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PERSONNEL QUESTIONS

Administration of justice in the United Nations

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Joint Inspection Unit entitled "Administration of justice in the United Nations" (JIU/REP/86/8).

ADMINISTRATION OF JUSTICE
IN THE UNITED NATIONS

Prepared by

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I. INTRODUCTION

1. The Joint Inspection Unit included in its work programme for 1986 an item on the administration of justice in the United Nations. The expression "administration of justice" 1/ has been used in recent United Nations publications, replacing the early expressions "internal recourse procedure" and "recourse procedure". 2/

2. The inclusion of the item was mainly due to the various opinions, criticisms and suggestions made lately on the "delays of justice" in the United Nations, particularly at Headquarters in New York. Excessive delays in the delivery of justice are equal to the denial of justice. In this respect, the administration of justice has been in a critical situation which has resulted in negative consequences, such as the demoralization of staff members as well as the progressive increase of costs in the United Nations. The Inspector, therefore, has decided to examine the problems and to propose concrete measures to improve the present situation.

3. Several studies have been undertaken in the last ten years on the administration of justice in the United Nations. In particular, the Administration 3/, the Staff Unions and Associations and the Administrative Management Service (AMS) have attempted to identify causes of the problems and have proposed valuable recommendations for solutions. These recommendations are designed either to streamline the present procedures or to completely modify the system. These include some structural reforms, such as the creation of the Office of Ombudsman and of the Office for the Administration of Justice, the changes in the functions and competence of the United Nations Administrative Tribunal (UNAT) as well as the unification or harmonization of the UNAT and the International Labour Organisation Administrative Tribunal (ILOAT) (A/40/471).

4. In view of the growing number of appeals and other grievances, as well as long delays in the administration of justice, the Advisory Committee on Administrative and Budgetary Questions (ACABQ) considered (A/40/7) that there was an urgent need to simplify administrative procedures with a view to achieving a significant reduction of complaints. It recommended that the Secretary-General should be requested to prepare a report focussing on the following:

- (i) simplifying rules and procedures so that the staff can more easily inform itself of its rights and obligations;
- (ii) identifying those aspects of staff administration which give rise to an inordinate number of appeals, with a view to reforming in those areas;

1/ See report of ACABQ (A/40/7); internal memoranda in the United Nations Secretariat; Staff Council documents, etc.

2/ FICSA's report, 1977; ACC documents, etc.

3/ In this report, the term "Administration" is used in the same sense as in A/C.5/40/38.

(iii) streamlining the appeals procedures so as to provide for:

- quick settlement of minor disputes prior to the appeals stage;
- a mechanism to reject applications for review that are frivolous, and
- a more efficient handling of cases that reach the Joint Appeals Board (JAB) and UNAT.

These recommendations of the ACABQ were approved by the General Assembly at its fortieth session (resolution 40/252). At the same time, the General Assembly (resolution 40/258) requested the Secretary-General "in his efforts to guarantee to staff members a just and expeditious resolution of disputes and grievances, to streamline the appeals procedures and to continue the study on the feasibility of establishing an office of Ombudsman, and to report thereon to the General Assembly at its forty-first session".

5. Long delays in the administration of justice have been identified at the Administration level rather than at the UNAT level. Therefore, this report refers mainly to the delays in the Office of Personnel Services (OPS), the JAB and the Office of the Secretary-General in charge of the reports of the JAB. More concretely, the number of cases pending before the JAB in New York as of 31 March 1986 was 94 (see Annex). Each case filed costs the Organization an average of \$24,000, excluding the costs involved in the UNAT.

6. This study aims at the rationalization of the system, including some structural changes. It will propose a clear separation between the function and power of administering justice and those of the Administration itself. It will also propose a clear separation of a conciliatory procedure from a judicial one. The former should be vested in a proper office (Ombudsman). The latter should be performed in two instances, by a Claims Court and by the UNAT.

7. The Inspector wishes to thank all those involved in this study for their co-operation. He is also grateful to Inspectors Efimov and Kojić for their collaboration in the preparation of this report.

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II. EXISTING PROCEDURES

A. Special procedures and general review procedures

8. Various existing recourse procedures 4/ which are available to staff members of the United Nations can be divided into two categories: "special procedures" and "general review procedures".

9. Special procedures are designed to provide a recourse to be used for a narrowly defined situation. These procedures cover various types of appeals, such as:

(a) Appeals from decisions of organs of the United Nations Joint Staff Pension Fund (UNJSPF), for which the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) is, on behalf of the Board, to review decisions by the Standing Committee itself, as well as to hear appeals from decisions of local Staff Pension Committee;

(b) Appeals in case of service-incurred injury or illness, for which an Advisory Board on Compensation Claims (ABCC) is established to make recommendations thereon;

(c) Claims concerning loss of or damage to personal effects attributable to the performance of official duties, which are examined by a Claims Board;

(d) Disputes concerning eligibility for sick leave, which are referred to an independent medical practitioner or a medical board acceptable to both the Secretary-General and the staff members;

(e) Appeals in respect of classification of posts, which involve recourse to a Secretariat-wide Classification Appeals and Review Committee;

(f) Rebuttals of performance evaluation reports provided in the administrative instruction, for which either the department concerned or the OPS deals with;

(g) Recourses for non-inclusion in a promotion register, which are available to the Appointment and Promotion Board, Committee or Panel;

(h) Appeals in respect of competitive examinations for promotion to the professional category, which are reviewed by the Central Examination Board, etc.

In these particular situations, the above-mentioned procedures must be followed as a rule, even if the later resort to one of the general review procedures is foreseen.

4/ ST/IC/82/7, 3 February 1982.

10. General review procedures are applicable to any administrative measure or decision or even to the failure to take a decision without restrictions of the subject covered. These procedures are structured hierarchically as follows: (i) the Joint Appeals Board (JAB); (ii) the United Nations Administrative Tribunal (UNAT), and (iii) the International Court of Justice (ICJ). The recourses, therefore, should be made following this order although, under certain circumstances, resort to the JAB may be omitted.

