her future was taken before the rebuttal procedure was finalized. The Tribunal does not accept as reasonable DPI's position that the completion of the rebuttal procedure was not material to its decision not to renew the applicant's appointment. To accept this proposition would be to render the Organization's entire rebuttal procedure redundant.'

M. L. Fayache, "List of UNAT cases dealing with PER: To the Presiding Officer of the Joint Appeals Board," UN Special (Geneva), **February 1999**, pp. 19-20.

[Note: Mr. Fayache added the following postscript:

"Since I have one case pending before the Geneva JAB, and since one of my main complaints is that I am without valid PER's since 1992, I am of course extremely concerned about the obvious unfamiliarity of the Geneva JAB and its reluctance to refer to the many UNAT judgments dealing with PER's."

The above list of judgments is cited here, at some length, because it shows just how defective the JAB panel decisions can be over a period of decades on an issue -- proper performance appraisals -- that is absolutely central to UN staff members' career well-being and advancement, and on which the principles and precedents of due process have been repeated endlessly. There are four aspects of the above parade of miscarriages of justice.

-- First, it shows the perverse ways in which abusive UN "managers" can routinely and consistently subvert the careers of their staff, with no negative impact for them (no manager was ever associated with the above decisions, let alone being reprimanded in any way.)

-- Second, these cases are only the "tip of the iceberg": those that reached the UNAT after a procedural journey of several years. How many hundreds, or quite possibly thousands, of other such shabby appraisals have been filed and never corrected in the past few decades, to the great detriment of staff morale and career hopes?

-- Third, in light of OHRM's weak monitoring processes (see the preceding subsection on that topic) and the usual top management "self-policing" of this process, one wonders how many hundreds of such improper and abusive PAS's are still being prepared every year.

-- Fourth, and worst of all, it seems that JAB and UNAT cases involving such violations of a very clear Staff Rule (101.3, with a lengthy added commentary on "integrity" in the Code of Conduct), continue on today, and the applicants continue to lose their JAB cases just as did those in the above list.

"Status, basic rights and duties of United Nations staff members", ST/SGB/1998/19 of **10 December 1998**, pages 33-34.

THE SECOND INTERNAL JUSTICE PROCESS, THE JOINT DISCIPLINARY COMMITTEE (JDCs) is by far the most mysterious. While the JAB's (however unfriendly they are in practice) are considered "the staff's" process, the JDCs, which advise the Secretary-General in cases of staff charged with misconduct, are clearly "management's" process. Little is reported, or even known, about actual JDC functioning and results.

The JDC's purport to follow due process, but in fact -- unlike the JABs -- they have no specific and detailed procedures. Nevertheless, they can and do recommend various penalties, ranging from written censure by the Secretary-General all the way up to summary dismissal.

United Nations Staff Rules", Secretary-General's Bulletin ST/SGB/2002/1 of 1 January 2002, Staff Rules 110.4 and 110.5, and esp. Rule 110.7 (c).

The importance and seriousness of JDC proceedings seems now to be greatly increasing. In early 2000 the Secretary-General presented the next round of reports on Secretariat progress in the midst of a growing mass of his own management reform activities. In a first report, requested specifically by the General Assembly, he stated that, with regard to management irregularities causing financial loss:

" ... the Secretary-General is in the process of establishing procedures to allow preliminary investigation of allegations of 'gross negligence' by heads of departments/offices or [the OIOS], [followed up where necessary] ... under revised Joint Disciplinary Committee procedures ... as part of his programme for management reform ... measures to establish a more effective accountability system ... such as [a] programme management plan, [an] Accountability Panel and monitoring of delegated authority ...

The Secretary-General believes that a comprehensive approach to accountability, backed up by all these measures, will contribute significantly to detecting and preventing management irregularities."

