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Administration of justice at the United Nations

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Report of the Internal Justice Council

I. Introduction

1. The present report is the first of the second Internal Justice Council, the membership of which was completed only on 18 April 2013 (see sect. III for an account of the causes of this delay and recommendations to avoid such delay in the future). The tenure of all members of the second Council is to expire on 12 November 2016.

2. Pursuant to General Assembly resolution 62/228, the Council consists of five members: two distinguished external jurists (one each nominated by the staff and by management), one staff representative, one management representative and a distinguished jurist chosen by the four members to chair the Council. The persons nominated to the Council are formally appointed by the Secretary-General.

3. The current members are external jurists Sinha Basnayake (Sri Lanka, nominated by management) and Victoria Phillips (United Kingdom of Great Britain and Northern Ireland, nominated by the staff), with Carmen Artigas (Uruguay, Economic Commission for Latin America and the Caribbean, staff representative) and Anthony J. Miller (Australia, former member of the Office of Legal Affairs, management representative). The Chair is Ian Binnie, a former justice of the Supreme Court of Canada.

4. The Council held a telephone conference on 29 April to plan for the present report. Much of the subsequent planning was undertaken by e-mail. It met in New York from 15 to 17 May 2013 and also met stakeholders who were available there or who could be contacted by telephone, including the Presidents of and a number of judges from both the United Nations Dispute Tribunal and the United Nations Appeals Tribunal; the Executive Director and representatives of the Office of Administration of Justice; the Principal Registrar and Registrars of the Tribunals; the Chief and representatives of the Office of Staff Legal Assistance; the Chief of

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the Management Evaluation Unit; representatives of the United Nations Staff Union in New York and the United Nations Development Programme/United Nations Population Fund/United Nations Office for Project Services/United Nations Entity for Gender Equality and the Empowerment of Women Staff Union; representatives of the Office of Human Resources Management, the Office of Programme Planning, Budget and Accounts and the Office of Legal Affairs; and an external counsel active before the Tribunals on behalf of the staff. The Council met the judges of the Appeals Tribunal on 21 June 2013 and completed its report by e-mail and at a meeting in New York on 25 and 26 July (two members participated by teleconference).

5. The delay in constituting the Council has resulted in insufficient time for it to deal with many matters other than responses to the specific mandates set out in General Assembly resolution 67/241, leaving broader aspects of its role in the formal system of administration of justice for later reports (see the recommendations for the Council's long-term work programme in sect. X).

II. Role of the Council: general and specific mandates

6. The first function of the new members was to ensure that they understood the role that had been assigned to the Council by the General Assembly. In that regard, the Council found it helpful to distinguish between its general mandate and the specific mandates entrusted to it by the Assembly from time to time, given that its general mandate and its objectives must govern the way in which it seeks to discharge each specific task.

A. General mandate of the Council

7. By its resolution 62/228, the General Assembly established the Internal Justice Council, stressing in paragraph 35 that such establishment could help to ensure independence, professionalism and accountability in the system of administration of justice. That focus was repeated in resolutions 65/251 (para. 52), 66/237 (para. 45) and 67/241 (para. 57). As part of this general mandate, the Council compiles an annual report dealing with the system of administration of justice and the compilation of lists of candidates for the selection of judges. Since its sixty-sixth session, the Assembly has requested the Council to include the views of both the Dispute Tribunal and the Appeals Tribunal as part of its report (see resolution 66/237, para. 45). Accordingly, the views of the Appeals Tribunal and of the Dispute Tribunal are set out in annexes I and II to the present report.

8. The Council considers that the general invitation in paragraph 52 of resolution 65/251 for it to provide its views, if it deems necessary, on how to enhance its contribution to the system is a necessary part of its general mandate.

B. Specific mandates of the Council

9. In addition to its general mandate, the General Assembly has requested the Council to perform a wide range of specific tasks that have varied from year to year.

10. Sections III to X of the present report respond to matters that were raised in resolution 67/241 or pursuant to the general mandate conferred on the Council by the General Assembly. Section XI provides a summary of the recommendations made by the Council to the Assembly in the body of the report.

C. Role of representative members of the Council

11. The Council intends, as part of its recommended work programme, to review its functions and responsibilities (see sect. X). At this stage, however, it wishes to deal with the role of its members, in particular the role of the representative members of the staff and of management.

12. The General Assembly has repeatedly stressed that the role of the Council — part of the system of administration of justice — is to help to ensure independence, professionalism and accountability in that system. This must apply also to the Council, which itself includes members who are described as the staff representative and the management representative. Accordingly, the Council considers that, although paragraph 36 of resolution 62/228 provides a mechanism whereby management and the staff each submit the nomination of a member with the title of "representative" to the Secretary-General for appointment to the Council, it is clear that all members of the Council, whether the Chair, the external jurists or the representatives, must discharge the duties entrusted to them by the Assembly in complete independence from whoever nominated them or any other source within or outside the United Nations.

13. The Council requests confirmation by the General Assembly that the use of the word "representative" does not mean that such a person is to act as an advocate or counsel of the staff or management, or act in conformity with any mandate other than that established by the Assembly, but simply means that management or the staff, as the case may be, can nominate persons in whom they have confidence to help the Council to discharge its mandate, given their background and experience in the United Nations system. Representatives may frequently have present or past employment experience in the United Nations common system, which may on occasion assist the Council in understanding the background to the issues before it.

D. Interim independent assessment of the system

14. The Council observes that, as might be expected, almost all stakeholders have suggestions to improve the relatively new system of administration of justice. Indeed, the improvement process is a continuing one and the present report contains recommendations in this regard (see sect. XI).

15. The Council notes that the Advisory Committee on Administrative and Budgetary Questions, in paragraph 12 of its report of 25 October 2012 (A/67/547), stated that it was convinced that an interim independent assessment of all functioning aspects of the system was required in order to take stock of the general direction of the system and to ensure that it was meeting the governing principles set out in paragraph 4 of General Assembly resolution 61/261.

16. In paragraph 19 of its resolution 67/241, the General Assembly requested the Secretary-General to submit a proposal for such an independent review at the sixty-eighth session.

17. The Council welcomes this initiative and will be pleased to cooperate in any way with the entity or persons assigned to this task by the General Assembly.

III. Delays in appointing members of the Council

A. Background

18. In paragraph 56 of its resolution 67/241, the General Assembly noted with concern the delays in selecting new members of the Council, noted that the lack of a functioning Council jeopardized the control mechanisms of the formal part of the system of administration of justice, requested the Secretary-General to keep it apprised of progress in appointing members to fill the remaining vacancies on the Council and requested the Council to provide recommendations and to report on lessons learned drawn from that situation. The present section responds to that request.

19. The composition of the Council was set out in paragraph 36 of resolution 62/228, when the General Assembly decided to establish by 1 March 2008 a five-member Internal Justice Council consisting of a staff representative, a management representative and two distinguished external jurists, one nominated by the staff and one by management, and chaired by a distinguished jurist chosen by consensus by the four other members.

20. The Secretary-General appointed the first four members of the Council in March 2008, and the Chair, Catherine O'Regan, in May 2008 for a four-year term to expire in May 2012.

B. Administrative process for appointment of the new Council

21. On 9 March 2012, the Office of Administration of Justice wrote to the President of the Staff-Management Committee to request the staff's nominations for the Council. A similar letter was forwarded to the Under-Secretary-General for Management. Subsequently, the President of the Committee advised that the appropriate party within the staff to whom to address the query was the Vice-President of the Committee. On 28 March 2012, the Office requested the Vice-President to forward the nomination of the staff.

22. On 10 May 2012, the President of the Committee advised the Office that the staff had nominated Michael Adams of the Supreme Court of New South Wales, Australia, as external jurist and Carmen Artigas of the Economic Commission for Latin America and the Caribbean as staff representative. Michael Adams had been elected by the General Assembly as an ad litem judge of the Dispute Tribunal on 31 March 2009 for a one-year term to begin on 1 July 2009, but his term had ended on 30 June 2010.

23. By a memorandum dated 16 May 2012, the Officer-in-Charge of the Department of Management informed the Office that management had nominated Sinha Basnayake as external jurist and Frank Eppert as management representative.

24. There was a legal dispute in connection with the nature of the process by which the Council's membership is generated. In essence, the staff position was that the idea of all members being appointed by the Secretary-General could entail a conflict of interest, given that he should not appoint someone tasked with the responsibility of reporting to the General Assembly on a system of justice in which he is the respondent to applications for relief by the staff.

25. In support of this position, the staff argued that, in paragraph 36 of its resolution 62/228, the General Assembly referred to nominations by parties and not to appointments by the Secretary-General. The staff therefore did not consider that article 4 (6) of the statute of the Dispute Tribunal was relevant or applied in that case.[1] Based on that concern and on their understanding that further indications from the Assembly were needed for the more efficient functioning of the Council, the staff submitted draft terms of reference for consideration at the first session of the Staff-Management Committee, held from 15 to 21 June 2012 in Arusha, United Republic of Tanzania, where it was decided that the staff would convey the draft terms of reference to the Council when the new members of the Council were in place.

26. On 31 May 2012, the Secretary-General extended the appointments of the existing Council members until 30 June 2012, pending finalization of the composition of the new Council. The staff subsequently informed the Office that they were opposed to the extension of their serving nominees in the Council.

27. On 23 July 2012, the Office advised the President of the Committee that the Office had been informed that the Secretary-General had determined that, because Mr. Adams had served as a judge of the Dispute Tribunal from 1 July 2009 to 30 June 2010, his appointment to the Council would, in the view of the Secretary-General, contravene article 4 (6) of the statute of the Tribunal and that the staff had therefore been requested to provide the name of another nominee as its distinguished external jurist.

28. In view of the possible impact of the delay in the establishment of the Council on the proper functioning of the system of justice, while expressing commitment to pursuing the process towards the elaboration of terms of reference for the body, including the clarification of the nature of its membership, the staff subsequently decided to nominate another external jurist.

29. On 26 September 2012, the Office was advised that the staff had decided to nominate Victoria Phillips as its distinguished external jurist on the Council. On 19 October 2012, the Office forwarded the draft documentation in respect of the nomination to the Secretary-General for his consideration.

30. On 13 November 2012, the Chef de Cabinet advised the Office that the Secretary-General had agreed with the proposed nominations and had signed the

[1] Article 4 (6) of the statute of the Dispute Tribunal states that "a judge of the Dispute Tribunal shall not be eligible for any appointment within the United Nations, except another judicial post, for a period of five years following his or her term of office". Article 3 (6) of the statute of the Appeals Tribunal is couched in similar terms.

letters appointing the representatives nominated by the staff and management, which were issued on the same day.

31. The first task of the new Council was to appoint a distinguished jurist as Chair. The members searched for suitable candidates[2] and agreed by consensus to ask Ian Binnie, a former justice of the Supreme Court of Canada, to serve as Chair.

32. Mr. Binnie was appointed by the Secretary-General in April 2013.

33. After the selection of the Chair, Frank Eppert resigned from the Council upon his retirement from the United Nations and a new management representative, Anthony J. Miller, was nominated and appointed.

C. Recommendations and lessons learned

34. The Council considers that the appointment process began too late in the life of the first Council, what with nominations being sought in March for the new Council to begin its work in June.

35. The dispute that arose could not have been anticipated. Nor could it have been anticipated that it would take from 10 May to 23 July to resolve. No criticism is made of any of the actors in this respect. With hindsight, however, had a longer period been allowed for nominations, such as six months before the expiry of the terms of office of the first Council, then the length of time that the dispute about nominations took to be resolved would still have occurred during the lifetime of the first Council and there would have been no need to extend its members' terms of office.