11. Besides the above-mentioned procedures, there is an informal procedure to investigate allegations of discriminatory treatment and other grievances, through the Panel on Discrimination and other Grievances. It is informal in the sense that a staff member is not required to resort to it in order to later secure formal consideration of a challenge to an administrative decision or a request for administrative action. This Panel may not necessarily lead to any definitive resolution of an administrative action. Rather, it is designed to deal with the matter quickly with the objective of clarifying the situation. It may, however, possibly influence administrative proceedings and then obviate an initial unfavourable decision. In other words, the Panel informally performs "conciliation" tasks. It replaces the former Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat established under General Assembly resolution 31/26 of 29 November 1976.

B. Four phases in the administration of justice

12. Generally speaking, there are four phases in the United Nations administration of justice. The first phase is the "mediation or conciliation process". When a staff member has a claim against the administration, he ought to discuss with the proper authorities the rightfulness or wrongfulness of the claim and try to reach an agreement. This could be done at the level of the OPS or at the beginning of the JAB process. Practically, this phase is open until the JAB produces the report on the case.

13. The second phase is the recourse to the JABs which have been established in New York, Geneva, Vienna and Nairobi, pursuant to Chapter XI of the Staff Rules. Appeals from staff members at other duty stations are considered by the JAB at the Headquarters.

14. The recourse to the UNAT constitutes the third phase of the present system. The UNAT, which was established in 1949 by the General Assembly, is a genuine judicial body.

15. The last and exceptional phase is a review of UNAT judgment by means of an advisory opinion of the ICJ (Art. 11 of the Statute of the UNAT). The only organ that may request a review is the Committee on Applications for Review of Administrative Tribunal Judgments that is "composed of the Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly" (Art. 11 (4) of the Statute).

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III. PRE-JUDICIAL AND JUDICIAL PHASES

A. The Joint Appeals Board (JAB)

16. The jurisdiction of the Board is to advise the Secretary-General "in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules, or against disciplinary action." The Secretary-General can agree or disagree with the conclusions of the JAB. If the recommendations of the JAB are accepted by the Secretary-General in accordance with the interests of the appellant, the case is considered to be closed. The last step is its implementation.

17. Originally, the JAB was established (Staff Rule 111.2) as an essential statutory filter of the initial review process. The fact that the JAB makes its recommendations by applying the Staff Regulations and Rules does not provide enough of a basis to consider it as a judicial body. In fact, many of the members of the Board did not have legal training, nor the legal experience of the interpretation of the relevant rules.

18. As mentioned in paragraph 16, the JAB's competence is only to advise the Secretary-General. Therefore, the recommendations it makes are subject to the final decision of the Secretary-General.

19. The JAB procedure includes several proceedings. Even before a case is considered by the Board, the Secretariat of the JAB has a great deal of work which also involves several stages, such as: examination of the letter of appeal; securing the reply of the respondent; obtaining the observations of the appellant or of the counsel on the respondent's reply; request for priority; preparation of the file for the Board and for the counsel; the constitution of the Board; and consideration by the Board and preparation of the JAB report for submission to the Secretary-General.

20. The composition of each JAB is as follows (Staff Rule 111.1(b)):

- (i) Chairpersons appointed by the Secretary-General from among a list presented by the joint staff/management machinery in respect of the staff representative body or bodies at the duty station at which the Board is established;
- (ii) Members appointed by the Secretary-General;
- (iii) An equal number of members elected by ballot of the staff under the jurisdiction of the Board.

21. The regular Board Secretariat consists of three Professionals (1 P-4; 2 P-3s) in New York, one Professional (P-3) in Geneva, one Professional (P-4) in Vienna and one Professional (P-4) in Nairobi, as well as their secretarial staff.

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22. According to the report of the Consultant to AMS, "the regular Board Secretariat, under optimal circumstances, can dispose of about 27 cases by report per year." ^{5/} With the assistance of the Task Force, composed of three short-term and two part-time appointees and two volunteers, the total capacity of the JAB Secretariat in New York was disposal by report of around 45 cases per year in 1981. In such a situation, each case generally takes about two years to complete the procedure. The fact that the number of submissions of appeals exceeds the capacity of the JAB Secretariat has resulted in a substantial increase of the backlog. Therefore, as the AMS report states, the delays in the administration of justice can be attributed not only to the procedure but also to the lack of human resources in the Administrative Review Unit and the Joint JAB-JDC Secretariat of the OPS.

23. With regard to the availability of the JAB's members, there have been some difficulties in forming panels to consider cases. This is because the members do not serve on a full-time basis and are not always available for various reasons, such as their heavy workload, missions, leave, sickness, etc. In the Inspector's view, this factor has exacerbated the slow functioning of the JAB in New York.

24. The JAB seems a quite primitive procedure of "home-made" justice and is lengthy, slow, costly and time-consuming. It is a procedure neither in accordance with the administrative development and the growth of the United Nations, nor with the present needs of an international civil service. Furthermore, there is not a clear distinction between defendant and the Secretary-General as respondent; in other words, between staff members and the Administration.

25. The Administration and even the JAB favoured some time ago the creation of a "small court" with full-time membership. The Staff Union also suggested that the JAB be replaced by a tribunal. The Inspector believes that this is a sound recommendation both from the technical and financial points of view.

26. With regard to administrative costs, the ACABQ report^{6/} mentions that each case filed in the JAB costs the Organization an average of \$24,000. Given that the number of cases pending before the JAB in New York at 31 March 1986 (see Annex) is 94, this represents a total cost of over \$2,200,000 (this does not include the costs involved in the UNAT). To these direct financial costs, other costs should be taken into account (e.g. the costs for a large number of staff members engaged in the procedure, including counsel and other officials).

27. With reference to disciplinary measures, the Charter of the United Nations states that the Secretary-General "shall be the chief administrative officer of the Organization" (Art. 97). Staff Regulation 10.1 stipulates that "the Secretary-General may establish administrative machinery with staff participation which will be available to advise him

^{5/} Report of the Consultant to AMS, "Review of Methods and Procedures for Administrative Reviews, Appeals and Processing of Cases for the Administrative Tribunal" (by G. Wattles), November 1981, para. 60, p. 27.