"Follow-up report on management irregularities causing financial losses to the Organization: Report of the Secretary-General", UN document A/54/793 of **13 March 2000**, para. 25. [emphasis added]

The report went on to say that this complex and sensitive new investigative task was not a problem for these managers, because they had "been conducting preliminary investigations in connection with allegations of misconduct, [so] they are familiar with the methods of conducting such investigations." He also stated that, after the preliminary investigation is completed, the Secretary-General may decide to refer the case to the Joint Disciplinary Committee for a recommendation.

"In this regard, ...

The relevant staff rules will be amended to provide for an expansion of the mandate of the JDC ... to consider gross negligence and to make recommendations for recovery under staff rule 112.3;

An experienced legal officer will participate in the deliberations of the expanded [JDC] on an ex officio basis to guide the members in the proceedings when considering such cases."

Follow-up report on management irregularities causing financial losses to the Organization," UN document A/54/793 of **13 March 2000**, paras. 25, and 12-14. [emphasis added.]

[Note: an Annex to this report, *inter alia*, cited the staff regulation sternly requiring staff to cooperate fully with all such investigations by all "authorized"

UN officials: that is, it firmly specified obligations, but granted staff no specific rights.]

This upgraded JDC role truly seems to be a judicial "witches brew." For several years now, amateur Secretariat manager/investigators have been allowed to develop a case, which the Secretary-General may send to the JDC's, which will have an expanded mandate (but, as before, no detailed procedures, for this or lesser matters), to consider the complex matters of gross negligence and recovery recommendations for the Secretary-General. This is very serious business. Ah, but it is really "no problem", because the struggling group assembled for any such case will have an "experienced legal officer" to "guide" them in such cases. But, where will be guide them?

The new hidden "investigations" are therefore a very dangerous, and thus far ignored, element of the UN internal justice system. They not only "shield managers from accountability" (the staff perception that the Secretary-General himself has already noted), but become a powerful weapon against staff, leading even to (or threatening, which may be quite sufficient) summary dismissal or even possible criminal proceedings against staff in national courts.

At present, UN staff "caught" in the new investigations process can only submit their plight, personal reputations, and often their careers, to judgment by a panel of part-time, untrained, amateur staff volunteers (no matter how highly motivated) of the JAB or the JDC. The Secretary-General has talked of reforming and educating the people who participate in the JDC (but not Administration staff) to make them capable of handling such manners, i.e., he admits that presently they are not. Meanwhile, when the dangers and shaky due process and individual rights aspects of such investigations have been presented to UN legal officials in JAB and UNAT cases, they often simply ignore the issues (and the General Assembly's multiple insistence on due process and staff rights in such processes) entirely.

THE THIRD INTERNAL JUSTICE PROCESS, THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL (UNAT) operates much like the JAB's (and presumably the JDC's). The UNAT rarely allows open hearings, discovery, witnesses or cross-examination, and it frequently decides against the staff member or provides only a very cursory

review of the facts, with little attention to legal issues or precedents involved, and an extremely concise summary of its own deliberations (as little as 2-3 pages, double spaced).

Even worse, when the UNAT becomes involved, it seems to suffer (and compound) the same carelessness and weaknesses of the JABs and JDCs. To begin with, it seems to rely almost totally on the original version of the case developed by the JAB of JDC secretariats, and heartily endorsed by the Office of Legal Affairs, as opposed to the detailed facts presented by the Appellant. It may also choose to consider only a minor aspect of the case; to decide against the staff member even though it acknowledges multiple management irregularities committed; or simply and sweepingly to reject the application "in its entirety", no matter how carefully the staff member and lawyer (who is permitted at this stage) have detailed, documented, and prepared it.

Roy, Mark A., "For a separate office for administration of justice in the United Nations", UN Staff Report, **July 1993**, pp. 2-3,

Axelbank, Jay, " Administrative injustice at the UN", UN Special, **December 1993**, p.14, and

Samson, Klaus, "The protection of the interests of ... staff ... in ... reorganization or reduction", UN Special, **January 2000**, pp.18-21.