36. There was also a period of delay between the staff approaching their second chosen nominee and her consent to her nomination being obtained. As a practising lawyer in a partnership, she had to obtain the consent of her partners to take on an external role, which led to a brief delay. Given that such delay may arise in the future, time should be built into the reconstitution process to allow for unforeseen disputes and delays.

37. The Council therefore recommends that the nomination process for the next Council begin no later than 1 May 2016.

IV. Dispute Tribunal and Appeals Tribunal

A. General

38. The views of both Tribunals are annexed to the present report in line with the request made by the General Assembly in paragraph 57 of its resolution 67/241. Moreover, as noted above, the Council had discussions with the Presidents and

[2] Initial telephone conferences were held on 13 December 2012 and 4 and 11 January 2013. The Council then approached a number of candidates and conducted interviews by videoconference on 1 March and 2 April. In addition, the Council also held telephone conferences on 28 February, 6 March and 3 April in connection with the selection process and the programme of work.

judges of the two Tribunals in May and a further discussion with the Appeals Tribunal judges, at their request, on 21 June 2013.

39. To respect the independence of the Tribunals, the Council will not directly comment on those views, which have been reproduced as received. There are, however, a few general matters connected with the Tribunals that raise substantive legal matters and affect not only the Tribunals but also the parties and their counsel. The Council considers that these matters justify separate comment herein.

40. It is appreciated that the United Nations is operating under severe budgetary constraints and that numerous demands are competing for scarce resources. Nevertheless, the Council agrees with the participants in the internal justice system, in particular the Dispute Tribunal judges and registrars, that a relatively modest investment in the elements of infrastructure discussed below would greatly increase efficiency, reduce delays, improve access to justice and swiftly repay the initial investment in the saving of the time and costs wasted on aborted hearings. In the case of a failed videoconference, for example, an interrupted hearing requires rescheduling of a continued hearing at a later date, loss of work time for the parties to attend the continued hearing, duplication of preparation by the judges and avoidable delay in the disposition of the claim, leading to frustration in the workplace.

B. Information technology

41. The Council notes that the Dispute Tribunal operates at three duty stations, each with its own Registry. The distances involved make travel expensive and time differences between locations make consultations difficult. It is thus crucial that there be access to effective videoconferencing, especially for hearing testimony and argument of counsel, which the judges indicated was vital. The Council was informed, however, that the option of videoconferencing is proving difficult in Nairobi for technical reasons. Information technology facilities there are obtained through local providers and there are some problems with Internet connections. The Organization is studying how these may be resolved in collaboration with providers. Second, witnesses are often in very remote locations where communications by mobile telephone are difficult. If connections are lost and cannot be re-established swiftly, it is necessary to reschedule a hearing, which may entail considerable delay because the Registry will already have other cases scheduled in advance. The Council was advised that such delays in disposing of cases in Nairobi are chronic.

42. The Council was told that applicants in many duty stations away from major duty stations are faced with a situation in which electronic facilities are only rarely easily available to them, meaning that they submit paper appeals, frequently to Nairobi (because many of those duty stations are located in Africa). This transfers the problem to the Nairobi Registry, which must upload all the documents into the Court Case Management System (see paras. 45-47).

43. In addition, recent budgetary restrictions have prevented the past practice of holding a face-to-face annual meeting of the judges and registrars of the Dispute Tribunal, making the need for effective means of videoconferencing even more crucial.

44. The Council commends the efforts being made to resolve these issues because it considers it vital that the necessary infrastructure investment be made so that the systems needed for the efficient administration of justice may function smoothly.

C. Court Case Management System

45. Another issue of concern for both the Registries and their staff is the sustainability and expansion of the Court Case Management System, which has introduced an electronic filing mechanism, thereby facilitating submissions and communications between the Tribunals and the parties while still providing for traditional filing for those users who lack access to computer facilities. All this material must be uploaded, which consumes time at all Registries and may cause particular difficulty and delay in Nairobi.

46. The Court Case Management System also requires permanent updates to be able to work with various digital environments worldwide (in order to secure universal access). In addition, further upgrades are needed to enable it to automatically provide thorough and fully reliable statistics, as requested by the General Assembly, in order to give an accurate measure of how the justice system performs.

47. The Council therefore recommends investment in the updating of the Court Case Management System as soon as budgetarily feasible, which will render the entire system of administration of justice more effective.

D. Electronic search engine

48. Easy access to the jurisprudence of the Tribunals is essential for all stakeholders in the system of administration of justice. The search engine of the Administrative Tribunal of the International Labour Organization (Triblex) enables a user to swiftly and accurately identify the state of the law on a particular topic. The search engine currently available on the websites of both United Nations Tribunals is primitive, essentially a word search function that renders effective research time-consuming and problematic. Investment in an effective search engine is, in the view of the Council, vital to the success of the system of administration of justice.

E. Representation of the Administration in disciplinary cases

49. The Council was informed in May by the Dispute Tribunal judges in Nairobi that disciplinary cases were all handled from Headquarters, making such handling more complicated than if the respondent were represented locally. The main problem appears to be that the time difference means that cases must begin late in the day in Nairobi and, if a hearing continues for more than three to four hours, staff there are forced to leave late in the evening, which raises security issues and may entail additional costs.

50. The Council sought clarification from the representatives of the Office of Human Resources Management. As far as the Council understands the situation, only non-disciplinary cases can be handled locally in Nairobi because the resources

for disciplinary cases are made available in a budget of the Office for posts at Headquarters, while the resources for local representation in other cases come from a Nairobi budget. Furthermore, the Secretary-General lacks the authority to transfer a post to Nairobi.

51. The Council considers it inefficient and impractical to prevent legally trained representatives in Nairobi, who are deemed competent to handle non-disciplinary cases locally, from handling disciplinary cases. The Council could understand that some very important cases, both non-disciplinary and disciplinary, might at times call for a senior lawyer from Headquarters to travel to another duty station to handle a case, but the Council considers that, as a general rule, the representatives at the locations where the Dispute Tribunal sits should handle all cases there. The Tribunal informed the Council that having representatives on the spot for all cases would facilitate its work.

52. The Council recommends that the necessary budgetary adjustments be made by the General Assembly to enable the respondent to be represented in disciplinary cases at the sites where the Tribunals operate.

F. Juridical status of the judges

53. The legal background to any discussion of the current status of the judges is summarized in paragraphs 2 and 3 of the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (ST/SGB/2002/9), which indicate that persons performing services for the United Nations could be staff who are considered as officials under the Convention on the Privileges and Immunities of the United Nations (General Convention) and other persons who are described as follows:

> 2. The United Nations has persons performing full-time services for it, at the direction of its legislative organs, who are not staff. For example, article 13 of the statute of the Joint Inspection Unit (approved by the General Assembly in its resolution 31/192 of 22 December 1976) provides that the Inspectors shall have the status of officials of the Organization but shall not be staff members. In addition, pursuant to article V, section 17, of the General Convention, the Secretary-General has specified and submitted to the General Assembly proposals that a number of persons who occupy certain positions within the Organization be accorded privileges and immunities under articles V and VII of the General Convention, even though they are not staff members. Those persons are the presiding officers of United Nations organs performing functions for the Organization on a substantially full-time basis (for example, the Chairman of the Advisory Committee on Administrative and Budgetary Questions and the Chairman and Vice-Chairman of the International Civil Service Commission). Those officials are not in a separate category under the General Convention, but their names are submitted by the Secretary-General to the host country together with those of Secretariat officials who are staff members. These persons have been consistently referred to by the General Assembly as “officials other than Secretariat officials”.
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> 3. Experts on mission may be retained by way of a contract known as a consultant contract, which sets out the terms of their appointment and the tasks that they must discharge. Other individuals may have the status of experts on

mission, even though they do not sign a consultant contract, if they are designated by United Nations organs to carry out missions or functions for the United Nations (for example, rapporteurs of the Commission on Human Rights, rapporteurs and members of its Subcommission on the Promotion and Protection of Human Rights and members of the International Law Commission).[3]

54. The focus of the prior Council was to ensure that the code of conduct for judges, which was then being finalized, regulated the ethical responsibilities of the judges rather than the Regulations (see A/67/98, para. 38). The Council notes that the General Assembly has now decided how the code of conduct is to operate and it is therefore clear that the code will govern the conduct of the judges (see resolution 66/237, para. 44).

55. The Council considers that, given the long-running concern of the judges over their legal status, the time has come to take a closer look at that status and how it is likely to operate in actual practice, e.g. the status of the judge might become a live issue if a disgruntled litigant were to sue a Tribunal judge in a national court for his or her role in a decision.

Current status of the judges of the Tribunals

56. The statutes of the Dispute Tribunal and the Appeals Tribunal are silent on the juridical status of the judges. Their status was defined on the basis of recommendations of the Secretary-General that the Dispute Tribunal judges would have the status of officials other than Secretariat officials in order to maintain their independence vis-à-vis the Secretariat (see A/63/314, para. 83). The same paragraph dealt with Appeals Tribunal judges, but only in terms of their part-time engagement and their emoluments for those part-time tasks.[4] Those emoluments were consistent with the general way in which those selected for part-time tasks by the General Assembly were usually remunerated (by way of a per diem and honorarium) and such persons are accorded the status of expert on mission (see ST/SGB/107/Rev.6). The Assembly approved those recommendations in paragraph 30 of its resolution 63/253. Accordingly, the Dispute Tribunal judges, including part-time judges, are officials other than Secretariat officials, while the Appeals Tribunal judges are experts on mission.

Issues arising from the current status of the judges

57. The General Assembly has made it clear that the status of a judge will not by itself determine conditions of service. For example, in paragraph 39 of its resolution 67/241, it recalled its decisions in paragraphs 30 and 31 of its resolution 63/253 that

[3] The Regulations were adopted by the General Assembly in its resolution 56/280. The explanatory commentary was prepared by the Secretariat. The privileges and immunities of experts are set out in section 22 of the General Convention. It deals with their functional immunity and provides that experts are accorded "in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations".

[4] It states: "It is also the intention of the Secretary-General to pay an honorarium to the judges on the Appeals Tribunal for each decision rendered, using rates equivalent to those applied to the judges of the ILO Administrative Tribunal: head judges would receive $2,400 per judgement, and participating judges would receive $600 per judgement."

the conditions of service of the judges of the Dispute Tribunal and the Appeals Tribunal should be treated separately from the conditions of service of other judicial appointments in the United Nations system.

58. However, the difference in the legal status of the judges of the two Tribunals — not the fact that their conditions of service differ — is troubling for a number of reasons.

59. First, their legal status depends on what functions are entrusted to them, not the manner of their remuneration. For example, some officials at the Under-Secretary-General level are paid at $1 per annum for service when actually employed at the Under-Secretary-General level (see A/66/380, paras. 36-38); the conditions of service of other officials coming under section 19 of the General Convention[5] are fixed separately, even though they all have the same legal status under that section (see A/65/676 and A/65/767); and other judges who may have part-time or intermittent duties will have been given the status of officials other than Secretariat officials and have appointments under section 19, such as judges of the International Residual Mechanism for Criminal Tribunals (see article 29 of the statute of the Mechanism).

60. Second, the duties of the judges as persons who adjudicate legal disputes between the Secretary-General and the staff are in essence identical, irrespective of the time devoted to those duties. The only juridical difference in their tasks is that the decisions of the Dispute Tribunal are subject to appeal to the Appeals Tribunal, which is the appellate body. From a functional point of view, it appears anomalous that their legal status and their immunities are different.

61. Third, other individuals entrusted by the United Nations to adjudicate disputes have the legal status of diplomatic envoys under section 19 of the General Convention (see A/66/158, para. 22, and A/65/304, para. 35).