^{6/} Supplement No. 7 (A/40/7); p. 24, para. 70.

in disciplinary cases". The Inspector believes that the Secretary-General has discretionary powers in case of serious misconduct of staff members. In this sense, the duties of the international servants are distinguished from those of national civil servants. Fortunately, there have been few cases for disciplinary measures. The Inspector makes no recommendations in this respect.

B. The Panel of Counsel in Disciplinary and Appeals Cases

28. The Panel of Counsel^{7/} was established to assist staff members in recourse or administrative proceedings in order to provide legal or quasi-legal advice. So far, four Panels have been established (New York, Geneva, Vienna and Nairobi).

29. According to Staff Rule 110.5(b) "The Joint Disciplinary Committee shall permit a staff member to arrange to have his or her case presented before it by any other staff member serving at the duty station where the Committee is established." With respect to appeals, Staff Rule 111.2(1) stipulates that "A staff member may arrange to have his or her appeal presented to the panel on his or her behalf by another serving or retired staff member. The staff member may not, however, be represented before the panel by any other person." Moreover, under Article 13 of the Rules of the UNAT, an applicant "may designate a staff member of the United Nations or one of the specialized agencies so to represent him, or may be represented by counsel authorized to practice in any country a member of the organization concerned."

30. These provisions led to the creation of the Panel of Counsel composed of a list of qualified staff members who could act as counsel in the cases before the Disciplinary Committee, the JAB and the UNAT. They are appointed by the Secretary-General for a period of one year on the advice of the Staff Council and with their own consent. If the counsel, whether or not a member of the Panel, agrees to act in the case, he should be authorized and directed by the Secretary-General to assess the preparation and the presentation of the case as part of his official duties. ^{8/}

31. In the Inspector's view, it is inappropriate that the Organization should be charged with the task of providing counsel in claims against the Organization itself. Furthermore, he considers that it is against the basic principles underlying the equality of the parties that one of them (in this case the Secretary-General) "authorizes and directs" the counsel of the counterpart.

32. With the creation of an inferior judicial court as is proposed in this report, a staff member would have the opportunity to have all costs charged to the Organization in the event that a claim is well-founded. In any case, the staff member can receive free counselling from the Staff Council. During the discussion of his claim at the Ombudsman's Office (see Chapter IV), he would also be able to obtain adequate information regarding the legality of his claim vis-à-vis the Staff Regulations and Rules.

^{7/} ST/AI/163/Rev. 1.

^{8/} ST/AI/163/Rev. 1, 13 June 1967, p. 2, para. 6.

33. Furthermore, the Co-ordinator of the Panel of Counsel was established in September 1984 to assist in re-building and strengthening the Panel. The Inspector is informed that the results of its work have been very positive. Nevertheless, for the reasons given before, he still believes that the functions and composition of the Panel should be reconsidered. In case it is decided to keep the Panel, thought should be given to the convenience of placing the Panel under the Office for the Administration of Justice (see Chapter IV, D).

C. The United Nations Administrative Tribunal (UNAT)

34. The UNAT was established by the General Assembly in 1949 under resolution 351 (IV) by the adoption of its Statute. The Statute of the UNAT was amended twice in 1953 9/ and 1955. 10/

35. The UNAT's competence is to hear and pass judgment upon complaints submitted against the United Nations or the specialized agencies participating under Article 14 of the Statute and the appeals against the UNJSPB or Staff Pension Committee of a member organization under Article 22 of the Rules of Procedures of the Committee.

36. In more specific terms, its competence ratione personae is in respect of:

(a) Staff members of the Secretariat of the United Nations (including its subsidiary organs), former staff members, successors to their rights or other persons entitled to rights under any contracts or terms of appointment (Art. 2(2) of the Statute of the UNAT); and

(b) Staff members of a member organization which has accepted the jurisdiction of the Tribunal in the UNJSPF who are eligible as participants in the Fund, even after their employment, successors to their rights or other persons entitled to rights under these Regulations (Art. 48(a) of the Regulations and Rules of the UNJSPF).

The UNAT has competence ratione materiae concerning alleged non-observance of: 11/

(a) Contracts of employment and the terms of appointment which include all pertinent regulations and rules (Art. 2(1) of the Statute) although its competence to disciplinary procedures is limited to a certain extent; and

(b) Regulations of the UNJSPF arising out of the decision of the Board (Art. 48(a) of the Regulations and Rules of the UNJSPF).

9/ By resolution 782B(VIII) of 9 December 1953.

10/ By resolution 957(X) of 8 November 1955.

11/ See also UNAT, Judgment No. 20 of 21 August 1953.

37. The UNAT is composed of seven members appointed by the General Assembly. The Statute does not indicate any specific qualifications for its members, except for the prohibition of having members from the same State. UNAT membership, therefore, includes persons of different background, regardless of whether or not they had legal training and experience. In practice, many of them have been representatives to the General Assembly.

38. The regular budget of the UNAT for the 1986-1987 biennium is \$546,700, which includes the requirements for both the UNAT and its Secretariat.

39. The Tribunal renders approximately 20 judgments a year. Its Secretariat (1 P-5 and 1 G.S), together with temporary assistance, provides the UNAT with administrative and technical support, such as the preparation of draft summary of facts and contentions of parties for judgment to be rendered; research and analysis related to the case; consultation with related bodies, etc. ^{12/} According to the information provided to the Inspector, at the end of 1986, the UNAT will have practically no backlog.

40. According to the FICSA Symposium on Recourse Procedures in the Organization of the United Nations held in 1976 ^{13/}, the restricted powers of the UNAT led to a very unsatisfactory situation. The Tribunal has no authority to order the executive head to reinstate a staff member unduly dismissed, for instance. The Tribunal can only determine the amount of compensation to be paid to the staff member, and this compensation may not exceed two years' net base salary (Art. 9(1) of the Statute).