Furthermore, because the entire JAB/UNAT process may drag on for up to four years, the judgement once reached seems like ancient history, as events have moved far beyond the original decision taken and many of the staff, managers, and others involved have long since moved on to other jobs, or distant locations, or retirement.

In the late 1990s the UNAT received some "new blood" for several years, which provided more judgements favoring the staff and some relatively significant damage awards, moving from about \$10,000 on up into the \$ 200,000 category. However, the UNAT is weak. It can almost never reverse an administrative decision taken. It cannot hold a manager responsible, although several UNAT judgements in the late 1990s expressed concern that abusive managers seemed never to be admonished or sanctioned in any way, and urged (with no apparent effect) that the Secretary-General change this situation.

In effect, and at present, the UNAT judgements appear quite random and erratic, and the staff applicant may receive a large cash payment, a token payment, or nothing at all, with no clear-cut reasoning provided. Most damaging, the managers whose decisions generated the cases are never affected in any way even when the staff member "wins".

The Secretary-General noted in 2000 that the seven UNAT judges handle only about 30 cases a year, or about four per judge, working together in groups of three. Most of its judgements are largely pro forma, devoting perhaps a dozen pages to restating the facts already determined by the JAB panels and the arguments of the two sides, followed by only two or three pages of reasoning to justify the Tribunal's (often narrowly restricted) judgement. Far from applying judicial rigor, the UNAT judgements sometimes seem to indicate that the judges hardly even read the case put before them, and rely on sweeping conclusions such as the favored "rejects the application in its entirety."

"Human resources management reform: Report of the Secretary-General", UN document A/53/414 of **13 October 1998**, Annex V, para. 2.

A staff article assessing the work of the UNAT and its binding decisions observed that:

" ... The atmosphere in which the [UNAT] operates gives many Secretariat employees the impression that it is reluctant to challenge any decisions taken by higher levels of management. 'One gets the feeling', said a UN employee, 'that the Tribunal is really part of the Administration'.

According to [a Staff Council resolution], 'in recent years there has been a growing awareness of the numerous deficiencies of most UNAT judgments by most members of the Committee on Applications for Review of [UNAT] judgements. The Committee ... is empowered to forward appeals to the International Court of Justice for a non-binding advisory opinion ... But despite its frequent criticisms of the quality of justice dispensed by the [UNAT], it has forwarded three cases out of approximately 80 appeals in four decades! This has led to demands in many quarters for changing or abolishing the Committee on Applications.'

Jay Axelbank, "Administrative injustice: Win case but lose job", UN Special (Geneva), **January 1994**, p. 31.

Among the miscarriages of justice found in UNAT decisions, perhaps the most egregious one concerns a disciplinary action mentioned earlier, when the most severe UN sanction -- summary dismissal -- was imposed upon a staff member for non-official use of the office photocopy machine. Of course, such an "offense" would put approximately one billion people worldwide out on the street, if it were enforced in a real court of law. A staff article later learned that:

"The Joint Disciplinary Committee found that due process had been denied [the staff member,] that the facts in the case had not been adequately established, and that the charge, if proved, did not warrant summary dismissal. It recommended reinstatement with three months net base pay damages or, in lieu of rehiring, that he be given two years net base pay.

The Administrative Tribunal flatly rejected the employee's appeal."

"Justice miscarries", UN Special (Geneva), **January 1994**, p. 31.

[Note: in this case it was not even the "staff's group", the JAB, but "management's group", the JDC, that pointed out this miscarriage of justice, but

to no effect on the learned deliberations of the UNAT judges.]

The UNAT judges themselves are never held accountable. The General Assembly recently lauded their performance, but without providing any analysis whatsoever of their performance, cost, output, or efficiency. Second, the UNAT does no summary or public reporting at all. Individual cases are "published" but are hard to get, and they are certainly not on a web site, systematically analysed, or publicized (as the Secretary-General in 2000 had said it would be desirable to finally do, but only for managers).