62. Lastly, in the light of the advisory opinion of the International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*,[6] it appears that, should a disgruntled applicant sue in a national court alleging that a judge was not acting in the course of his or her official duties, the national court could assert that it had jurisdiction to decide that threshold fact, given that the opinion of the Secretary-General is to be given only the greatest weight but is not determinative. Moreover, States are at times reluctant to intervene to assist the Organization because the question of whether an official

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[5] Section 19 provides that, "in addition to the immunities and privileges specified in section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law".

[6] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62. The Court pointed out that, "when national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity", noting that "that finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts" (para. 61). The Court continued that the national court, by not deciding the jurisdiction issue in limine litis, was in breach of "a generally recognized principle of procedural law" (para. 63), a breach that was attributable to the Member State because the "conduct of any organ of a State must be regarded as an act of that State" (para. 62).

acts in the course of his or her official duties is a factual question for the Secretary-General. On the other hand, if the judges had the status of diplomatic envoys under section 19 of the General Convention, the United Nations would inform the permanent mission of the State concerned and request that State to inform the court of the simple factual issue that the official had the status of a diplomatic envoy under the Vienna Convention on Diplomatic Relations, which sets out, in article 31, a few clear exceptions to that immunity (in essence, actions relating to real property, succession and professional or personal activity of the envoy).

Recommendations

63. It is the strong recommendation of the Council that judges of both Tribunals, whether full-time or part-time, be accorded the privileges and immunities of section 19 of the General Convention, so that when they exercise judicial functions on behalf of the United Nations they have the immunity of diplomatic envoys, which would facilitate assertion of their immunity if sued. This alone does not affect their emoluments, given that the General Assembly has decided that that is a separate question. Such immunities would, of course, apply only in respect of their official activities. In other respects, immunity would be waived. Protection for those official activities would apply to part-time judges in relation to their official activities, including if they were sued during a period when they were not performing their judicial functions for the United Nations (see ST/SGB/2002/9, commentary to regulation 1 (c)).

64. The Council also recommends that the diplomatic status of the judges specifically be included in the statutes of the Tribunals. It seems to the Council that, if it is necessary to assert the immunity of a judge, it will help to establish immunity if such immunity is clearly set out in a document dealing only with the Tribunals and their powers and responsibilities, i.e. their statutes. Currently, it would be rather complicated for a national court to ascertain the precise status and immunity of the judges. To do so would involve a detailed examination and explanation of a whole series of United Nations documents emanating from various sources in the Organization, with the very real possibility of error and grievous results for the judge concerned.[7]

65. The remaining legal issue is whether the rank accorded to the judges should be that of Assistant Secretary-General or that of Under-Secretary-General, i.e. whether there should be a distinction between the rank of a trial court judge and an appellate court judge. While this is a policy decision for the General Assembly, the Council notes that the Assembly decisions specifying more stringent qualifications for

[7] The starting point would be the decision of the General Assembly in paragraph 30 of resolution 63/253, but this resolution is in general terms referring to approval of proposals from the Secretary-General set out in his report (A/63/314). The Secretary-General's report deals with the issue in paragraph 83, but that paragraph refers clearly only to the status of judges of the Dispute Tribunal as officials other than Secretariat officials. It does not deal with the status of Appeals Tribunal judges as experts on mission. To one familiar with the way in which experts are paid, it is clear that the judges of the Appeals Tribunal are experts on mission (see, for example, the Council's previous reports cited above and the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission) but explaining all of this to a national court and seeking to convince it that the Appeals Tribunal judges have the immunity of experts on mission, when the statutes are silent, would be a complex exercise.

Appeals Tribunal judges (see sect. IV) would militate in favour of a higher rank for them. In line with those decisions of the Assembly, the Council recommends that the appropriate rank for Appeals Tribunal judges is that of Under-Secretary-General and for Dispute Tribunal judges that of Assistant Secretary-General.

66. Lastly, while noting that the question of conditions of service is solely a matter of financial policy for the Fifth Committee to decide, the Council recommends that the judges be accorded the same travel facilities in business class that were accorded to members of the United Nations Administrative Tribunal by the General Assembly (see ST/SGB/107/Rev.6, annex III). In the view of the Council, this would be fair because the qualifications for the judges of both Tribunals are greater than those that were required for members of the United Nations Administrative Tribunal and also because judges who possess the necessary qualifications are usually of a certain age. Economy-class travel is not conducive to productive work while in flight, especially on sensitive or confidential materials, and leaves the judge less able to plunge into his or her workload on arrival. For all those reasons, the Council requests the Assembly to accord business-class travel to the judges of both Tribunals.

67. In the four years since they began functioning as the central part of the internal justice system, the judges have gained admiration by treating applicants and the Secretary-General impartially when dispensing justice. Their work is complex and difficult, always done in public under unremitting scrutiny, and their professional and personal lives must be conducted accordingly. Justice is a value held in high regard in all societies, given that a society in which it prevails has high integrity and legitimacy. Moreover, in the past two decades, the United Nations has vigorously promoted the rule of law in those countries where it has had political or peacekeeping missions. The Council feels that it is not too much to ask that the Organization recognize with an appropriate status under section 19 of the General Convention those who dispense justice and the rule of law within its own jurisdiction.

V. Qualifications of Appeals Tribunal judges

68. In paragraph 40 of its resolution 67/241, the General Assembly emphasized the importance of recruiting the candidates best able to shape the Appeals Tribunal as a pillar of judicial excellence and invited the Council, with reference to the recommendation in paragraph 35 of its report (A/67/98), to specify its recommendations on the stipulated qualifications for the Tribunal judges. The present section responds to that invitation.

A. Qualifications

69. In its resolution 61/261, the General Assembly established a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike. The statutes of the Dispute Tribunal and the Appeals Tribunal were adopted by the Assembly in its resolution 63/253 and the Tribunals became operational on 1 July 2009.

70. The Appeals Tribunal is expected to deliver clearly reasoned decisions that not only determine the outcome of a particular case but provide guidance for future cases. In other words, its function is jurisprudential as well as error correction, and its judges should be selected accordingly.

71. The current qualifications required to become a judge of the Appeals Tribunal are set out in article 3 of its statute as follows:

> 1. The Appeals Tribunal shall be composed of seven judges.
>
> 2. The judges shall be appointed by the General Assembly on the recommendation of the Internal Justice Council in accordance with General Assembly resolution 62/228. No two judges shall be of the same nationality. Due regard shall be given to geographical distribution and gender balance.
>
> 3. To be eligible for appointment as a judge, a person shall:
>
> (a) Be of high moral character; and
>
> (b) Possess at least 15 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.[8]

B. Work of the Appeals Tribunal

72. To accomplish what is a formidable mandate, the Appeals Tribunal (and the Dispute Tribunal) judges are required to interpret and apply a vast range of legal sources including, in addition to the Charter of the United Nations itself, General Assembly resolutions, general principles of law, principles of human rights law, administrative law, employment and contract law, various international conventions and fundamental human rights documents, and international labour standards. In practice, there is frequent reliance on the case law of other comparable tribunals dealing with similar issues (including the International Labour Organization Administrative Tribunal and the World Bank Administrative Tribunal), in addition to established case law of national jurisdictions espousing international principles.[9] The Dispute Tribunal judges, in the nature of their work, are generally focused on the facts of a particular dispute and the application to those facts of a particular rule of law. The Appeals Tribunal judges, by contrast, are charged with the responsibility

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[8] By way of comparison, the qualifications required of a judge of the Dispute Tribunal are set out in article 4 of its statute as follows:

> 1. The Dispute Tribunal shall be composed of three full-time judges and two half-time judges.
>
> 2. The judges shall be appointed by the General Assembly on the recommendation of the Internal Justice Council in accordance with Assembly resolution 62/228. No two judges shall be of the same nationality. Due regard shall be given to geographical distribution and gender balance.
>
> 3. To be eligible for appointment as a judge, a person shall:
>
> (a) Be of high moral character; and
>
> (b) Possess at least 10 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.

[9] See, generally, Memooda Ebrahim-Carstens, "The United Nations Dispute Tribunal: significant trends, challenges and landmark decisions", paper prepared for the Organization of American States/American Society of International Law, Washington, D.C., 7 February 2013.

of developing a coherent body of United Nations jurisprudence. Appellate work requires a more comprehensive approach to the working out of potentially conflicting rules and principles. The importance of appellate rulings is not confined to the parties to the particular dispute. It is therefore essential that a prospective Appeals Tribunal judge possess a solid grounding in both private law and relevant international law, with a special emphasis on administrative and employment law.

C. Candidates to be of high moral character

73. The fundamental personal quality of an Appeals Tribunal judge is the demonstrated capacity to decide disputes grounded in his or her independence, impartiality and integrity (see art. 36 (3) (a) of the Rome Statute of the International Criminal Court). Tribunal judges must clearly be honest and of good character and reputation. Their conduct and reputation should be above reproach in the view of a reasonable observer.

74. The requirement of high moral character responds to the entitlement of a litigant to an independent and impartial tribunal that is expressed in article 10 of the Universal Declaration of Human Rights:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[10]

75. These personal qualities were elaborated upon by the Human Rights Institute of the International Bar Association in a resolution addressing the values pertaining to judicial appointments to international courts and tribunals adopted on 31 October 2011.[11] The Council agrees with the content and importance of the values identified by the Association and believes those values to be relevant to the required high moral character expected of candidates for appointment to the Appeals Tribunal. In sum, a candidate for appointment to the Tribunal should have demonstrated in the course of his or her professional career and personal life the capacity, if elected, to perform the work of the Tribunal to the following standards:

(a) **Demonstrated independence**. Judges must uphold and exemplify independence in both its individual and institutional aspects. This includes being independent of the parties to the case, as well as from the outcome of their disputes, and deciding the facts of a case free of extraneous influences or inducements, including on the part of national Governments, international agencies and office holders;

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[10] To the same effect, see the criteria established by the Judicial Group on Strengthening Judicial Integrity at its meeting held in Bangalore, India, in February 2001. The Bangalore Draft Code of Judicial Conduct was considered by a working party of the Consultative Council of European Judges in 2002. It was revised and further considered at a high-level meeting held at the Peace Palace in The Hague, the Netherlands, in November 2002. That meeting was convened to secure the scrutiny of the draft, so as to ensure that it contained concepts and values equally acceptable to judges from the common law, civil law and other traditions of law. From those judicial meetings emerged the final form of the Bangalore Principles of Judicial Conduct. In its resolution 2003/43, the Commission on Human Rights noted the Principles.

[11] Available from www.ibanet.org/Article/Detail.aspx?ArticleUid=A428D839-07C9-4933-BBEC-755D72EBA6C4.

(b) **Demonstrated impartiality**. Judges must be (and must be seen to be) impartial in the process by which their decisions are made, as well as in the substance of their decisions. Judges must have demonstrated the capacity to perform judicial duties without bias, favour or prejudice, and without the appearance of bias, favour or prejudice;

(c) **Demonstrated propriety**. Judges must adhere to, and display, good behaviour in both their professional and personal life, in order to preserve the dignity of the judicial office and to promote the fact, as well as the appearance, of judicial independence. Professional or personal relationships should never improperly influence, or appear to influence, a judge's judicial conduct. The judicial office should never be used, or appear to be used, to advance the private interests of the judge;

(d) **Demonstrated commitment to equal treatment**. Judges must treat all who appear before them in court, whether as parties, advocates, witnesses or officials, on the basis of equality, so as to ensure the actuality and appearance of a fair outcome in matters before them. Bias or prejudice, or the appearance of bias or prejudice, towards any person or group should never be tolerated in the conduct or performance of the duties of judicial office.

