

Insider's View: The United Nations Judicial Tribunals as Tools for Managerial Accountability

by Tamara A. Shockley¹

The UN General Assembly reaffirmed its commitment to strengthening managerial accountability in the UN. One of the essential components of accountability was the importance of managerial compliance with the Charter of the UN, General Assembly resolutions, and the UN Staff Regulations and Rules. As the General Assembly and staff members of the UN demand greater transparency in organizational decision-making, a new managerial tool for accountability has emerged in the UN in the form of UN Judicial Tribunals. The emerging jurisprudence from the UN Judicial Tribunals affects how a UN manager will make decisions concerning the legal status of a UN international civil servant. The commentary inquires whether managerial accountability before a judicial body can impact the organizational culture of the UN.

Introduction

In 2009, the UN created a new legal system of administration of justice with a two-tiered judicial system comprising the UN Dispute Tribunal and the UN Appeals Tribunal (hereinafter UN Judicial Tribunals). The UN Judicial Tribunals were established in response to the demand by UN staff members for a justice system that provided adequate safeguards of rights and accountability by management. As stated in the General Assembly resolutions 61/261 of 30 April 2007² and 62/228 of 6 February 2008,³ the new judicial system would be consistent with “the relevant rules of international law and the principles of the rule of law and due process to ensure the rights and obligation of staff members and the accountability of managers and staff members.”⁴

The General Assembly adopted the Statutes of the UN Dispute Tribunal and the UN Appeals Tribunal in resolution 63/253 of 23 February 2009.⁵ As courts of limited competence, the UN Judicial Tribunals only hear cases that fall within the parameters as stated within its statutes. Article 2 (1) of the statute of the UN Dispute Tribunal states the tribunal shall be competent to hear and pass judgment on an application filed by an individual to appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. The UN Appeals Tribunal has competence under Article 2 of

1. Ms. Shockley is an administrative legal specialist with UNICEF and former Executive Secretary with the UN Administrative Tribunal. The statements in this publication are the views of the author and do not necessarily reflect the policies or the views of UNICEF or the UN Secretariat.

2. GA Res. 61/261, UN GAOR, 61st Sess., Supp. 49, UN Doc. A/61/49 (2007).

3. GA Res. 62/228, UN GAOR, 62nd Sess., Supp. 49, U.N. Doc. A/62/49 (2007) 458.

4. *Ibid.*, GA Res. 61/261.

5. GA Res. 63/253, UNGAOR, 63rd Sess., Supp. 49, UN Doc.(A/63/49) 499.

the statute to hear and pass judgment on an appeal filed against a judgment rendered by the UN Dispute Tribunal. The applicant has to assert the Dispute Tribunal has “a) exceeded its jurisdiction or competence; b) failed to exercise jurisdiction vested in it; c) erred on a question of law; d) committed an error in procedure, such as to affect the decision of the case; or e) erred on a question of fact, resulting in a manifestly unreasonable decision.”⁶

The UN Judicial Tribunals are statutory institutions created by the UN General Assembly in response to the need for an independent, transparent, effective, efficient, and adequately resourced judicial system that would ensure managerial accountability.⁷ In this commentary, I will discuss how international judicial bodies with limited competence can hold managers accountable in a system as geographically wide, diverse, and complex as the UN. Specifically, why should a UN manager be responsive to judicial rulings in cases in which he or she was not involved in as a litigant?

Accountability in the UN Secretariat—Results-Based Management

Good governance requires accountability of managers for their actions and consequences for their actions to senior management. Managers should expect to be held fully accountable for their decisions and senior management should expect these decisions are made in the best interests of the organization. If a manager fails to meet performance expectation, whether by mismanagement of staff or intentional disregard of the UN Staff Regulations and Rules and administrative instructions, the manager needs to know there will be consequences for his or her action.