"Review of the Statute of the United Nations Administrative Tribunal", General Assembly resolution 55/159 of **31 January 2001**, preambular para. 1, and "Human resources management reform: Report of the Secretary-General", A/53/414 of 13 October 1998, Annex V, para. 5.

[Note: However, in October 2000 the ACABQ obtained some and published some welcome basic information on UNAT cases, judgments, and payments made to successful Applicants during the late 1990s, in "Administration of justice in the United Nations: Report of the [ACABQ]," UN document A/55/514 of **23 October 2000** .

Finally, the UNAT has little impact. Unlike any real world court, it almost never rights a wrong (in this case reversing an administrative decision, no matter how unjust or dubious). Second, it can impose no sanctions on the wrongdoers, even where their malfeasance is clearly established.

Indeed, despite some protestations to the Secretary-General in a few cases in the late 1990s, the UNAT never even bothers to mention or identify the UN managers involved in a case, nor can it even propose to the Secretary-General that he take disciplinary action or sanctions of any kind.

In fact, the UNAT functions merely like a slot machine in a gambling casino. The staff Applicants, after a four- or five-year wait, get to "pull the handle", watch the tumblers spin, and see (apparently quite randomly) whether they will win a payoff of \$100,000 or more, perhaps \$20,000, or in many cases (and as so often in a casino) nothing at all.

Thus, the UNAT process, like that of the JABs and JDCs, seems enormously costly, not only in terms of years passing by as cases drag along, or of administrative costs and paperwork burdens, but -- worst of all, and as the Secretary-General admits -- a system that serves neither the interests of justice nor of staff, nor of management (although staff would disagree that managers are disadvantaged, as clearly shown by the Secretary-

General's admission that staff perceive the system as shielding managers from accountability for their decisions.)

The JIU study of the internal justice system to the General Assembly in 2000 confirmed that "on numerous occasions" UN Secretariat officials had not been held accountable by the UNAT for wrongful or grossly negligent decisions. The Inspectors, in a rather hidden proposal that could be a powerful accountability lever in a proper UN internal justice system -- if it were ever accepted and implemented as it definitely should be -- "underlined" that

"whenever the actions of Secretariat officials are found by the appellate bodies to be wrongful or grossly negligent, these officials should be held accountable as appropriate for any financial loss suffered by the Organization as a direct result of those actions."

"Administration of justice in the United Nations", JIU report 2000/1 of August 2000 (and UN document A/55/57), para. 173 on "Full accountability of Secretariat officials".

LEG - 3, and 3a & 3b

The JIU, however, did not comment on the troubling realities involved, namely that:

- any case against managers would take years to pass through the JAB/UNAT process;
- it would very probably be resolved in the managers' favor;
- the UNAT cannot impose any sanctions;
- this function would be left to the Secretary-General, who never apparently considers any sanction actions at all; and
- by the time the sanctions question was resolved all parties (except the appellant) would long since have disappeared.

Instead, to get real insight into the problems, one has to go far back to the excellent FICSA analysis of the grave internal justice system flaws of 1974. In fact, the managers whose decisions generated the cases are never affected in any way, even when the staff member "wins". Instead, any payout comes out of the pockets of the world's taxpayers who fund the UN anyway, leaving scarcely any trace on the justice system or the managers themselves.

"Appeals procedures for international civil servants, Federation of Civil Servants Associations (FICSA), FICSA Studies and Policies NO. 2, of 1974, as quoted and discussed in Ozorio, Peter, "Tribunal trouble: Legal rights revisited", UN Special, October 1992, pp. 25-26.

Even worse, the UNAT seems consistently oblivious to the expanded rules of staff conduct, especially as they involve the General Assembly's requirements for management accountability and the integrity of all concerned.

Without any sanctions and corrective action, or even public identification of the manager involved, and no right whatsoever to go to any higher (outside) court, the JAB/UNAT system quite simply and sadly has no deterrent or redress value. Quite the contrary, it serves to discourage staff from going through the long internal legal process in the small hope of obtaining a very uncertain and often small cash reward, and to embolden managers who realize that they will suffer no negative personal consequences for abusive decisions which they take.