76. In the view of the Council, all these qualities are embraced by the requirement that candidates be of high moral character and should be endorsed by the General Assembly.

D. Candidates to possess 15 years of judicial experience

77. The term "judicial experience" should not be interpreted narrowly to include only courts (i.e. judicial institutions whose members are appointed by Governments within a judicial hierarchy to determine disputes by the application of law to the facts) because, in some jurisdictions, labour relations, including employment law, are largely conducted by and before administrative tribunals, which belong to the executive branch rather than the judicial branch of the Government, whose members are legally trained and include some of the most knowledgeable people in the areas relevant to the workload of the Appeals Tribunal. Experience in such work by a legally trained individual should be considered an important asset. It is to be noted that such individuals may be able to find more easily than full-time judges the time to participate in the three two-week periods per year that the Tribunal has devoted to its sessions during the past three years.

Judicial experience need not be continuous

78. In the past, the Council has interpreted this requirement as requiring 15 years of full-time judicial experience, which has had the result of excluding some very well-qualified candidates who have been part-time judges of exceptional ability. These candidates have usually devoted their extrajudicial time to teaching or practising law. While their experience in the aggregate may have been 15 years or more, it has not been continuous. In the view of the Council, 15 years of experience in the aggregate should suffice.

Level of experience

79. The judicial level at which the experience has to be gained is not specified. In theory, it could be in a court or tribunal with no appellate jurisdiction, or with appellate jurisdiction in simple cases, although in practice the Council would not recommend such persons as candidates for selection. In the view of the Council, the experience should be at the level of an appellate or superior court, for at least 5 of the required 15 years. Such a requirement would prevent candidates with little or no appellate experience applying for positions in the Appeals Tribunal. Persons nominated to serve as judges on the Tribunal should possess the legal qualifications for holding high judicial offices in the national courts of their home countries. In addition, they should have the experience (including in legal analysis and legal writing) to deal with the type of legal work dealt with by the Tribunal.

80. A requirement that the entire 15 years be served at a superior level could overlook the fact that judges are often promoted to these higher courts or appointed from specialized administrative tribunals towards the end of their careers and therefore would not spend the entire 15 years in the higher court before they reach retirement age. A rigid requirement might also favour judges from countries where the judiciary is a career that is entered soon after graduating from law school, as opposed to countries where judges are recruited from practitioners.

81. In the view of the Council, it would suffice to require that the 15 years of relevant experience include at least 5 years of appellate experience in a court with a substantial appellate jurisdiction.

Area of expertise

Employment law or equivalent

82. In common law, administrative law, as specified in article 3 (3) (b) of the statute of the Appeals Tribunal, and employment law are distinct categories. Under many civil law systems, the two fields are not only distinct but also are practised before different courts or tribunals. Lawyers with employment law experience would, however, also be good candidates for the Tribunal. Some of the best candidates have come from tribunals in the United States of America specializing in employment law. The Council therefore recommends that employment law be expressly included as an alternative qualification and that the statute of the Tribunal be amended accordingly.

Academic institutions

83. Currently, only judicial experience is considered relevant. In an appellate tribunal with jurisprudential as well as error correction functions, however, it would be helpful if one or perhaps two (but no more) of the seven judges were to have a significant depth of academic experience in an area of law relevant to the work of the Appeals Tribunal. Academics in the field of labour relations often have considerable practical experience sitting as arbitrators. One of the Tribunal judges told the Council that introducing individuals with an academic rather than a practice or wholly judicial background into the Tribunal might undermine its current collegiality. This has not, however, been the experience in the other appellate courts referred to below. Moreover, such a concern is, in the view of the Council, more

than outweighed by the extra value brought to the job if the right candidate or candidates can be found.

84. Of the current United States Supreme Court judges, Antonin Scalia was a professor at the University of Virginia (1967-1971) and the University of Chicago (1977-1982), in addition to a visiting professor at Georgetown and Stanford universities; Anthony Kennedy was a professor of constitutional law at the McGeorge School of Law, University of the Pacific (1965-1988); Ruth Bader Ginsburg was a professor of law at Rutgers University (1963-1972) and Columbia University in the City of New York (1972-1980); and Elena Kagan has been a professor at the University of Chicago and Harvard University.

85. In the United Kingdom, Lord Goff of the House of Lords (formerly the highest court in the country, now the Supreme Court) was a leading academic before his judicial appointment, as were Lord Hoffmann and Baroness Hale, now Deputy President of the Supreme Court.

86. In Canada, the current Chief Justice, Beverley McLachlin, taught law at the University of British Columbia early in her career. Other recent Supreme Court of Canada judges who were formerly professors of law for all or part of their careers were Louise Arbour (later the United Nations High Commissioner for Human Rights), Frank Iacobucci and Michel Bastarache.

87. All those judges had, in addition to their academic work, diverse experience outside academic institutions.

88. It may be noted that, while Appeals Tribunal judges do hold oral hearings, such hearings are to consider legal arguments. In such a forum, experience in managing a trial is not essential and academics would not be functioning outside their range of experience.

89. Accordingly, the Council recommends that the statutory criteria be amended to include relevant academic experience, when combined with practical experience in arbitration or the equivalent, to be taken into account towards the qualifying 15 years, provided that at least 5 of the 15 years were spent in a court with substantial appellate jurisdiction.

International tribunals

90. The experience required by the statute of the Appeals Tribunal must be in one or more national jurisdictions. Experience gained in an international court is therefore excluded. It may be noted, however, that the law applied by the Tribunals is often called international administrative law. It would appear that experience gained in some international courts may be relevant, i.e. in the Inter-American Court of Human Rights, the European Court of Human Rights and the African Court on Human and Peoples' Rights. The Council recommends that the statutory qualifications be widened to include experience in international jurisdictions, leaving it to the Council when selecting candidates for submission to the General Assembly to decide whether experience in a particular jurisdiction would be relevant to work in the Tribunals.

E. Additional criteria

91. The Council recommends that all judges must be fluent, both orally and in writing, in at least one of the working languages of the Appeals Tribunal and that all judges must on appointment be in a state of health appropriate for effective service during the entirety of the proposed term of appointment. In addition, where several candidates are equally eligible for appointment and it is considered appropriate and reasonable to do so, diversity is an important consideration.

VI. Abuse of proceedings

A. Introduction

92. In paragraph 42 of its resolution 67/241, the General Assembly recognized the importance of effective measures against the filing of frivolous applications, encouraged the judges to make full use of those measures currently available to them and invited the Council to provide its views on appropriate options in that regard. The present section responds to that request.

93. The Council observes that, in paragraph 30 of resolution 66/237, the General Assembly requested both Tribunals to review their procedures with regard to the dismissal of manifestly inadmissible cases.

94. The Council will deal with both resolutions herein under the general category of "abuse of proceedings", both because frivolous applications[12] and manifestly inadmissible proceedings are forms of abuse of proceedings[13] and because the statutes of the Tribunals provide that, where a party has manifestly abused the proceedings before it, the Tribunals may award costs against that party (art. 10 (6) of the statute of the Dispute Tribunal and art. 9 (2) of the statute of the Appeals Tribunal, respectively). Procedural issues such as contempt of court and dealing with the source of perjured evidence, which would often be deterred by potential criminal sanctions in national courts, are addressed by the Tribunals under "abuse of proceedings" because of their interpretation of resolution 66/237, in which the General Assembly stated that the Tribunals had no powers beyond those conferred under their respective statutes.[14]

95. In relation to this topic, the Council also notes an informal document circulated by the Dispute Tribunal containing possible changes to its rules of procedure. The document remains under discussion by the Tribunal. The Council will make some comments on the document because it is relevant to the mandate on

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[12] There may be frivolous applications, making frivolous claims, but also frivolous replies, asserting frivolous defences.

[13] Abusive proceedings include, in the common law systems, subcategories such as frivolous, vexatious and scandalous proceedings and proceedings that have no basis in fact or law. Under the various civil law systems, abusive proceedings include proceedings brought with an ulterior motive, that are an abuse of rights, that lack good faith, that are deceitful or that have no basis in fact or law. See Michele Taruffo, ed., *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (The Hague, Kluwer Law International, 1999).

[14] Resolutions 66/237, para. 9, and 67/241, para. 5. Some Tribunal judgements seem to accept, however, that the Tribunals have inherent or implied powers in limited circumstances, such as contempt of court (see *Igbinedion* (UNDT/NBI/2011/023)).

abuse of proceedings that was given to the Council by the General Assembly. The comments may also help the Tribunal's considerations of its rules of procedure. The proposals contained in the document confer the following powers on the Tribunal:

(a) Striking out or amending all or part of any application or reply on the grounds that it is frivolous, vexatious, manifestly inadmissible or unreasonable, or has no reasonable prospect of success;

(b) Striking out any application or reply, or part thereof, on the grounds that the manner in which the proceedings are being conducted by or on behalf of the applicant or the respondent, as the case may be, has been abusive, disruptive, scandalous or otherwise unreasonable.

96. The proposals appear at least partly inspired by the paragraphs in the General Assembly resolutions noted above. They all have the common objective of preventing an abuse of proceedings. The paragraphs describe various types of abusive proceedings. Those under rule (a) deal with abuse of procedures of the Dispute Tribunal and those under rule (b) with abusive conduct.

97. The Council also recognizes that a valid claim should not fail because of the way it is formulated by a self-represented applicant who lacks the benefit of legal assistance in correctly presenting a claim. Nor should an applicant's claim fail if the misconduct was due to actions of counsel. Moreover, it seems to the Council that action on abuse is closely tied to the promulgation of a code of conduct for all counsel so that all counsel know in advance the expected standards of conduct.

98. Dispute Tribunal proceedings in particular are based on the adversarial system, where the parties present the opposing sides to the dispute, with the judge as an impartial observer. The code of conduct for judges approved by the General Assembly in its resolution 66/106 imposes a duty on judges to conduct proceedings fairly, however. It would appear to follow that a judge can therefore require that the parties observe procedural fairness even though the party affected by the abuse fails to raise the issue.

99. Before responding to the General Assembly's request that options be given for dealing with frivolous litigation, the Council believes that a review of selected decisions of the Tribunals would be useful to give an impression of how abuse of proceedings has been interpreted. The analysis that follows examines only cases in which there was a substantive discussion of abuse of proceedings.[15] In many cases, allegations of abuse of proceedings were dismissed without discussion.

B. Interpretation of abuse of proceedings

Abuse of the procedures

100. A number of cases have examined pleadings that on the face comply with the rules of procedure but could be characterized as an abuse of the procedures established by the Tribunals to speedily and effectively dispose of cases. In the Council's examination of the precedents, it was noted that abuse of proceedings

[15] The Dispute Tribunal reporting system gives both case references and judgement numbers. Only the case references are given herein.

applications appeared to succeed, roughly, as often against respondents as applicants.