41. Recommendation III of the Symposium reads as follows:

- (a) the administrative tribunal should enjoy powers corresponding to those of the Court of Justice of the European Communities ("full jurisdiction capacity") in respect of all matters brought before it;
- (b) when the tribunal recognizes that an application is fully justified, it should be for the tribunal, and not for the head of the secretariat, to decide whether the annulment of the decision appealed against or the carrying out of the obligation established is possible and advisable, or whether there is reason to award to the interested party an indemnity as compensation for the prejudice suffered;
- (c) if the tribunal decides to make an award, it should be free to fix the amount without any predetermined limit being applied so that full compensation for the prejudice suffered may be made;

^{12/} Proposed Programme Budget for the Biennium 1986-1987, Supplement No. 6 (A/40/6), Vol. II., Section 26, p. 9.

^{13/} Federation of International Civil Servants' Associations, Studies and Policies No. 4 - Recourse Procedures in the Organizations of the United Nations System, Geneva, 1977, pp. 1-9.

- (d) the tribunals should be able to hold more frequent and longer sessions, so as to allow for more frequent resort to oral proceedings, which, although not indispensable in every case, should be regarded as constituting a normal procedure rather than an exceptional one;
- (e) the revision of the decisions of administrative tribunals should be possible within a period of three months following the disclosure of any new fact or facts, whatever time has elapsed since the pronouncement of the judgment in question.

42. Consequently, the FICSA Council decided to propose to the Administrative Committee on Co-ordination a reform of the statutes of the Administrative Tribunals in accordance with the proposals contained in this recommendation.

43. The Inspector is, to a certain degree, in agreement with some of the FICSA's recommendations mentioned above. He considers that the jurisdiction of the UNAT should be reviewed, taking into account the power of the General Assembly. With reference to its structure or composition, the Inspector feels that the members of the UNAT should be elected among persons who have legal training and extensive experience in this field, such as judges at national level or lawyers with expertise in administrative or labour law, thereby ensuring coherent jurisprudence. In the case of the ILOAT, its members are professional judges from the highest levels of national courts.

44. For reasons of expediency, the Inspector limits the present report to the restructuring of the administration of justice in the United Nations to its most essential components. He agrees that a full study of the UNAT should be necessary if the General Assembly concurs with the proposals of this report.

D. The International Court of Justice

45. The last and exceptional phase is a review of UNAT judgments by means of an advisory opinion of the ICJ (Art. 11 of the Statute of the UNAT). The only organ that may request a review is the Committee on Applications for Review of Administrative Tribunal Judgments. A request for the review of a UNAT judgment can be submitted to the Committee by the applicant, the Secretary-General, or any Member State. This Committee's function is only to decide the possibility of submission for review to the ICJ. However, its decision to request an advisory opinion will have an effect to suspend the judgment concerned.

46. The ICJ, therefore, reviews a UNAT judgment only in respect of the particular questions presented by the Committee on the ground of four criteria specified in the Statute (Art. 11(1)) as follows:

- that the Tribunal has exceeded its jurisdiction or competence;
- that the Tribunal has failed to exercise jurisdiction vested in it;
- that the Tribunal has erred on a question of law relating to the provisions of the United Nations Charter; or
- that the Tribunal has committed a fundamental error in procedure which occasioned a failure of justice.

47. The advisory opinion given by the ICJ is binding on the Secretary-General and the UNAT, which may be required to confirm its original judgment or to give a new one in conformity with the opinion of the ICJ.

48. The recourse to the International Court of Justice for an advisory opinion concerning judgments handed down by the UNAT has been criticized because it does not fully safeguard the principle of the equality of the parties and that of the separation of powers. 14/

49. Under the rules of the ILO Tribunal, the possibility of a recourse to the International Court of Justice is open only to the Organization. However, under the rules of the UNAT, the recourse is contingent upon the authorization of a Committee of the General Assembly, which is a political and not a judicial body. Moreover, as has been stated, it is open to question whether the International Court of Justice, whose normal duty is to adjudicate disputes between States, is a proper body to review decisions of an administrative nature involving individual State Members.

14/ See A/40/471, para. 3, p. 6.

IV. SOME PROPOSALS FOR REFORM

A. Mediation and conciliation - the Ombudsman's Office

50. Many suggestions and opinions concerning the administration of justice include special emphasis on the solution of the conflict at the stage of mediation and conciliation. The Inspector completely shares this view. He recognizes that the mediation and conciliation process is a main merit of current procedure although it is not really institutionalized.

51. As mentioned in paragraph 11, there is an informal procedure through the Panel on Discrimination and other Grievances to deal with conciliation. Apart from the Headquarters, eight Panels have been so far established (Addis Ababa, Baghdad, Bangkok, Geneva, Jerusalem, Nairobi, Santiago and Vienna). In spite of their relatively good rate of settlement of cases 15/, dissatisfaction has been observed on the part of both the Administration and the staff. In this connection, the staff representatives in the Fifth Committee in 1984 made reference to 16/ the annual report of the Headquarters Panel as follows:

- (a) that there were continued delays in implementation of its formal recommendations, largely because this depended upon the effectiveness of the Office of Personnel Services in approaching the departments and offices concerned; and
- (b) that this sometimes resulted in protracted consultations and reopening of questions already studied by the Panel.

Moreover, they also pointed out the lack of co-operation from the departments and offices concerned. According to them, "Unfortunately, it is often the very officials who were parties to the dispute who have the ultimate authority to accept or reject findings". 17/

52. The impartiality of the panels located outside of Headquarters has also been called into question. Thus, staff members at some duty stations seem to prefer to request their cases to the Headquarters Panel.

53. On the other hand, from the Administration's point of view 18/, the Panels have not been sufficiently objective and have not listened to both sides in a number of cases. Moreover, despite their informal role, the Panels have had a tendency to assume an advocacy role. In addition, their recommendations have often been difficult to implement.

15/ A recent report of this Panel to the Secretary-General indicates that, during the period covered (4 February 1983 to 4 February 1984), of the 119 cases submitted to this Panel, 74 were resolved through informal arrangements, which represent 62 per cent, and that only four were submitted to the JAB, representing 3.3 per cent (ST/IT/84/49, 17 July 1984, p. 6).

16/ "The Report of the Secretary-General on the Feasibility of Establishing an Office of Ombudsman in the United Nations", (A/C.5/40/38, 5 November 1985, paras. 30-32; A/C.5/39/23.