THE FOURTH INTERNAL JUSTICE PROCESS might be considered to be the Panels on Discrimination and Other Grievances. However, after earlier successes they fell into disuse during the 1990s, and in 2002 were replaced by a new, small Ombudsman office located in the Office of the Secretary-General. Their decline seems mostly due to the fact that their function was informal and conciliatory, but especially because, as the Secretary-General bluntly presented it in a 2000 report, of their volunteer members' inexperience, and because "their findings are often not substantiated by evidence and *managers thus resist cooperating with them.*"

"Human resources management reform: Report of the Secretary-General", A/55/253, 1 August 2000, Annex V, para. 3. [emphasis added]

[Note: the message of the last phrase, of course, is that the managers and Administration representatives -- equally as untrained in the law as are staff panels -- can nevertheless recognize flawed evidence when they see it, i.e., seize a major but dubious excuse to negate the entire process.]

In fact, the fourth process was one that never came to be, partly because of an apparent breakdown of efforts in the General Assembly and in a special expert group. In its resolution 48/218 A of December 1993, which established the system of management accountability, the General Assembly also stated that:

"III. ... Determined to address alleged cases of fraud in the United Nations in an impartial manner, in accordance with due process of law and full respect for the rights of each individual ..."

2. Also decides to this end to establish an *ad hoc ... working group of experts*... to report to the General Assembly [in 1994]."

"Review of the administrative and financial functioning of the United Nations", General Assembly resolution 48/218 A, **23 December 1993**, sections II. And III.

The General Assembly had already called in a 1992 resolution for the Secretary-General to make proposals on establishing mechanisms to recover misappropriated funds, and to seek criminal prosecution of those who committed fraud against the UN. His report cited the quite limited practices for fund recovery and for criminal action. He then proposed that the statute of the UNAT might be amended to give it jurisdiction to judge claims of embezzlement against staff members and seek recovery. However, this had already been discussed, and rejected, in 1978 and again in 1979, because of the possibility of unifying the UNAT and the ILOAT [now up for (tepid?) debate again] and because it would not be reasonable to create a centralized criminal court for this limited UN function.

"Recovery of misappropriated funds from staff members and former staff members: Report of the Secretary-General", UN document A/48/572 of **9 November 1993**., paras. 1-3, 25-35.

Meanwhile 25 expert members of the Assembly's intergovernmental working group considered establishing a new jurisdictional and procedural mechanism or extending the mandates and improving the function of the existing ones. The Secretariat provided a background report on the existing general and legal framework, standards of conduct, prevention and detection of misconduct, disciplinary mechanisms, the UNAT, and fund recovery. The report repeated the standard UN assertion that:

It is clear ... that staff members dissatisfied with any administrative decision... including ... to carry out a recovery action or to impose a disciplinary measure, have the opportunity to appeal to a judicial body, which will impartially consider such appeals."

"Alleged cases of fraud in the UN: Study of the possibility of the establishment of a new jurisdictional and procedural mechanism or of the extension of mandates and improvement of existing jurisdictional and procedural mechanisms; Overview by the Secretariat", UN document A/AC.243/1994/L.3 of **4 April 1994**, esp. para. 49.

In September 1994 the working group submitted its report. Unfortunately, it was a mishmash of ideas and proposals, all left hanging, with a bow toward the Secretariat's intentions to enhance existing mechanisms as well as the work of the new OIOS. The French expert submitted a detailed proposal, which was discussed and left for "further study", which apparently never

occurred.

The group also noted the Secretariat's assurances that there was not much fraud (contrary to the Thornburgh report concerns), and pondered some revisions to the financial rules concerning financial integrity of staff, and training for financial personnel. It noted possibilities for a new mechanism to adjudicate complex cases of financial irregularity and fraud which the General Assembly might wish to consider, or amending the UNAT Statute to allow it to handle such cases, strengthening of the JDC's, UN work with national courts on fraud cases, and -- the only interesting and new idea -- monitoring a new UNDP Personal Responsibility and Financial Liability initiative just getting underway. It then terminated its work.