101. In one case, the Dispute Tribunal held that frequent applications to it for suspension of proceedings to seek to resolve the dispute informally, with no apparent progress made or reported to it, did not serve the cause of justice, unnecessarily loaded its docket and were tantamount to an abuse of process.[16]

102. In another case, the mere filing of a request for a further extension of time to file an application on the day that the earlier extension of time had expired without any demonstration of willingness to abide by the earlier extension was held to be an abuse of proceedings.[17]

103. A recruitment exercise in which the applicant was a candidate for a post advertised was cancelled and the post readvertised. The applicant complained of this cancellation, but applied for the readvertised post and requested the Dispute Tribunal to stay her application pending the outcome of the new recruitment proceedings. The Tribunal expressed the view that the applicant was seeking simultaneously to be selected for the readvertised position and also hold the stayed proceedings as a threat against the Administration. This was held to be an abuse of process.[18]

104. An applicant filed an application to the Joint Appeals Board under the former justice system against her termination of service. The Board found that she had not been wrongly terminated, but that her rights had been violated in other respects. It recommended reinstatement, or alternatively, one year's salary as compensation. The respondent informed the applicant that he accepted the Board's findings, but would pay only three months' salary as compensation, not one year's salary. Subsequently, however, he retracted his admission of liability, arguing that the retraction was justified because the action was then under the new justice system and that at the time of the admission he did not have all the evidence currently available. The Dispute Tribunal held that the retraction of liability was not justified, had caused the applicant to litigate a major part of her claim, had led to a waste of time and resources and was an abuse of proceedings.[19]

105. In one case, after one of the respondent's principal witnesses had been examined, cross-examined and re-examined, the respondent moved to recall him on the ground that some of the questions put in cross-examination had dismayed and surprised the witness. The Dispute Tribunal held that none of the rare circumstances justifying a recall were present and that the motion was an abuse of proceedings.[20]

106. In a previous judgement, the Appeals Tribunal had held that an application should be rejected because it had been filed out of time and in any case had no merit. The applicant requested reconsideration of the decision on the ground that the

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[16] *Solloway* (UNDT/NBI/2011/029, paras. 9 and 10). The case was struck off the Tribunal's docket, with leave to the applicant to reinstate the application only upon leave given by the Tribunal. No costs were awarded.

[17] *Macharia* (UNDT/NBI/2009/43), affirmed on appeal in 2010-UNAT-015. The Dispute Tribunal ordered that the case should be struck out, without prejudice. No costs were awarded.

[18] *Hussein* (UNDT/NBI/2009/010, para. 4, affirmed on appeal in 2010-UNAT-006).

[19] *Mistral Al-Kidwa* (UNDT/NY/2010/053, paras. 43, 44, 84 and 85).

[20] *Tadonki* (UNDT/NBI/2009/36, paras. 58 and 325, a decision of three judges). This judgement is under appeal.

method of calculating time limits adopted by the Appeals Tribunal was inconsistent with that adopted previously by the United Nations Administrative Tribunal. The Appeals Tribunal found that the previous decision was res judicata, that no appeal lay against it and that therefore the requested reconsideration was an abuse of the appeals process.[21]

107. In one case, the Dispute Tribunal had held that an applicant had engaged in numerous and different manoeuvres, which had no real usefulness for the defence of his rights, which had entailed extra costs for the respondent and which had been an abuse of proceedings justifying an order for costs.[22] On appeal, the Appeals Tribunal held that the abuses had been committed by a legal representative of the applicant and therefore the applicant could not be held liable for costs.[23]

Abusive conduct

108. There had been an abuse of proceedings when, at a hearing by teleconference, the applicant led the evidence of two witnesses who it was later established had given false identities and false evidence.[24]

109. In one case, the applicant, whose application was to be heard in Geneva, first requested that the judge hearing the case should recuse himself, and, when that request was rejected, requested that his case should be moved away from Geneva because the Registrar of the Dispute Tribunal was biased. The applicant's description of the Registrar was abusive and defamatory. That request was also rejected and the Tribunal held that there had been an abuse of proceedings.[25]

110. In another case, after the Dispute Tribunal had granted a motion by the applicant for interim relief, the respondent filed a motion requesting reconsideration by the Tribunal of its order. The Tribunal found that the allegations made to support the motion were unnecessary, gratuitous and attempted to portray the applicant as having a negative character, even though attempts to portray a party's negative character alone were not admissible. The Tribunal found the allegations to be an abuse of proceedings.[26]

111. In one case, midway through the proceedings, the respondent introduced an allegation of sexual harassment on the part of the applicant. The Dispute Tribunal held that that allegation had never been investigated under the Organization's rules and regulations and had played no part in the decision to terminate the services of the applicant. In addition, no evidence had been produced to raise even a suspicion that the applicant had sexually harassed anyone. The introduction of the allegation was held to be an abuse of proceedings.[27]

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[21] *El-Khatib* (2010-UNAT-029bis).

[22] *Mezoui* (UNDT/GVA/2009/60, para. 78).

[23] *Mezoui* (2012-UNAT-220, para. 49). This case is considered further in paras. 131-133 below.

[24] *Bagula* (UNDT/NBI/2010/31/UNAT/1689, paras. 46 and 47 and 50-52). The applicant had been summarily dismissed. The Tribunal ordered that management should keep back his final entitlements with a view to recouping sums that the applicant had unlawfully obtained.

[25] *Ishak* (UNDT/GVA/2009/66, paras. 38, 39 and 50, affirmed on appeal in 2011-UNAT-152). The United Nations Administrative Tribunal had also held in Fayache that outrageous and improper allegations made in pleadings could constitute abuse of proceedings (AT/DEC/1200, para. IV).

[26] *Tadonki*, paras. 56 and 326.

[27] Ibid., paras. 321-324.

Cases where no abuse was found

112. The Dispute Tribunal has specifically held that various types of conduct do not constitute abuse of proceedings.

113. In one case, it held that submissions not exceeding the limits of legitimate representation of the respondent's interests were not an abuse of proceedings.[28]

114. At the conclusion of the hearings in one case, it was discovered that the evidence of one witness tendered by the respondent had been false. The Dispute Tribunal found that the witness had misled not only the Tribunal and the former Joint Appeals Board and Joint Disciplinary Committee but also the counsel for the respondent.[29] There was nothing to show that the legal representatives acting for the respondent knew, or could reasonably have known, that the evidence was false, and accordingly there had been no abuse of proceedings.[30]

115. In one case, where a sum of $259.90 due from the respondent was paid only after a delay, leaving the interest on the sum outstanding for a period of about 18 months, the applicant filed an application claiming, among other things, the interest on that sum (calculated at the United States prime rate plus 5 per cent). The Dispute Tribunal held that there had been no abuse of proceedings, although possibly the claim for the interest might have been resolved informally.[31]

116. In one case, the Dispute Tribunal held that the omission in good faith of a necessary step in procedure by counsel for the applicant, without any degree of intention to act frivolously or to abuse the proceedings, did not justify an order to pay costs.[32]

C. Reflections on the case law

117. Given that one of the principal objectives of the new justice system was to prevent the serious delays that accompanied the former system,[33] an efficient and effective approach to litigation that conforms to the jurisprudence of the Tribunals might be formulated along the following lines:

> Abuse of proceedings includes both egregious departures from proper procedure and misconduct in the course of otherwise proper proceedings and in particular:
>
> (a) Any procedural measure taken by a party as part of the litigation that is clearly unfair to the other party;
>
> (b) Asserting any claim or defence for which there exists no basis in law or in fact, nor a reasonable belief in its existence;

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[28] *McKay* (UNDT/GVA/2010/103, para. 72), affirmed on appeal in UNAT-2012-314.

[29] *Bridgeman* (UNDT/NY/2010/052, para. 15).

[30] Ibid., paras. 28 and 29.

[31] *Tolstopiatov* (UNDT/NY/2011/059, paras. 24-26).

[32] *Ba* (UNDT/NBI/2012/17, para. 32).

[33] The General Assembly emphasized the importance for the United Nations to have an efficient and effective system of administration of justice so as to ensure that individuals and the Organization were held accountable for their actions in accordance with relevant resolutions and regulations (resolutions 61/261, eighth preambular paragraph; resolution 62/228, third preambular paragraph; and resolution 66/237, para. 8).

(c) Delaying the proceedings intentionally or by gross negligence without justification;

(d) Wilfully failing to comply with directions and deadlines for the conduct of a case in the Dispute Tribunal or the Appeals Tribunal;

(e) Any intentional attempt to hinder the Tribunals from reaching a finding as to whether there is accountability.

118. One feature shown by the review is that, the absence of any definition of the term "abuse of proceedings" notwithstanding, the judges do not appear to have had difficulty in finding the thin line that separates giving the space for robust litigation needed to vindicate legitimate rights, on the one hand, and endeavouring to gain advantages through unacceptable litigation strategies, on the other.

119. Arguments for a more precise and detailed definition of abuse of proceedings might be that it would help self-represented litigants,[34] who might find difficulties in ascertaining what the concept means,[35] and that it would limit any unjustified extensions of the concept. On the other hand, there is always the danger that attempts to define an elusive concept such as abuse of proceedings will preclude a tribunal from taking proper action to address a situation not contemplated by the rule or simply overlooked by its drafters.

120. On balance, it would seem to the Council preferable not to have a comprehensive definition, and allow judges to continue to elaborate the concept in the light of experience. If a definition is considered desirable by the Tribunals, however, the provisions suggested in paragraph 117 appear appropriate.

D. Options

121. The Council has been invited to present appropriate options that may tend to reduce abuse of proceedings. Some options are set out below.

Option I: let sleeping dogs lie

122. This option — merely maintaining the present position — has serious disadvantages. In most cases, parties have no knowledge of legal procedures and leave their conduct to legal representatives. Under their current powers, the Tribunals cannot impose sanctions against legal representatives who do not comply with legal ethics. Moreover, the existing remedy of costs can be ordered only against a party, not counsel, and even then not until the conclusion of the hearings. The abuse of proceedings may persist until that point, and the pernicious effects thereof continue long afterwards. In addition, the main component of costs is usually legal fees. While the remedy of costs against an offending party for abuse of proceedings should be retained, there is no power to award costs against counsel for misconduct.

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[34] In the period from July 2010 to June 2011, 43 per cent of all applicants before the Dispute Tribunal were self-represented; in the period from July to December 2011, 40 per cent, and in the period from January to December 2012, 40 per cent.

[35] It has been noted that "also troubling is the fact that frivolity, like beauty, is often in the eyes of the beholder". Warren Freedman, *Frivolous Lawsuits and Frivolous Defenses: Unjustifiable Litigation* (New York, Quorum Books, 1987), p. 13.

123. The option is not recommended by the Council.

Option II: striking out offending pleadings

124. In many jurisdictions, the primary remedy for an abuse of proceedings is to strike out the claim or response of the offending party, whether because the claim made or the response provided is simply untenable as a matter of law, or because it is obvious that the factual substratum either does not exist or is incapable of proof. In either case, a tribunal must be able to protect the integrity of its own procedure by a strike out.

Striking out or amending all or part of a frivolous, vexatious or manifestly inadmissible application or reply[36]

125. Frivolous proceedings would include cases of manifestly inadmissible proceedings and also those that claim trivial or absurd relief, e.g. requesting the award of $1 or that the applicant be given a wooden desk instead of a metal desk. Vexatious proceedings would include those noted above and also those that are intended to harass either the Tribunals or the opposite party — repetitive claims based on the same grounds or submissions that insult the Tribunals or the opposite party. Manifestly inadmissible proceedings, or parts of proceedings, mean proceedings that are not receivable by the Tribunals under the applicable law. Such proceedings would include, for example, applications, replies, submissions, written memorials or documents submitted after the applicable time limits, claiming relief that the Tribunals are not empowered to grant, or based on causes of action outside the jurisdiction of the Tribunals; or applications by persons who are not entitled to apply for relief.

126. The Dispute Tribunal proposal provides that its rules of procedure should empower judges to strike out such proceedings, but only after an affected party has been given written notice of the proposed order or judgement and has been afforded an opportunity to show cause why the order or judgement should not be made. Moreover, a limited safeguard exists in the possibility of an appeal to the Appeals Tribunal if the Dispute Tribunal erred on a question of law[37] (e.g. by incorrectly interpreting the facts underlying its finding of "manifestly unreasonable proceedings") or on a question of fact resulting in a manifestly unreasonable decision[38] (e.g. when determining the facts that constituted "manifestly unreasonable proceedings"). The Council supports this proposal.