In General Assembly resolution 64/259 of 5 May 2010, “Toward an accountability system in the UN Secretariat,” the General Assembly reaffirmed its commitment to strengthening accountability in the UN.⁸ The General Assembly noted the absence of a comprehensive accountability system could lead to mismanagement, waste, and risks in the organization. The resolution defines accountability as follows:

Accountability is the obligation of the Secretariat and its staff members to be answerable for all decisions made and actions taken by them, and to be responsible for honouring their commitments, without qualification or exception. Accountability includes achieving objectives and high-quality results in a timely and cost-effective manner, in fully implementing and delivering on all mandates to the Secretariat approved by the UN intergovernmental bodies and other subsidiary organs established by them in compliance with all resolutions, regulations, rules and ethical standards; truthful, objective, accurate and timely reporting on performance results; stewardship of funds and resources; all aspects of performance, including a clearly defined system of rewards and sanctions; and with due recognition to the important role of the oversight bodies and in full compliance with accepted recommendations.

The General Assembly stressed the importance of promoting a culture of accountability and results-based management through leadership and commitment of senior managers. The

6. Article 2 (1) (a) through (e) of the Statute of the UN Appeals Tribunal.

7. See, the “Report of the Redesign Panel on the UN of Administration of Justice”, A/61/205 of 28 July 2006.

8. GA Res. 64/259, UN GAOR, 64th Sess., Supp. 49, UN Doc A/64/259 (2010).

UN Office of Human Resources Management created a “profile of an effective manager for managerial excellence in the UN.”⁹ The profile defined the effective manager as one who “achieves results and such results must be with the full engagement of a committed and motivated staff.” Results-based management requires managers to ensure their business processes and services contribute to the achievement of desired results for the organization. Results-based management is a way for managers to manage staff by the development of planned achievements and performance indicators to accomplish the organization’s global goals and strategic objectives. If the staff member performs well, the organization achieves its goals. It is the manager who is accountable to ensure the staff member achieves optimum performance in order for the organization to succeed.

UN Judicial Tribunals and Managerial Accountability

What is the linkage between results-based management and the jurisprudence of the UN Judicial Tribunals? As stated in General Assembly resolution 64/259, one of the essential components of accountability was the importance of managerial compliance with the Charter of the UN, its resolutions and the UN Staff Regulations and Rules.¹⁰ As the General Assembly and staff members of the UN demand greater transparency in organizational decision-making, a new managerial tool for accountability has emerged in the UN in the form of UN Judicial Tribunals.

How do the judicial rulings affect the decisions of UN managers? One of the purposes for the establishment of the UN Judicial Tribunals was to guarantee internal accountability in the UN for acts done by managers in the exercise of their functions. If a staff member alleges a decision by a manager has violated his or her rights, the staff member must follow institutional procedures to pursue action against the manager. In an accountability regime, it is crucial the judicial function has remedies and other means of redress to hold the manager accountable. The UN Judicial Tribunals provide methods for dispute settlement and remedies for redress when management fails to comply with its own rules and procedures.

The remedial outcomes under the statutes of the UN Judicial Tribunals are limited to rescission of the decision, specific performance, compensation, and damages.¹¹ The UN Judicial Tribunals have the authority to rescind a contested administrative decision or order specific performance. If the contested administrative decision concerns appointment, promotion, or termination, the tribunals may also set an amount of compensation the organization may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered. There is a limitation on the amount of compensation that will normally not exceed the equivalent of two years’ net base salary of the applicant. In exceptional cases, the UN Judicial Tribunals may order the payment of a higher compensation but provide the reasons for the exceptional circumstances.

The link between the UN Judicial Tribunals and the accountability of UN managers is the right of the tribunals to request an explanation of a managerial decision and to impose a

9. “Profile of an Effective Manager for managerial excellence in the UN.” Office of Human Resources Management, Division for Organizational Development, UN.