17/ A/C.5/39/23, paras. 37-38.

18/ A/C.5/40/38, para. 32, p. 8.

54. In view of the shortcomings mentioned above (Panels and JABs), the Inspector feels that the creation of an independent office for mediation and conciliation is required. The AMS report 19/ recommended in 1983 the creation of a conciliation office or a mediation Ombudsman's office. The Inspector concurs with the view expressed in this recommendation. Some of the organizations in the United Nations system have indeed established such an Ombudsman's Office 20/ in order to resolve all types of staff management disputes through informal negotiation, mediation or conciliation procedures at the earliest stage possible.

55. Under the General Assembly resolution 40/258, the Secretary-General should submit to the forty-first session a report inter alia on a study of the feasibility of establishing an Office of Ombudsman, which would contain specific proposals. However, in the Inspector's opinion, the Ombudsman would be a one-person institution with secretarial support. The person in charge should be appointed by the General Assembly for a period of five years at D-2 level from a list of candidates prepared by the Secretary-General in consultation with the staff representative bodies. He should have legal training and desirable working experience in the Organization. Moreover, in order for the Ombudsman to assume its responsibilities, its legal status should be independent from the Administration. Since, however, the Ombudsman would have to obtain necessary information to this end, it should have access to all levels of the Administration, as well as to confidential information. If a compromise is signed by the parties, the decision of the Ombudsman is final at the administrative stage of disputes. All these considerations apply to the Ombudsman's Office to be established in New York. Moreover, the Inspector recommends that the Office of Ombudsman should also replace the existing panels of JABs in Geneva, Vienna and Nairobi. With regard to these Offices, their appointment and level could be determined by the Secretary-General in consultation with the staff representative bodies.

56. The Inspector considers that the institutionalization of a mediation and conciliation procedure by means of the Office of Ombudsman would contribute to the more effective settlement of complaints. In certain types of appeals, the recourse to the conciliation procedure should be compulsory.

19/ AMS, Study of Methods and Procedures for Review of Administrative Decisions and Appeals under the Staff Rules, January 1983.

20/ In the United Nations system, an Ombudsman has been established in four Organizations: the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Monetary Fund (IMF), and the World Bank. A similar institution has also been established in three United Nations subsidiary organs: the United Nations Development Programme (UNDP), the United Nations High Commissioner for Refugees (UNHCR), and the United Nations Children's Fund (UNICEF).

B. Proposal for two jurisdictions

57. A system of two-stage judicial appeals is one of the basic principles of democratic law and is established in most countries. It is, therefore, natural that "such a system should be desired by the United Nations staff for their claims against their employer", as mentioned in the same Consultant's report 21/ to AMS. Moreover, the FICSA Symposium mentioned in paragraph 40 indicates that "there was a large degree of agreement that there would be considerable merit in having two degrees of jurisdiction."

58. Under the present system, staff appeals to the JAB, which is not a judicial body, lead only to recommendations to the Secretary-General, who has the right to reject them. The Staff Union and even the JAB have already suggested that the JAB "be replaced by a tribunal which would give binding judgments, subject only to a right of appeal by either the appellant or the Administration to the Administrative Tribunal." 22/ One of the recommendations made at the FICSA Symposium mentioned above also includes the establishment of two instances of appeals jurisdiction, either by the conversion of the internal appeal organs in such a way as to provide a jurisdiction properly so-called which would formulate binding decisions, or by the establishment of the supreme tribunal (recommendation IV(b)).

59. These suggestions were examined by the CCAQ, without taking decision on the substance. The same Consultant's report to AMS mentions that "the costs, delays and other difficulties seem for the present to make such a system unattainable within the Organization." 23/ In the Inspector's opinion, the creation of another permanent body in charge of the administration of justice in addition to the UNAT is justifiable for a huge organization like the United Nations with a biennial regular budget of about \$1.6 billion and with more than 15,000 employees. The two jurisdictions, if implemented, would contribute to the efficient settlement of internal administrative disputes, thereby resulting in the reduction of the costs which the Organization is charged under the present system.

C. The Claims Court and the United Nations Administrative Tribunal

60. The Inspector believes that, from the legal and administrative points of view, the two-stage judicial appeal seems logical and advisable. The present sui-generis procedure is open to many criticisms. The delays in the administration of justice in the United Nations cannot be attributed only to the lack of human resources in the offices concerned. The whole system of administration of justice should be modified in a more rational and modern way. For the reasons mentioned above, the Inspector is in favour of recommending the replacement of the JAB by a Claims Court, with expeditious procedures. Its composition and functions are indicated below.

21/ Report of the Consultant to AMS, ibid., para. 5, p. 3.

22/ Op.cit., para. 5, p. 31.

23/ Op.cit., para. 6, p. 3.

61. A person who has a solid legal training should be appointed on a full-time basis for a fixed-term period (five years) at D-2 level. The Secretary-General should consult with the staff representative bodies about his nomination. He should be elected by the General Assembly on a full-time basis, thereby ensuring the coherent jurisprudence as well as an efficient settlement of the disputes within a reasonable period.

62. The Claims Court would represent a first judicial instance of the United Nations administration of justice which would follow the conciliation stage. The staff member should have free access to the Claims Court. Nevertheless, the decisions of the Court should be binding and definitive in some appeals cases, according to the amount and nature of the claim. In other appeals, the decision could be binding, if the parties so agree at the beginning of the procedure.

63. The Inspector believes the administrative costs of the Claims Court as a first instance judicial body could be considerably less than the costs of the present system. The estimated cost of the proposed Court on a biennial basis could not be more than \$500,000. The savings could be substantial (see para. 26).

64. With reference to the UNAT, the Inspector is of the opinion that the recourse to this instance should be open only to the cases already examined by the Claims Court.

D. The Office for the Administration of Justice

65. In 1984 the Legal Committee of the New York Staff Council recommended, inter alia, "to create a separate Office for the Administration of Justice within the Executive Office of the Secretary-General in order to separate the entire function of the administration of justice from OPS and thereby to avoid direct conflict of interests among the four units of OPS (Administrative Review Unit, Joint JAB-JDC Secretariat, Rules and Personnel Manual Section, and the Secretariat of the Panel of Counsel), which are directly responsible for dealing with the appeals arising out of the decisions taken by OPS itself, contrary to the fundamental principles of due process of law, fair play and impartiality in the administration of justice."