Striking out or amending all or part of an application or reply that is manifestly unreasonable, or that has no reasonable chance of success[39]

127. With regard to making such orders, the Dispute Tribunal is understandably cautious, given that opinions may legitimately differ as to whether an application or reply is manifestly unreasonable or has no reasonable chance of success. There may be a small number of cases, however, when the Tribunal is satisfied that these

[36] This is a part of the Dispute Tribunal proposal (para. (a)). The statute of the Dispute Tribunal empowers it to establish rules relating to procedures for summary dismissal and for other matters relating to the functioning of the Tribunal (arts. 7 (2) (h) and 7 (2) (l)).

[37] Article 2 (1) (c) of the statute of the Appeals Tribunal.

[38] Article 2 (1) (e) of the statute of the Appeals Tribunal.

[39] This is a further part of the Dispute Tribunal proposal (para. (a)).

conditions are clearly and convincingly established[40] (e.g. where the supporting documentation required to be annexed under articles 8 (2) (g) and 10 (1) of the rules of procedure does in no way support a claim or defence and no credible supporting witness evidence can be cited by the affected party, or when at the beginning or at a certain stage of the proceedings it becomes clear that there is no reasonable chance of success) and striking out would then be justified. Subject to the proposed rule being so limited, the Council supports this measure also.[41]

Striking out any application or reply, or part thereof, on the grounds that the manner in which the proceedings are being conducted by a party has been abusive, disruptive, scandalous or otherwise unreasonable[42]

128. A party has traditionally been given a certain degree of latitude in the manner in which it presents its case to the Dispute Tribunal. While, therefore, the Council can support striking out if it can be proved by clear and convincing evidence that proceedings are being conducted in an abusive or disruptive manner, it has concerns about the power to strike out proceedings that are being conducted in a scandalous or otherwise unreasonable manner. Scandalously conducted proceedings would probably fall within abusive proceedings and specific mention in the rules would be unnecessarily repetitive, and the power to strike out otherwise unreasonably conducted proceedings appears overly broad. Accordingly, the Council would prefer these two grounds to be excluded.

Option III: obligations imposed on legal representatives to observe ethics

129. The General Assembly has requested the Secretary-General to prepare a code of conduct for legal representatives who are external individuals and not staff members. Moreover, the Assembly envisages that external counsel and counsel who are staff members would be subject to the same standards of professional conduct.[43] The code, with appropriate sanctions for breaches thereof, could add to the safeguards against abusive proceedings (see sect. VII below).

130. The sanctions imposed on legal representatives for misconduct could potentially take several forms, including denial of the right of audience of the counsel before the Tribunals until the misconduct is remedied or (as discussed below) an adverse award of costs against the lawyer who committed the misconduct, irrespective of the outcome of the dispute before the Tribunals.

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[40] This is a standard of proof established by the Appeals Tribunal and confirmed in a number of cases: "Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt — it means that the truth of the facts asserted is highly probable." See Molari (2011-UNAT-164, para. 30).

[41] The same safeguard of an opportunity to show cause against the proposed judgement or order, and a limited right of appeal, will exist for all cases.

[42] This is the UNDT Dispute Tribunal proposal (para. (b)).

[43] The Council recommends that there be a single code of conduct that applies to both staff member legal representatives and external counsel (see sect. VI below).

131. Under the statutes of both Tribunals, orders for costs in respect of an abuse of proceedings can be made only against a party. This is also the position under some national legal systems.[44] Under the uniform practice of the Dispute Tribunal, orders were made against one of the parties, without inquiry as to whether the party, or the party's legal representative, was actually responsible for the abuse.[45] Following this practice, in *Mezoui*, the Dispute Tribunal made an order for costs against the applicant.[46] On appeal, the order was set aside, the Appeals Tribunal holding that, given that the finding of abuse was based on the actions of Ms. Mezoui's legal representative during trial, Ms. Mezoui should not be made responsible for her legal representative's misconduct.[47]

132. As a consequence of this decision, collateral inquiries may now need to be made to determine whether the client or the legal representative was responsible for the abuse that occurred.

133. A potential consequence of *Mezoui* is that, confident in the knowledge that no order for costs can be made against a legal representative, a client and his or her legal representative may agree to state that the abusive proceedings were the responsibility of the legal representative alone.

134. Further to the comments in paragraph 97 supporting the adoption of a unified code of conduct for all counsel, the Council recommends the adoption of disincentives to deter abuse by legal representatives.[48] Such a disincentive might consist, for example, of giving the Tribunals express power to exclude legal representatives from audience before them for a specific period, to which might be added in very exceptional circumstances an award of costs against the legal representative personally, enforceable by a denial of access to the Tribunals until the award is paid.

Option IV: winner is awarded costs

135. Under many national legal systems, the general rule is that the unsuccessful party may be ordered to pay the costs of the successful party (irrespective of whether the unsuccessful party had committed abuse of proceedings). Imposing this rule would result in parties and their legal representatives taking great care to

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[44] Either through monetary sanctions or negative consequences in terms of costs, both the Italian and the French legal systems appear to ascribe responsibility for carrying out abusive practices to the parties exclusively. The actual performer, i.e. most probably the lawyer, is not expressly contemplated in norms such as article 92 of the Italian Code of Civil Procedure or article 32-1 of the French Code of Civil Procedure. See Taruffo, p. 124.

[45] This course was in accordance with a practice direction adopted by the Dispute Tribunal on 27 April 2012. It states in paragraph 3 that "a party may present his or her case to the Tribunal in person, or may designate counsel as per art. 12 of the Rules of Procedure of the Tribunal" and that "all acts and submissions undertaken by designated counsel in the course of the case shall be considered as acts and submissions of the designating party".

[46] UNDT/GVA/2009/60, paras. 77, 78 and 80.

[47] 2012-UNAT-220, para. 49.

[48] Some legal systems have such deterrents. Accordingly, in the United Kingdom, an order for wasted costs can be made against a legal or other representative in respect of improper, unreasonable or negligent conduct or omissions that result in costs being incurred by a party. An application for an order may be made by a party against the opponent's lawyer, or by a disgruntled client against his or her own lawyer (see Neil Andrews, *English Civil Procedure* (Oxford, Oxford University Press, 2003), sect. VIII, chap. 37, paras. 37.73-37.110).

advance only meritorious claims and defences. It may also result in a lowering of the volume of litigation, given that parties would be deterred from litigating dubious claims.[49]

E. Conclusions

136. Options II, III and IV appear viable reforms and do not involve additional expenditure.

VII. Code of conduct for external counsel

137. In paragraph 44 of its resolution 67/241, the General Assembly stressed the need to ensure that all individuals acting as legal representatives, whether staff members or external counsel, were subject to the same standards of professional conduct applicable in the United Nations system and requested the Secretary-General, in consultation with the Council and other relevant bodies, to prepare a code of conduct for legal representatives who were external individuals and not staff members and to report thereon to it at the main part of its sixty-eighth session.

138. On 16 July 2013, the Council received an initial draft code of professional conduct for external counsel acting within the United Nations system of administration of justice and was asked for comments thereon by 22 July 2013. The Chair sent comments on 25 July. The main points contained therein were the following:

(a) Clear definitions of client, scope of representation and counsel;

(b) Linking the required standards to the core values in the Charter and the Staff Regulations and Rules of the United Nations;

(c) Ensuring that the duty of confidentiality is consistent with counsel's obligations as an attorney under the law that governs his or her practice;

(d) Leaving it to the Tribunals to determine whether counsel has discharged the duty to draw adverse jurisprudence to its attention;

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[49] Such a rule might have a useful impact on a small core of continual litigators. The Council has learned from the Registries that a small number of applicants have each submitted from 10 to 18 applications for evaluation. While some appear to advance their claims in good faith, others appear determined to litigate rather than settle claims. The Council has learned from the Registries that, in the Dispute Tribunal, there have been two applicants who have filed 5 applications, one applicant who has filed 6 applications, two applicants who have filed 10 applications, one applicant who has filed 21 applications and one applicant who has filed 22 applications. In the Appeals Tribunal, there have been three appellants who have filed 5 appeals, one appellant who has filed 6 appeals, one appellant who has filed 8 appeals and one appellant who has filed 10 appeals. Some cases were withdrawn and others joined, however. The phenomenon is not, however, confined to the United Nations justice system. Under the case reporting practice of the International Labour Organization Administrative Tribunal, each case brought by an applicant has, in the title setting out his or her name, the ordinal defining the case's position in the totality of cases brought by that applicant (e.g. the first case brought by an applicant would have the title "In re X. Y. Z. Applicant (1)"). During its work, the Council came across "In re Vollering (21), Judgement 2114".

(e) Requiring counsel admitted to the practice of law in a jurisdiction to be bound by any rules of conduct that govern his or her practice of law and to provide the client with the address of the body to which violation of those rules can be reported;

(f) Requiring counsel to sign a declaration that he or she will comply with the United Nations code of conduct.

139. The Council wishes to emphasize that there should be one common code of conduct for all counsel who appear before either the Dispute Tribunal or the Appeals Tribunal, given that it would violate the important principle that the Tribunals should treat both parties with equality if counsel for the two sides were held to two different standards depending on whether one was a staff member and the other was not.

140. United Nations staff members who appear before the Tribunals as counsel, whether for the Secretary-General or for staff members, are governed by the relevant provisions of the Staff Regulations and Rules of the United Nations that relate to conduct. The ethical standards contained therein should form the basis of the common code of conduct for all counsel because the General Assembly has decided that all who appear must be subject to the same standards of professional conduct.[50] The Staff Regulations and Rules of the United Nations were not, however, drafted with the notion that staff might on occasions be officers of a United Nations court system. It is not always easy to apply the general provisions therein to the specialized situation of counsel who owe duties not only to their clients but also to the court as a part of the formal system of administration of justice created by the Assembly. Accordingly, a distinct code governing the conduct of counsel is necessary.

141. While misconduct by counsel does not appear to be a major problem, the Council was informed that the Dispute Tribunal has twice referred cases of possible misconduct by counsel for the Administration to the Secretary-General for possible disciplinary action and the Appeals Tribunal has concluded that an external counsel also engaged in misconduct. Accordingly, it seems to the Council to be important that the Tribunals have the power in their statutes to bar counsel from appearing for a period or permanently[51] and to impose costs on counsel because of wilful transgressions of the code, subject to procedures put in place to ensure due process for counsel accused of such transgressions.

142. The Council accepts that some remedies, or the procedures leading to imposition of some penalties, might have to be different depending on whether counsel is a staff member or external to the Organization. Some duties may have to be different depending on whether external counsel is a practising lawyer, given that

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[50] In paragraph 44 of its resolution 67/241, the General Assembly stressed the need to ensure that all individuals acting as legal representatives, whether staff members or external counsel, were subject to the same standards of professional conduct applicable in the United Nations system and requested the Secretary-General, in consultation with the Council and other relevant bodies, to prepare a code of conduct for legal representatives who were external individuals and not staff members and to report thereon to it at the main part of its sixty-eighth session.

[51] The United Nations Administrative Tribunal, by a letter dated 30 December 1993, decided to exclude an individual indefinitely from acting on behalf of any applicant or intervener in connection with any application before the Tribunal. The Tribunal previously had warned the individual more than once about his offensive conduct.

the relationship between the Secretary-General and a staff member assigned to defend an administrative decision before the Tribunals is not the same as the relationship between counsel and client. Nevertheless, the Council reiterates its view that there should be only one code of conduct for counsel. Accordingly, the Council recommends that the Secretary-General formulate a draft and circulate it for comment to stakeholders and to the Council rather than continuing to draft any further separate codes of conduct.