10. GA Res. 64/259, UN GAOR, 64th Sess., Supp. 49, UN Doc A/64/259 (2010).

11. Article 10 (5) (a) and (b) of the Statute of the UN Dispute Tribunal and Article 9 (1) (a) and (b) of the Statute of the UN Appeals Tribunal.

remedy when a manager fails to comply with applicable UN Staff Regulations and Rules. The right to a remedy as a general principle of law and a norm of customary international law applies to international organizations and to its staff members.¹² A staff member has a right to access the UN Judicial Tribunals for a fair hearing respecting his or her due process rights, and if his or her substantive rights have been violated, there is the right to a remedy. The remedies must be effective and adequate and capable of implementation: “An effective and accessible justice system is . . . the way to provide the element of individual redress and reparation and, where appropriate, sanction, which form essential components of accountability systems.”¹³

Decisions of the UN Judicial Tribunals that impact Managerial Accountability in the UN UN Judicial Tribunals decide upon the validity of managerial decisions on a case-by-case basis. Case law has emerged that has had an impact on the UN manager’s approach to their duties and responsibilities when making a decision that affects a staff member’s conditions of employment. The emerging jurisprudence has and will affect how a manager will make a decision with the knowledge he or she may be held accountable for the consequences of that decision before a judicial tribunal. The UN Judicial Tribunals have rendered legal decisions that affect the entire career lifespan of a staff member—appointment, career development and separation. These are discretionary decisions made by managers concerning the welfare of a staff member and as such can be challenged before a UN Judicial Tribunal.

Appointment and Promotion

The UN Judicial Tribunals have held decisions of appointment and promotion are within the discretionary authority of the organization, and it will not substitute its decision for that of the decision maker.¹⁴ The UN Judicial Tribunals will examine the selection process to determine whether the process has been conducted in an improper, irregular, or flawed manner and assess whether the decision was tainted by undue considerations or was manifestly unreasonable. It is the obligation of the organization to undertake consideration of the candidates in good faith and in accordance with the applicable administrative instructions.¹⁵ The assessment of candidates in a promotion exercise involves an expertise in judgment and experience, and, unless there is a mistake of fact or law, or an irregularity in the procedure, the manager’s decision will be upheld.

The organization has a duty to set clear rules for promotion, and if it wishes to modify the promotion criteria, it can only modify the rules prior to a selection process.¹⁶ The organization must follow its own procedures when promoting staff and an irregularity requires the decision be rescinded and compensation awarded.¹⁷

The UN Judicial Tribunals have ruled on a number of directives to managers in the selection of a candidate for a post. Managers have responsibilities to the organization to choose the

12. Wellens, Karel, “Fragmentation of International Law and Establishing an Accountability Before for International Organizations: The Role of the Judiciary in Closing the Gap,” 25 Michigan Journal of International Law, Summer 2004.

13. Harlow, Carol, “Accountability in the EU” 147, Oxford University Press (2003).

14. *Liarski v. Secretary-General of the UN*, Judgment No. UNDT/010/134.

15. *Solanki v. Secretary-General of the UN*, Judgment No. UNDT/2009/045.

16. *Tsoneva v. Secretary-General of the UN*, Judgment No. UNDT/2009/048.

17. *Ardisson v. Secretary-General of the UN*, Judgment No. UNDT/2009/040.

best candidate and an obligation to the candidates to ensure the evaluation process is fair. The manager must evaluate all relevant attributes considered as essential in the vacancy announcement when assessing a candidate's qualifications to determine suitability.¹⁸ If the manager wishes to modify the promotion criteria, he must do so prior to the selection process. In the evaluation of the candidates, the manager must accurately assess the candidate in the interviews and the scoring of written examinations.¹⁹ The manager has the discretionary authority in the selection of the final candidate and is not bound to accept the recommendation of the selection panel, but he must explain why he selected the preferred candidate.²⁰ The manager must inform the applicants of the outcome of the selection exercise in a timely manner.²¹

Taking into consideration the recent jurisprudence of the UN Judicial Tribunals, the manager should maintain accurate records of the appointment exercise so the tribunals may make a critical examination of the decision. The manager must maintain documentation to explain and justify his decision and to provide verifiable reasons for the selection of the candidate.