66. The Inspector endorses this recommendation of the Staff Council. Under the present system of the administration of justice, the OPS is in a position to play a double role both as defendant and applicant. The conflicts of interests within the same Office are clearly noticeable. The staffing table of the proposed Office could be provided by the OPS with a view to reassigning its staff. As mentioned in paragraph 33, if a decision is taken to the continuation of the Panel of Counsel, the Panel should be under the jurisdiction of the Office for the Administration of Justice.

67. The Office for the Administration of Justice should be responsible for providing administrative support to the Ombudsman's Office, the Claims Court and the UNAT. Furthermore, one of its main functions should be to watch over the implementation of decisions taken by the Ombudsman and the two administrative judicial organs of the United Nations.

68. The Office should report annually to the General Assembly on the situation of the administration of justice in the United Nations, including, inter alia, the reports of the Ombudsman, the Claims Court and the UNAT.

V. LEGAL COSTS AND ADMINISTRATIVE ASPECTS

A. Legal costs

1. Conciliation

69. Legal costs are not charged now during the JAB procedure. The nature of the procedure, the possibility of reaching a compromise, the expenses incurred by the appellant and some other reasons support the current practice. The Inspector believes no costs should be charged to the staff member at the conciliation stage - Ombudsman.

70. This stage - Ombudsman - should be open. Any staff member should have the right to defend his interests in the way he considers the best. The Administration should not pay legal costs at all, even when the staff member's claim is considered well founded. On the other hand, the claimant should not pay any legal cost either even when his claim has been completely rejected.

2. Claims Court and UNAT instances

71. In the proceedings before the Claims Court and the UNAT, the situation is different. At this stage, the staff member has already the opportunity of reaching a compromise with his claim (Ombudsman's Office) and of evaluating the real value of his appeal. In any appeal to the Claims Court or to the UNAT, the right of any staff member should be exercised with full responsibility.

72. The UNAT in its Judgment No. 2 pronounced on 30 June 1950 decided that "the actual costs shall be awarded to the applicants in the amounts to be fixed by the President on submission of claims by the Applicants."

73. The Legal Department in its memorandum of 13 December 1950 summarized its opinion on the competence of the Tribunal to award costs as follows (A/CN.5/5):

a) The Tribunal is without authority under its statute to tax costs against the losing party;

b) Even if the Tribunal decided that it had competence to assess costs (as opposed to damages), they should be strictly limited and not include all types of "actual costs" as was permitted by the Tribunal in its Judgment No. 2 (attorney's fees, translation and typing expenses).

74. The Legal Department memorandum also states that the decision of the League's Tribunal established no precedent for the UNAT and that the principle invoked by the League's Tribunal does not qualify as a general principle of law.

75. Furthermore, the memorandum states that knowledge that costs would be borne by the Administration whenever Judgment is rendered against it, and that no penalty is attached to frivolous complaints, would have the undesirable effect of encouraging litigation.

76. This statement is probably due to the fact that under Article VII of the League's Tribunal, a complainant was required to deposit with the Administration an amount equal to one-fifth of his annual salary, which was to accrue to the benefit of the Administration if the Tribunal considered that there were not sufficient grounds for presenting the complaint. Since no similar provision for a deposit exists in the Statute of the UNAT, the award of costs only against the Administration would accentuate the unilateral application of the principle that costs should be paid by the losing party.

77. In a Statement of Policy approved by the UNAT on 14 December 1950 (A/CN.5/R.2), it is stated that in view of the simplicity of the proceedings of the Administrative Tribunal, the Tribunal will not, as a general rule, consider the question of granting costs to applicants whose claims have been sustained by the Tribunal (para. 4).

78. In exceptional cases, the Tribunal may grant a compensation for such costs if they have been unavoidable, reasonable in amount and if they exceed the normal expenses of litigation before the Tribunal (para. 5).

79. Regarding cases which do not involve special difficulties, it will not be the policy of the Tribunal to award costs covering fees of legal Counsel (para. 6).

80. According to ST/IC/82/7, legal costs are distributed as follows:

(a) A staff member who is represented by another member of the Secretariat in any recourse proceeding will generally not be entitled to the reimbursement of any legal costs, since probably no out-of-pocket expenses are incurred;

(b) A staff member who engages outside counsel for an Administrative Tribunal proceeding may be awarded costs by the Tribunal in accordance with its statement of policy on this subject which recognizes that costs may be awarded to the extent that they are demonstrated to have been unavoidable, reasonable and in excess of normal expenses of litigation.

81. The Tribunal also generally awards costs only if the applicant is at least partially successful in the proceeding. The question of charging legal costs to the appellant in cases in which the claim has not been sustained (neither by the JAB nor by the Tribunal) had not been considered.

82. The Inspector agrees with Judge Ammoun (see para. 88) in the sense that the obligation of the losing party to bear the costs could be regarded either as a general principle of law in itself, or as an application of the equity principle as stated by the League of Nations Administrative Tribunal. National administrative courts applied the principle when a government official appealed an administrative decision. He could not find any substantial differences in order to apply to the staff members of the United Nations an exceptional and privileged treatment. Consequently, he endorses the Secretary-General's proposal (doc. A/40/471, para. 35(b)) that the Administrative Tribunal be authorized to impose costs on the applicant, which would be limited to no more than one month's net emoluments. He also believes that the costs could be charged at the Claims Court instance.

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83. The Inspector understands the requirement of the Administrative Tribunal of the League of Nations is being discussed again under different proposals. Nevertheless, he would like to point out that the requirement of "deposit" in the League of Nations was abolished and replaced by the charging of costs to the litigants. He agrees, in principle, that the presentation of claims clearly devoid of any justification should be discouraged and even penalized.