VIII. Office of Staff Legal Assistance financing

143. In paragraph 48 of its resolution 67/241, the General Assembly noted that the report of the Secretary-General on administration of justice at the United Nations contained a number of joint financing options for the Office of Staff Legal Assistance by the Organization and the staff and in that regard requested the Secretary-General, when submitting a single preferred proposal for consideration and approval, to do so in consultation with all relevant stakeholders, including the Council and staff representatives.

144. As at the time of preparation of the present report, the Council had received a discussion paper prepared by the Office of Administration of Justice on this subject, setting out the advantages and disadvantages of certain options, but had not received the Secretary-General's single preferred option. Nevertheless, the Council notes a number of principles that were enunciated by the prior Council:

(a) The Office of Staff Legal Assistance is of great value to the justice system, both in its representative and in its advisory functions. Its role is not to promote a litigation culture. On the contrary, timely legal advice may stop unmeritorious claims at the outset (A/67/98, paras. 45-48);

(b) The Office was established to remedy a serious disparity in the calibre of legal assistance given to the staff as compared to the legal resources available to management, resulting in an egregious inequality of arms in the internal justice system (ibid., para. 45). That view was shared by both the Secretary-General and by management and the staff.[52]

145. The Council anticipates receipt of the Secretary-General's recommendations for the Office of Staff Legal Assistance in due course and will study its terms and, depending on the circumstances, provide its considered views in its report of 2014 or as an addendum to the present report.

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[52] See A/62/294, para. 25, and footnote 7 of A/67/98, which provides: "The Secretary-General, in his report, also reiterated the view of management presented at the seventh special session of the Staff-Management Coordination Committee (see SMCC/SS-VII/ 2007/2) that experience had shown that when staff members resorted to outside counsel for representation, unfamiliarity with the legal framework applicable to the United Nations system could contribute to difficulties in the resolution of disputes. Accordingly, management fully supported strengthening the legal resources available to staff, by expanding the Panel of Counsel into an office with budgeted posts recommended by the Panel, to be staffed with legally qualified and proficient counsel on a full-time basis."

IX. Office of Administration of Justice

146. The Council notes, as it has in its previous reports, the importance of the work of the Office of Administration of Justice. The Office "is an independent office responsible for the overall coordination of the formal system of administration of justice, and for contributing to its functioning in a fair, transparent and efficient manner". In that regard, "the Office provides substantive, technical and administrative support to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal through their Registries; assists staff members and their representatives in pursuing claims and appeals through the Office of Staff Legal Assistance; and provides assistance, as appropriate, to the Internal Justice Council" (see ST/SGB/2010/3, sect. 2.1). The Council is grateful to the Office for the assistance provided to it.

X. Views on implementation of the formal system of administration of justice

A. Introduction

147. The central task of the Council is to help to ensure the independence, professionalism and accountability of the system of administration of justice. To effectively carry out its central task, the Council has thought it appropriate to propose to the General Assembly a longer-term programme of work to supplement the yearly requests that might also be anticipated from the Assembly based on past practice.

B. Review of the mandate of the Council

148. Two staff unions, in their discussions with the Council, and other unions, in prior papers submitted to the Staff-Management Committee, also urged a review of the terms of reference of the Council, in particular the qualifications for membership thereof, the nomination and appointment process (including the conditions under which the Secretary-General can decline to accept a nomination from the staff or management) and an examination of the ways in which the Council could more effectively interact with stakeholders. The Council was informed that management had agreed that the issue should be examined but had considered that it was not in a position to reach agreement with the staff because the Council should first consider the issue and make recommendations to the General Assembly.

149. A number of years ago, the Redesign Panel on the United Nations system of administration of justice recommended that the Secretary-General should elaborate the terms of reference of the Council (see A/61/815, para. 49) and the Advisory Committee on Administrative and Budgetary Questions noted that the Secretary-General's report (A/62/294) issued consequent to the report of the Panel appeared to restrict the functions of the Council to compiling lists of potential judges, recommending that further functions should be clarified (see A/62/7/Add.7, para. 57).

150. In their memorandum to the General Assembly in 2012, the Dispute Tribunal judges noted that the boundaries of functions and responsibilities between the

Internal Justice Council, the Office of Administration of Justice and the Dispute Tribunal were blurred and that that threatened the judicial independence mandated by the General Assembly in its resolution 63/253 (see A/67/98, annex II, para. 7).

151. The Council proposes that it examine the terms of its mandate during its term of office and make appropriate recommendations to the General Assembly.

C. Systemic problems

152. As noted above, the Council's interviews with many of the participants in the internal justice system of the United Nations have suggested numerous reforms that, with modest or no cost, could significantly enhance the independence, professionalism and accountability of its procedures, reduce inefficiency and enhance access to justice. Some of the reforms have already been endorsed herein. Others, and their justification, require further study and investigation and will be reported on in due course.

153. The Council considers that the time is ripe for an examination of the jurisprudence of the Tribunals to ascertain whether there are any recurring problems of a systemic nature that give rise to unnecessary litigation. Cases that reviewed disciplinary measures should be examined to ascertain whether the Tribunals have identified systemic problems. For example, the Council was informed that the staff and management have been working for some time in an effort to revise the instruction regulating the way in which investigations before the imposition of disciplinary measures are to be handled, although no agreement has yet been reached.

154. The Council's review should also consider whether there is any truth in the view of some that a culture of litigation is developing in the system. Such review would, however, be rather difficult and very time-consuming without an update to the Court Case Management System to enable it to generate reliable statistics (see para. 47).

D. Case management and general organization of hearings and sessions

155. Given the large and increasing numbers of cases being heard by the Tribunals, and recognizing that most court systems from time to time do suffer avoidable delays, and in the light of the considerable support from judges and Registry officials interviewed by the Council for increased powers with regard to case management, the Council considers that it might usefully examine the issue to ascertain whether benefits might be obtained from such increased powers and related systems to reduce avoidable delays in bringing cases to a resolution. The Council notes that the problem of avoidable delays is a concern of courts and commentators generally and is not at all a problem peculiar to the Tribunals.[53]

156. Obviously, the specific needs of the Tribunals will need to be taken into account and no national system will be directly applicable, but it is considered that

[53] See, for example, James G. Apple, "The virtues of a case management system in courts", *International Judicial Monitor* (2013). Available from www.judicialmonitor.org/current/editorial.html.

adoption of strengthened rules of procedure to assist the judges to move the proceedings along would be beneficial.

157. Consideration should also be given to extending Appeals Tribunal sessions from two to three weeks. The Council anticipates that it will have extensive discussions with the Tribunals and the Registries concerning these issues before making any recommendations.

E. Accountability

158. One of the principal objectives of the new internal justice system, apart from ensuring its professionalism and independence, was to ensure the accountability of managers and staff alike.[54]

159. The Council agrees with the recommendation of the Advisory Committee on Administrative and Budgetary Questions and others that, given that four years have passed since the establishment of the system, it would now be worthwhile to assess the possibilities and limitations with regard to the internal justice system achieving the desired accountability, professionalism and independence.

F. Office of Administration of Justice assistance

160. A number of the above tasks will be rather time-consuming and may in fact require full-time work, although the Council is a part-time body. Moreover, the resources of the Office of Administration of Justice, other than the Registries, are extremely limited, consisting of five staff members, including the Executive Director. The Council recognizes the severe budget constraints facing the Organization and will seek to begin its work on its own, but, at some stage, may have to request that additional resources be made available to enable it to complete some of the tasks in a timely manner, perhaps through the careful and limited use of a consultant to research the jurisprudence of the Tribunals. Alternatively, if a more effective search engine were put in place (see para. 48), such a consultant may not be necessary.

XI. Summary of recommendations

161. The various recommendations made herein are summarized below.

Role of the Internal Justice Council

162. The general mandate of the Council includes making recommendations on how to enhance the system of administration of justice (para. 8).

163. The representative members of the Council nominated by the staff and management are not their advocates and must act in complete independence and in conformity with the mandate established by the General Assembly for the Council (para. 13).

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[54] See resolutions 61/261, para. 4; 62/228, third preambular paragraph; 63/253, second preambular paragraph; 65/251, para. 7; 66/237, para. 8; and 67/241, para. 9.

Delays in appointing members of the Internal Justice Council

164. Nominations for members of the third Council should be sought six months before the end of the term of the current Council, i.e. by 1 May 2016 (para. 37).

Tribunals

165. Investment in the Court Case Management System and an updated search engine will make the system of administration of justice more efficient (paras. 47 and 48).

166. Budgetary permission should be granted by the General Assembly to enable counsel for the Secretary-General at the duty stations of the Tribunals to handle disciplinary cases (paras. 49-52).

167. The judges of both Tribunals should be accorded the privileges and immunities set out in section 19 of the General Convention (para. 63) and this legal status should be set out in the statutes (para. 64).

168. The Dispute Tribunal judges should be accorded the rank of Assistant Secretary-General and the Appeals Tribunal judges the rank of Under-Secretary-General (paras. 65 and 67).

169. The judges of both Tribunals should be accorded the same level of travel facilities as were accorded by the General Assembly to the members of the United Nations Administrative Tribunal (para. 66).

Qualifications of Appeals Tribunal judges

170. The resolution of the International Bar Association of 31 October 2011 concerning the values pertaining to judicial appointments to international courts and tribunals as set out in paragraph 75 should be endorsed by the General Assembly (para. 76).

171. Fifteen years of judicial experience, whether continuous or non-continuous, should suffice to satisfy the requirements of article 3 (3) (b) of the Statute of the Appeals Tribunal (paras. 77 and 78), but, in addition, a candidate for appointment should have at least 5 years of appellate experience among the required 15 years of judicial experience (paras. 79 and 81).

172. Experience in tribunals specializing in employment law should be expressly included as an alternative qualification (para. 82).

173. Relevant academic experience combined with practical experience should count towards the qualifying 15 years, provided that the judges have at least 5 years of appellate judicial experience (para. 89), and the statutes should be amended accordingly.

174. The statutory qualifications should be widened to include experience in international tribunals of relevance to the work of the Appeals Tribunal (para. 90).

175. Judges should be fluent in at least one of the working languages of the Appeals Tribunal. It is essential that the candidate be of good health and able to discharge the burdens of office (para. 91).

Abuse of proceedings

176. The Tribunals should be given express powers to address abuse of their proceedings (paras. 122-123).

177. The Council supports the proposal of the Dispute Tribunal that its rules of procedure empower it to strike out or amend all or part of a frivolous, vexatious or manifestly inadmissible application or reply and, in addition, an application or reply that does not in any way support a claim or a defence that has no reasonable chance of success, but only after an affected party has been given written notice of the proposed order or judgement and an opportunity to show cause why the order or judgement should not be made (paras. 125-127).

178. The Council does not support the rules of procedure permitting the striking out of pleadings deemed by the Tribunals to be "otherwise unreasonable" (para. 128).

179. Subject to the comments in paragraphs 97 and 139 advocating the adoption of a unified code of conduct for all counsel, the Council recommends measures to deal with misconduct by legal representatives (para. 134).

Code of conduct for external counsel

180. The Secretary-General should prepare a code of conduct applicable to all counsel who appear before the Tribunals (para. 142).

Views on implementation of a formal system of administration of justice

181. As part of its long-term work programme, the Council should:

(a) Review its mandate and make appropriate recommendations to the General Assembly (para. 151);

(b) Review the jurisprudence of the Tribunals to ascertain whether there are any recurring problems that give rise to avoidable inefficiencies in litigation (paras. 152-154);

(c) Examine the case management procedures of the Tribunals (paras. 155-157);

(d) Assess the possibilities and limitations with regard to the internal justice system achieving the independence, professionalism and accountability envisaged at its creation (para. 159).