Nonrenewal of Fixed-Term Contract

The UN Judicial Tribunals have considered as "*persuasive authority*" the jurisprudence of the former UN Administrative Tribunal that a fixed-term appointment does not carry any expectancy of renewal nor conversion to any other type of appointment that expires automatically.²² The UN Judicial Tribunals have held decisions on the nonrenewal of fixed-term contracts are within the discretion of the secretary-general and must not be improperly motivated or violate due process. The UN Judicial Tribunals will only examine whether there were countervailing circumstances, including improper motives or whether there was a violation of due process that may have tainted the contested decision with illegality.²³ If the manager gives a reason for the nonrenewal to the staff member, such as poor performance, the manager must support his or her decision by facts.

Performance Evaluation

The UN Judicial Tribunals have held that if a decision not to renew an appointment on grounds of poor performance is reasonably made in the documentation and the decision is not significantly affected by the omission of a relevant consideration or an error of fact or law, then the decision not to renew will be upheld.²⁴ The UN Judicial Tribunals will review whether the supervisors have complied with the procedural rules for performance appraisal and whether the ratings given by management warranted the nonrenewal of the staff member's contract based on performance.²⁵

The manager has the burden to prove the procedures were followed and the staff member's nonperformance was documented. If the manager's decision not to renew the staff

18. *Krioutchkov v. Secretary-General of the UN*, Judgment No. UNDT/2010/068

19. *Khan v. Secretary-General of the UN*, Judgment No. UNDT/2010/081; *Antaki v. Secretary-General of the United Nations*, Judgment No. UNDT/2010/059.

20. *Khan v. Secretary-General of the UN*, Judgment No. UNDT/2010/081.

21. *Krioutchkov v. Secretary-General of the UN*, Judgment No. UNDT/2010/065.

22. *Maghari v. Commissioner-General of UNRWA*, Judgment No. 2010-UNAT-039.

23. *Abdalla v. Secretary-General of the UN*, Judgment No. UNDT/2010/140; *Azzoumi v. Secretary-General of the UN*, Judgment No. UNDT/2010/005; *Hepworth v. Secretary-General of the United Nations*, Judgment No. UNDT/2009/193.

24. *Zuñiga Rojas v. Secretary-General of the UN*, Judgment No. UNDT/2010/218.

25. *Eldam v. Secretary-General of the UN*, Judgment No. UNDT/2010/133; *Dzintars v. Secretary-General*, Judgment No. UNDT/2010/150.

member's contract was based on poor performance, the manager must comply with the relevant provisions of the UN administrative instruction on performance appraisal.²⁶ The manager is accountable to assist in the improvement of the work of the staff member and to comply with the prescribed performance appraisal procedures.²⁷

As soon as performance shortcomings are identified, appropriate steps to rectify the situation must be taken by the manager, in consultation with the staff member.²⁸ The manager must institute performance improvement measures based on the ongoing performance evaluation and prior to the finalization of the e-PAS report.²⁹ The rebuttal proceedings are part of the performance evaluation process and must be completed with maximum dispatch.³⁰

Separation from Service

The organization will be in breach of the contract of employment by not respecting the terms of a separation agreement and will be liable to compensation to the staff member.³¹ The only method by which separation from service can be effected is pursuant to staff regulation 9.1 or pursuant to disciplinary procedures that are part of the conditions of the contract.³² An agreed termination will be given effect and honored by the manager and staff member if the terms are negotiated free from any duress or misrepresentation.