84. The Inspector takes note of the Addendum on Legal Aid to the Rules of Procedure of the European Commission of Human Rights of December 15, 1975. It requires that, in order to get legal aid, the applicant should not have sufficient means to meet all or part of the cost involved. The Commission may, at any time, revoke its grant of free legal aid, since it has full power to enquire about the income, capital assets and financial commitments of the applicant.

3. ICJ instance

85. With respect to proceedings before the International Court of Justice, the Court observed in the first case submitted to it pursuant to Article 11 of the Statute of the UNAT that "when the Committee (on Applications for Review of Administrative Tribunal Judgments) finds there is a substantial basis for the application, it may be undesirable that any necessary costs of review proceedings under Article 11 of the Statute of the Administrative Tribunal should have to be borne by the staff member" (I.C.J. Report 1973, p. 212, para. 99). The Secretary-General took account of this suggestion and made an ex gratia payment to the applicant in that case to cover part of the costs he had incurred before the Committee and the Court.

86. The International Court of Justice in its Advisory Opinion of 12 July 1973 (Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal) states in paragraph 99:

As to Mr. Fasla's request for costs in respect of the review procedure, first before the Committee and afterwards before the Court, there is no occasion for the Court to pronounce upon it. The Court confines itself to the observation that when the Committee finds that there is a substantial basis for the application, it may be undesirable that any necessary costs of reviewing proceedings under Article 11 of the Statute of the Administrative Tribunal should have to be borne by the staff member.

In other words, costs should not be borne by the staff member when there is a substantial basis for his application.

87. At "contrario sensum", costs could be borne by the staff member when there is not a substantial basis - or no basis at all - for his application. It is necessary to bear in mind that the Committee on Application for Review of Administrative Tribunal Judgments is a political and not a judicial body.

88. Judge Ammoun, in his dissenting opinion to the Advisory Opinion of the Court mentioned above, states the following:

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The League of Nations Administrative Tribunal was the first international tribunal to affirm that there is a general principle of law to the effect that the costs are paid by the losing party (Judgment No. 13, Schumann, 7 March 1934).

.....

Thus the obligation on the losing party to bear the costs could be regarded either as a general principle of law in itself, as stated by the League of Nations Administrative Tribunal, or as an application of the equity principle deriving from Article 38, paragraph 1(c), of the Statute of the Court.

It is true that the Statute and Rules of the Administrative Tribunal do not include any provision laying down this principle, and setting out how it is to be applied, nonetheless, the Tribunal of the United Nations could not wash its hands of it. Continuing the line of cases of the League of Nations Tribunal, it has made awards of costs against the losing parties in 17 cases, which confirms that the Tribunal has regarded the making of an order for costs as a general principle, even though the Statute does not provide for it.

B. Administrative aspects

1. Responsibility of the Administration

The origin of a claim

89. Claims are always made against an administrative decision. Theoretically, if a decision is clearly based on a Staff Regulation or Rule, it should not be a cause for complaint among staff members. In practice, however, this is not always the case. The Staff Regulations and Rules, as any rule of law, can be interpreted in different ways. There are, nevertheless, many cases in which the decisions of the Administration have not been consistent with previous decisions or have been ill-founded. This explains the fact that, during certain periods, nearly 50 per cent of the JAB's reports contested the Administration's decisions. Moreover, according to the JAB related statistics, the JAB receives a relatively large number of a similar nature. A big proportion of cases (over 50 per cent) concerns the renewals of fixed-term contracts and G to P promotion. This may be partly due to deficiencies in the governing rules. However, this situation leads to the conclusion that measures should be taken in order to enhance the sense of responsibility at the administrative level.

Measures to be taken

90. The Inspector discussed ways by which this sense of responsibility could be achieved. First of all, Administration officials should be made aware of the responsibility of the Administration, as well as of their own responsibility in respect of the consequences of an ill-founded decision. Therefore, the Administration should take measures so as to encourage these officials to carry out their responsibilities in the best way possible with the aim of reducing the number of administrative

disputes. These measures should also be designed to discourage officials to apply the relevant regulations and rules in an improper manner. In cases where a decision is obviously ill-founded, the Inspector recommends taking disciplinary measures against officials who are responsible for such a decision.

2. Responsibility of staff members

Rights and privileges of staff members

91. A staff member's right to appeal against an administrative decision which does not observe the terms of his appointment and other relevant regulations and rules is undeniable. However, in practice, staff members take advantage of their right to appeal. For example, on one occasion one staff member submitted 20 complaints against administrative decisions. Staff members' abuse of their right may be due to the appeals procedures which do not require their time or money and impose no penalty for filing totally groundless appeals. More specifically, presenting a claim to the JAB could be advantageous for staff members, because they can spend working hours in the counselling process, in the preparation of the claim, etc. Thus, it is not difficult to explain the cause of the "proliferation" of claims. In the Inspector's opinion, the practice of submitting claims with a "vocational attitude" should not be allowed. Such a practice hinders the proper functioning of the administration of justice. This practice is also an obstacle in other staff members' exercising their right to have a prompt decision on their claims. Corrective measures should be taken as soon as possible in order to prevent further abuses.

Measures to be taken

92. The Administration and Staff Unions should take measures to inform staff members about their rights and privileges and the latter's proper application. They should also be made aware of the proper functioning of the whole administration of justice which should not be hindered by particular staff members' abuse of their rights. The document from the International Civil Service Advisory Board (ICSAB), presently the International Civil Service Commission (ICSC), published in 1954 "Report on Standards of Conduct in the International Civil Service" (there is a 1965 edition) should be up-dated. Addresses from Secretaries-General (30 May 1961; 12 January 1982), from the former Director, United Nations Division of Human Rights (9 December 1983), proposals from the Administration and from the Staff Union put emphasis on the needs for consolidated standards of conduct. It is appropriate that the General Assembly request as soon as possible the formulation of such standards of conduct to the International Civil Service Commission. The review of ICSAB report of 1954 on standards of conduct in the international civil service had been requested also by the ACC. In the draft preface to 1982 edition, it is mentioned that "certainly much has changed in the world and in the organizations of the United Nations system in the nearly thirty years since the report was prepared. What has not changed is the need for the highest standards of efficiency, competence and integrity in the international civil service; without those qualities, the organizations could no longer fulfill the purposes for which they were established" (ACC/1982/PER/33).