"Jurisdictional and procedural mechanism for the proper management of resources and funds of the United Nations: Report of the Ad Hoc Intergovernmental Working Group of Experts established pursuant to General Assembly resolution 48/218 A", UN document A/49/418 of **22 September 1994**.

Any action was thus turned over to the Secretariat, and in late 1994 Secretary-General Butros-Ghali issued an official bulletin, ST/SGB/273. It emphasized "strict regard for fairness and due process" for all staff involved in investigations, and "disciplinary proceedings" for any staff member (i. e., manager) who retaliates against another staff member reporting in good faith to, or cooperating with, the OIOS.

"Establishment of the Office of Internal Oversight Services", Secretary-General's Bulletin ST/SGB/273 of 7 September 1994.

With that, the idea of a serious and competent court to deal with fraud and misconduct in the UN was buried. All such cases would henceforth be dumped into the JAB, JDC and UNAT system, which was and still is unprepared to recognize and properly deal with them.

As already discussed under the Inept "Administration of Justice" System and elsewhere in this subsection, it was only gradually in 2000 and in 2002 that the Secretary-General, pressured by the General Assembly, began the very modest current training efforts to better equip the JAB's and JDC's for more serious tasks and, or so he stated, to make managers directly involved in defending their contested decisions before these bodies. Further, he was "considering setting up" transparent accountability mechanisms for managers and staff, to be "attained over the next three to five years" i.e., between 2001 and 2003.

""Human resources management reform: Report of the Secretary-General", A/53/414 of 13 October 1998, paras. 5-9.

Subsequently, JAB, JDC, and UNAT cases continue on largely as before, with managers scarcely involved and still protected by "the Secretary-General" and the all-encompassing behemoth known as "the Administration." The General Assembly, to its credit, has pressed the UN Secretariat intensively ever since the late 1980s to combat corruption, establish an investigations unit, hold managers accountable, and sanction them for serious malfeasance, including criminal cases in national courts if necessary.

However, there is no evidence that these revised UN rules (and especially any hint of their commentary measures) are actually being applied and enforced in daily UN operations. Instead of requiring management accountability, the Secretariat is undermining it by eliminating countervailing staff rights and confronting UN staff instead with much "are obliged to" instead of "have the right to.")

The staff have nowhere to turn other than the feeble old internal justice system to seek remedies that would deal objectively, transparently, and properly with the requirements, abuses, and violations of significant and complex new areas of UN conduct (and misconduct). In particular, there is a need for effective measures and processes to deal with issues of management accountability, staff misconduct, investigations within the Secretariat, and issues of harassment, all of which have not yet been established.

The UN "rules of the game" have changed, but the UN administration of justice system has not. This Secretariat failure has created a very dangerous void. For instance, in a world of "full disclosure", the 1998 Secretariat staff rule states very firmly and impressively that "Any form or discrimination or harassment, including sexual or gender harassment, as well as physical or verbal abuse at the workplace ...is prohibited." Yet, real full disclosure, would require that this firm prohibition be accompanied by a second sentence stating that "However, there are no serious processes to deal with such acts, and even if there were they would never be prosecuted, or the staff member vindicated, if they were committed by a manager."

Staff rule 101.2 (d), "Status, basic rights and duties of United Nations staff members", ST/SGB/2002/13 of **1 November 2002**

Regrettably, however, all the elements of the UN internal justice system -- the JAB and JDC secretariats and panels, the personnel

departments, the Office of Legislative Affairs in New York, and the UN Administrative Tribunal itself -- continue to conduct their "legal" business in 2004 as if these updated regulations and rules of staff conduct do not exist. At least six fundamental loopholes exist which prevent effective internal justice as part of an overall accountability system within the UN, as discussed under the next topic. All of them now heavily favor the "freedom" -- not the accountability -- of UN managers, to the great detriment of UN staff.