Secretary-General's Enforcement of Managerial Accountability

In Article 10 (8) of the Statute of the Dispute Tribunal and Article 9 (5) of the Statute of the Appeals Tribunal, the UN Judicial Tribunals "may refer appropriate cases to the Secretary-General of the UN or executive heads of separately administered UN funds and programs for possible action to enforce accountability."³³

Although the UN Judicial Tribunals have been operative for approximately two years, a number of judgments have been referred to the secretary-general to take action to hold managers accountable for their actions or decisions. In one case, the applicant requested as part of the pleas for the Dispute Tribunal's determination of managerial accountability and to order the secretary-general to hold certain managers personally accountable. The Dispute Tribunal held the authority to refer cases to the secretary-general for enforcement of accountability was available only to the tribunal, which may exercise on its own motion whenever it deems appropriate.³⁴ Whether the secretary-general takes any action against the manager does not adversely affect the rights of the applicant. The UN Judicial Tribunals may refer cases to the secretary-general either in its remarks in the judgment, *obiter dicta*, or in the reasoning or order of the judgment, *ratio decidendi*.³⁵

The Dispute Tribunal has referred a case to the secretary-general for possible enforcement of accountability measures to determine whether nepotism had occurred and who could

26. *Nogueira v. Secretary-General of the UN*, Judgment No. UNDT/2009/088.

27. "Performance Appraisal System," ST/AI/2002/3.

28. *Larkin v. Secretary-General of the UN*, Judgment No. UNDT/2010/108.

29. *Jennings v. Secretary-General of the UN*, Judgment No. UNDT/2010/213.

30. *Ibid.*

31. *Koh v. Secretary-General of the UN*, Judgment No. UNDT/2009/078.

32. *D'Hooge v. Secretary-General of the UN*, Judgment No. UNDT/2010/044.

33. See, Article 10 (8) of the Statute of the Dispute Tribunal and Article 9 (5) of the Statute of the Appeals Tribunal.

34. *Villanueva v. Secretary-General of the UN*, Judgment No. UNDT/2011/014.

35. *Finnis v. Secretary-General of the UN*, Judgment No. UNDT/2011/1060.

be held accountable.³⁶ The Dispute Tribunal stated it hoped the Secretary-General would take the accountability referral seriously so a full investigation could be undertaken. The Dispute Tribunal expressed that both managers and staff members must ensure that the UN Staff Regulations and Rules are applied to their own conduct, regardless of their position within the organization and such “investigation would promote the rule of law within the organization.”³⁷

In another case, the staff member alleged his managers made unlawful decisions and took unlawful steps in the course of investigations into alleged misconduct.³⁸ The UN Dispute Tribunal rescinded three unlawful administrative decision taken by the organization and held the actions of several UN officials were unlawful, careless, or negligent. The Dispute Tribunal referred the secretary-general to take any disciplinary action or other steps against the managers in light of the findings and in the interest of the maintenance of the rule of law in the UN.

In a case involving a manager giving misleading information to the organization’s legal representatives to support the defense of his decision, the Dispute Tribunal found it was disturbing the false justification submitted by the manager became part of the organization’s defense.³⁹ The Dispute Tribunal held the legal representatives in their defense of the organization are entitled to be given honest and factual instructions by the managers. Although the Dispute Tribunal did not refer the case to the secretary-general, it stated the failure of managers to provide factual information to the tribunal would bring the internal justice system into disrepute.

The former UN Administrative Tribunal held in several cases that staff members who violate UN Staff Regulations and Rules or administrative instructions should be held personally liable for the financial loss suffered as a result of their actions.⁴⁰ The UN Administrative Tribunal held that by invoking UN staff rule 112.3⁴¹ on personal liability for financial loss would dissuade staff members from deliberately ignoring the rules and relieve the organization of having to bear the cost of an international violation of the rules by its staff members.⁴²

As noted above, the UN Judicial Tribunals have referred cases to the secretary-general for action to enforce managerial accountability. If the secretary-general decides to take action against a manager upon a referral from the UN Judicial Tribunals, such action must be taken in accordance with established due process procedures on disciplinary measures.⁴³ If the secretary-general has reason to believe the manager has engaged in misconduct for which a disciplinary measure may be imposed, such action must afford the manager the basic requirements of due process and an investigation of the allegations should be undertaken.