VII SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

93. The study of the present procedure for the administration of justice in the United Nations gave to the Inspector origin to two different kinds of ideas: that the procedure has its own merits; and that the growth of the Organization and the evolution of the concept of career of international civil servants have made the procedure somewhat obsolete.

94. The main merit of the procedure is the acknowledgement of the value of the process of mediation and conciliation although it is not really institutionalized. The other merit is the creation and functioning of a clearly judicial body, the United Nations Administrative Tribunal.

95. The Inspector believes that the "obsolete-component" of the system is the Joint Appeals Board. That is the stage or phase at which the delays in the administration of justice are clearly noticeable. Furthermore, there is not a clear distinction between conciliatory procedure and the judicial one. These represent the main deficiency of the present procedure. Thus, the Inspector considers that the whole system of administration of justice should be adjusted to meet the actual needs of the Organization in efficiently resolving internal administrative disputes.

96. The creation of an independent Office of Ombudsman may be required as a valid instrument for a procedure of genuine conciliation. The Ombudsman should be a one-person institution with secretarial support. The person in charge should be appointed by the General Assembly for a period of five years at D-2 level from a list of candidates prepared by the Secretary-General in consultation with staff representative bodies. The conciliatory procedure should be informal and expeditious. Its decision should be binding if so accepted or desired by the parties.

97. At a judicial level, the Inspector believes that, like most of the democratic countries, a two-stage judicial procedure should be established. He proposes that a Claims Court be established as the first instance, and that the UNAT be the second instance.

98. With a view to streamlining the procedures for the administration of justice, amendments to relevant procedural rules should be made. The new system should be more economical, adequate and efficient than the present one. For these reasons, the Inspector has not hesitated in proposing fundamental changes.

99. Generally speaking, the Administration loses more than 50 per cent of cases before the UNAT, of which many are of a similar nature. This may be a result either of wrong application of the governing rules on the part of officials of the Administration or of deficiencies in the governing rules themselves. The Administration should take measures to make the officials in charge of the application of the Staff Regulations and Rules and other relevant statutory provisions aware of the responsibility of the Administration and of the consequences of an ill-founded decision. These measures may include some penalties or disciplinary action.

100. One cannot deny a staff member's right to put a claim against a decision which he considers ill-founded or unfair. However, the practice of introducing claims with a "vocational-attitude" should not be allowed. Such a practice hinders the proper functioning of the administration of justice. This practice is also an obstacle in other staff members' exercising their right to have a prompt decision on their claims. The need for updating consolidated standards of conduct in International Civil Service is urgent. Staff members should be well informed of the proper exercise of their rights. Furthermore, the Inspector feels that some corrective measures should be introduced in order to prevent staff members from abusing their rights and privileges. For example, the submission of claims clearly devoid of any justification should be discouraged and even penalized. Other measures may include the introduction of a system of previous "deposit", or charging legal costs.

101. The Inspector agrees that it is difficult to charge costs to any staff member even when his claim has not been sustained by the JAB, the Secretary-General and the Tribunal itself. It is also difficult to justify any undue costs which staff members incur for the Organization; and the delays that those ill-founded claims produce, hampering the rights of other staff members in the administration of justice. The Inspector considers that, under certain circumstances, costs should be imposed on the losing party, regardless of whether this concerns the Organization or a staff member. For such a reason, he endorses the Secretary-General's proposal (doc. A/40/471, para. 35(b)) that the Administrative Tribunal be authorized to impose costs on the applicant which would be limited to no more than one month's emoluments. This authorization could be extended to the Claims Court instance.

102. The proposed procedure in this report would be as follows:

1) The staff member will take his case to the Ombudsman's Office for conciliation;

2) If there is no conciliation, he will be free to take his case to the Claims Court asking for a judicial solution; and

3) If the decision of the Claims Court is, in-toto or in-part, against his appeal, he can make recourse to the UNAT.

103. The Inspector makes the following recommendations:

Recommendation 1

An Office for the Administration of Justice should be created within the Executive Office of the Secretary-General in order to separate the entire function of the administration of justice from the Administration itself (paragraphs 65 - 68).

Recommendation 2

An Office of Ombudsman should be established to deal with conciliation and mediation. It should replace the Panel on Discrimination and other Grievances, as well as the Joint Appeals Board (paragraphs 54 - 56).

Recommendation 3

Two jurisdictions should be introduced. A Claims Court would constitute the first instance. The INAT, therefore, should be the second instance (paragraphs 57 - 64).

Recommendation 4

Amendments to the Staff Regulations and Rules should be made in order:

(a) to provide measures to discourage officials of the Administration to apply the relevant rules and regulations in an improper manner (including disciplinary measures or penalties directed to officials who are responsible for ill-founded decisions) (paragraph 90); and

(b) to provide measures to prevent staff members from abusing their rights and privileges by imposing costs on litigants and penalizing the submission of claims which are clearly devoid of justification (paragraphs 82, 83, 91 and 92).

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Survey of the cases before the Joint Appeals Board
as of 31 March 1986

	1981	1982	1983	1984	1985	1986 ^{*/}	Total
Total cases received	70	62	80	46	47	16	321
Total cases completed	69	55	63	22	15	3	227
<u>Total cases pending</u>							
Cases under JAB Panels' consideration	-	-	5	7	2	-	14
Cases under administrative settlement	-	-	1	-	1	-	2
Cases ready but no JAB Panels constituted	-	2	1	-	2	-	5
Respondent's replies due on merits of the cases (UN)	-	-	-	3	1	-	4
Respondent's replies due							
United Nations	-	3	3	2	21	12	41
UNDP	-	-	4	6	3	1	14
UNICEF	-	-	-	1	-	-	1
Counsel's observations on respondent's reply due	1	2	3	4	2	-	12
Case kept in abeyance at the request of appellant	-	-	-	1	-	-	1
Total	1	7	17	24	32	13	94
Appellant's selection of counsel awaited	-	1	1	4	13	8	27

^{*/} As of 31 March 1986.