Can UN Judicial Tribunals Change UN Organizational Culture?

Should UN Judicial Tribunals take a proactive approach in cases by identifying potential problems and resolving common issues that make managers more accountable through its

36. *Kozlov & Romadanov v. Secretary-General of the UN*, Judgment No. UNDT/2011/058.

37. *Ibid.*

38. *Kamunyi v. Secretary-General of the UN*, Judgment No. UNDT/2010/214.

39. *Bridgeman v. Secretary-General of the UN*, Judgment No. UNDT/2011/018.

40. Judgments No. 358, Sherif (1985); No. 887, Ludvigsen (1998); No. 914 Gordon et Pelanne (1999); No. 108 Loh (2001)

41. Abolished as of 1 July 2009.

42. See, Judgment No. 1052, Bonder (2002), para. XXIII.

43. See, UN Staff Regulations and Rules, Article X, Regulation 10.1; and “Revised Disciplinary Measures and Procedures,” ST/AI/371, dated 2 August 1991 and ST/AI/371/Amend. 1., dated 11 May 2010.

decisions? Will holding a manager accountable for his or her decision before a judicial body change the culture of the UN and improve staff-management relations? Judicial decisions do make an impact upon the culture of an institution as senior management addresses the remedial mechanisms ordered by the UN Judicial Tribunals in cases of unlawful actions.

In order to establish a comprehensive and adequate accountability regime for the UN the obligation is two-fold. The UN senior management must enforce decisions of the UN Judicial Tribunals and develop an ongoing accountability regime that responds to the underlying administrative error. Eventually, this will result in a cultural change in the organization. Prior to making a decision, managers must ask what will be the judicial consequences not only in regard to the staff member concerned but also the consequences for the organization. Managers must be knowledgeable of the UN Staff Regulations and Rules as well as administrative issuances and apply these directives in accordance with the proper procedures. The manager will assess the consequences of his decision taking into consideration the guidance of jurisprudence of the UN Judicial Tribunals, and such an assessment by the manager will not only ensure a fair decision but also enhance the role of the judiciary in the accountability regime.

A manager may also be held accountable for a decision during the management evaluation stage of the formal conflict resolution process.⁴⁴ A decision can be rescinded by the organization due to the manager's failure to follow rules and procedures in accordance with UN Staff Regulations and Rules prior to a staff member's application to the UN Judicial Tribunals. In a case where a decision is rescinded due to the manager's reckless disregard of the staff member's rights, the organization should take action at the management evaluation stage against the manager. If action is taken to hold the manager accountable at the early stages of the conflict resolution process, it will lessen the financial liability of the organization before the UN Judicial Tribunals and strengthen the credibility of the organization to staff members. Further, if managers are aware the organization will hold them accountable and take action, managers will reflect about a decision that may affect their professional reputation and career in the organization.

Conclusion

How can the organization institutionalize cultural change for managerial accountability? First, organizational change must be endorsed by senior management top-down to staff to establish a corporate initiative of managerial accountability. Managers must be trained bottom-up to understand the changes in organizational priorities and their professional responsibility in the management of their staff. One recommendation would be for the organization to develop a communication strategy to inform managers of their obligations. Electronic training modules on managerial accountability could be incorporated within existing human resources training and to provide accessibility to the electronic training to managers in field duty stations and peace-keeping missions. As the UN Judicial Tribunals continue to adjudicate different areas of managerial responsibility, the electronic training module on managerial accountability should be updated to reflect the progression in jurisprudence.

44. UN staff rule 11.2(a) on "Management evaluation": (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1(a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

The dynamics of the new emerging managerial culture in the UN shows the significance of the role the UN Judicial Tribunals play in the accountability regime. Although developing under specific constraints as judicial bodies, the UN Judicial Tribunals can ensure managerial decisions affecting staff are taken in the interests of the organization in accordance with the proper procedures and respect for the rule of law.