(*Signed*) Ian **Binnie**

(*Signed*) Carmen **Artigas**

(*Signed*) Sinha **Basnayake**

(*Signed*) Anthony J. **Miller**

(*Signed*) Victoria **Phillips**

Annex I

Memorandum from the judges of the United Nations Appeals Tribunal

Requirement of the Appeals Tribunal that the judges be accorded a status concordant with the Tribunal's position within the United Nations internal justice system

1. The United Nations Appeals Tribunal judges have consistently requested that they be granted the status of Under-Secretary-General within the Organization. First and foremost, this request is based on the necessity that, within a rank-conscious system such as that of the United Nations, the credibility of the Tribunal (the appellate arm of the internal justice system) depends in no small measure on the formal status and function of its judges.

2. The Appeals Tribunal judges wish to remind the General Assembly that, in the United Nations Administrative Tribunal, which the Appeals Tribunal replaced, the judges had Under-Secretary-General status. Moreover, judges of other international tribunals, such as those for the Former Yugoslavia and Rwanda, as well as the Special Tribunal for Lebanon, are accorded this status.

3. It is imperative that this issue be dealt with by the General Assembly, which should be reminded that addressing the issue in the manner requested has little, if any, financial consequences for the Organization. What the granting of the Under-Secretary-General status to Appeals Tribunal judges will achieve is not something that can be assessed in monetary terms; rather, it will be measured by the authority and certainty that will be manifest when Appeals Tribunal judgements fall to be considered and implemented throughout the United Nations. Authority and certainty are necessary components of all judicial pronouncements, especially those of an appellate court. Under-Secretary-General status is therefore commensurate with the standing of the Appeals Tribunal as the highest court in the internal justice system.

4. Accordingly, the Appeals Tribunal judges call for an immediate response to their repeated request to be afforded Under-Secretary-General status.

Request of the Appeals Tribunal that the Convention on the Privileges and Immunities of the United Nations apply to its judges

5. The Appeals Tribunal judges repeat their request that the General Assembly apply the Convention on the Privileges and Immunities of the United Nations to them, in like manner as the applicability of the Convention to the judges of the International Court of Justice and of other tribunals established under the auspices of the Organization. Given their role in ensuring that the Staff Regulations and Rules of the United Nations are properly enforced and adhered to, the Tribunal judges themselves should not be left in a position where their own obligations and privileges remain unclear.

Requirements of the Appeals Tribunal for its proper functioning, in accordance with its statutory mandate

6. The mandate of the Appeals Tribunal as a properly functioning, professional, transparent and independent appellate court is set out in its statute, adopted by the General Assembly in its resolution 63/253.

7. The judges of the Appeals Tribunal are supremely conscious of their mandate and over the past four years have striven to ensure that the new system of justice be administered accordingly. Most importantly, they have ensured that appeals are heard and determined as expeditiously as possible, with due regard to the resources made available to the Tribunal for that purpose.

8. Since the inception of the new system of justice, the Appeals Tribunal judges have articulated their concerns about staffing and budgetary deficits and, while noting that such concerns have been addressed in part by the Office of Administration of Justice, the Internal Justice Council, the Secretary-General and the General Assembly, the judges remain concerned that the current influx of appeals will push the new system of justice into crisis.

9. In paragraph 37 of its resolution 67/241, the General Assembly itself noted the increasing number of cases proceeding to formal adjudication.

10. At all costs, the Appeals Tribunal judges wish to avoid the accumulation of a backlog of appeals, and the ensuing delays, which were one of the negative attributes of the former internal justice system.

11. Currently, the Appeals Tribunal is receiving approximately 125 cases per annum, which will require an average disposal rate of at least 120 cases each year to avoid a backlog. This increase underpins the requirement for three Tribunal sessions per year for the foreseeable future.

12. In such circumstances, it is inevitable that additional human resources will become imperative for the proper future functioning of the Appeals Tribunal and for the success of the new system of the administration of justice as a whole.

13. Accordingly, while the Appeals Tribunal Judges appreciate the financial strictures under which the entire Organization is operating, they wish to put on record the continuing desire that the Tribunal can continue to operate in accordance with international best practice.

General Assembly resolutions: paragraph 34 of resolution 67/241 and paragraph 30 of resolution 66/237

14. The Appeals Tribunal notes that the General Assembly, in paragraph 35 of its resolution 66/237, affirmed that judgements of the Dispute Tribunal, including judgements, orders or rulings, imposing financial obligations on the Organization were not executable until the expiry of the time provided for appeal in the statute of the Appeals Tribunal or, if an appeal had been filed in accordance with the statute of the Appeals Tribunal, until the Appeals Tribunal had completed action on such appeal in accordance with articles 10 and 11 of its statute.

15. In paragraph 34 of its resolution 67/241, the General Assembly, recalling paragraph 35 of its resolution 66/237, noted that corresponding changes in the rules of procedure of the Dispute Tribunal and the Appeals Tribunal had not been made.

16. The Appeals Tribunal judges consider it neither necessary nor logical that paragraph 35 of resolution 66/237 merits an amendment of the rules of procedure of the Tribunal.

17. The Appeals Tribunal judges also take note of paragraph 30 of resolution 66/237, in which the General Assembly requested the Appeals Tribunal to review its procedure with regard to the dismissal of manifestly inadmissible cases. They are of the view that the current rules of procedure of the Tribunal are adequate for dealing with manifestly inadmissible cases in the event that the Tribunal were to make such a finding.

Annex II

Memorandum from the judges of the United Nations Dispute Tribunal on systemic issues

A. Introduction

1. Further to their previous memorandum to the General Assembly in 2012 on systemic issues of the United Nations administration of justice system (A/67/98, annex II), the judges of the United Nations Dispute Tribunal hereby respectfully share with the General Assembly their views after four years of existence of the Tribunal.

B. Institutional stability

Interim independent assessment of the formal system of administration of justice

2. The judges take note that, pursuant to paragraphs 19 and 20 of General Assembly resolution 67/241, an interim independent assessment of the formal system of administration of justice will be conducted. While welcoming this initiative, the judges wish to stress that it is essential for a successful assessment that it be conducted by a competent body and that the structural framework of the system remain unchanged during the assessment period.

3. With regard to competence, the judges recommend that the assessors be required to have both experience and understanding of the roles, responsibilities and professional duties of the judiciary within an independent judicial system. As to the structural framework, the judges strongly believe that a meaningful assessment of the development of the system requires examining a stable structure or, at the very least, a structure that is subject only to minimal changes during the assessment period. For example, the existing pool of human resources of the Dispute Tribunal and its Registries should not be changed during the assessment period. To do otherwise would compromise the reliability of the findings arising from the assessment.

4. Concerning the terms of reference of the assessment, the judges recommend that the assessment team focus on determining whether the goals set by the General Assembly in its resolution 61/261 for the formal system of administration of justice are in fact being achieved. They further suggest that a draft report of the interim independent assessment be sent for comments to the entities assessed and that comments received be added in unedited form to the final report for consideration by the Assembly. This is consistent with the internationally accepted standards and practices for similar types of assessment exercises.

Number of permanent judges in each duty station

5. While different proposals on this issue were submitted to the General Assembly for its consideration at the end of 2012, the judges understand that it would be premature for the Assembly to adopt any proposal before the completion of the above-mentioned interim independent assessment.

6. Nevertheless, the judges wish to stress that, after four years of the Dispute Tribunal's existence, the regularization of the ad litem judges' positions remains a fundamental issue that needs to be resolved as a matter of priority and without further delay. The current statistical data continue to show – as pointed out in the judges' 2012 memorandum to the General Assembly – that a timely handling of the workload of the Tribunal calls for the appointment of one additional permanent judge at each of the Tribunal's duty stations. The number of cases filed with the Tribunal in 2012 was 258, less than in 2011, when 282 cases were filed. It must be noted, however, that there has already been an increase in the number of cases filed early in 2013, i.e. 161 new applications by 30 June.

7. The judges reiterate their previous view on this matter (see A/67/98, annex II, sect. A) and recall that access to justice is denied if it is delayed. Furthermore, mindful of their view that a successful assessment requires the examination of a stable structural framework, the judges urge the General Assembly to give positive consideration to the extension of the appointments of the ad litem judges and their supporting staff beyond 31 December 2013.

C. Matters affecting the independence of the system of administration of justice

Independence of the Dispute Tribunal

8. In the opening paragraphs of its resolution 67/241, the General Assembly recalls and reaffirms previous resolutions on the functioning of the system of administration of justice as well as applicable legal principles. Most importantly, the Assembly concludes, in paragraph 8, that some decisions taken by the Tribunals may have contradicted the provisions of General Assembly resolutions on human resources management-related issues.

9. The judges express their deep concern about this conclusion because it constitutes an interpretation of judicial decisions by a legislative body. In doing so, the legislative body exceeds the well-known and generally accepted principle of separation of powers that draws a clear distinction between the competencies of each body. The core function of an independent judiciary is to apply and interpret legal provisions previously approved by the legislator. The independence of the judiciary requires that any attempt — irrespective of its source — to unduly influence the jurisprudence of the judiciary be rejected. If the legislative body disagrees with the development of jurisprudence by the judiciary, it is limited to the exercise of its undisputed right and competence to amend the laws from which each judicial decision derives in accordance with international law and the rule of law.

10. The judges note that in paragraph 12 of the same resolution the General Assembly emphasized the importance of the principle of judicial independence in the system of administration of justice. The doctrine of separation of powers draws clear lines between the competencies of each body, as described above. Acting otherwise imperils the independence of any judicial body and runs counter to the Assembly's initial intent when setting up the new system of administration of justice.

Reporting line

11. The judges recall that another core systemic issue that remains unresolved is the lack of a direct reporting line from the Dispute Tribunal to the General Assembly. The need to ensure the impartiality and independence of the judiciary, as well as of the judges' position in the hierarchy of the United Nations, requires that the Tribunal must have direct access to the Assembly, instead of processing all views and requests of the judiciary, including those relating to its conditions of service, through a report prepared and submitted by the Secretary-General and/or through one prepared by the Internal Justice Council. Given the role of the Council as a body charged by the Assembly with responsibility for general oversight and reporting on the efficiency and effectiveness of the system of internal justice as a whole, it is inappropriate for one of the component parts of the system to report to the Assembly through the Council.

12. The judges further reiterate that such a reporting line has been established for other United Nations tribunals and for the informal part of the system of administration of justice, namely the Office of the Ombudsman.

D. Transparency of the system of administration of justice

Courtroom and access to the public

13. The judges are pleased to inform the General Assembly that on 11 June 2013 the Registry in Nairobi inaugurated the Dispute Tribunal's first fully functional courtroom after four years of the Tribunal's existence, in line with paragraph 60 of Assembly resolution 67/241. The Geneva Registry is expected to follow by the end of 2013, but work is yet to begin on the design of a courtroom in New York. The judges consider it important that the New York Registry be located in the Headquarters Building, where its presence at the heart of Headquarters would give the Tribunal visibility, transparency and standing in keeping with the spirit and intention of Assembly resolution 61/261.

Complaints mechanism

14. The judges welcome the approval of a mechanism for addressing possible misconduct of judges by the General Assembly in paragraph 41 of resolution 67/241. The implementation of the necessary procedural framework is under preparation. Since the approval of the mechanism, no complaint has been made known to the President of the Dispute Tribunal. It is the judges' view that, according to general principles of non-retroactivity, the new mechanism is not applicable to complaints that may have been possibly filed before the approval of the mechanism.

E. Adequate resourcing

15. The judges note that, in its resolution 67/241, the General Assembly reaffirmed its decision, contained in paragraph 4 of resolution 61/261, to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the

rights and obligations of staff members and the accountability of managers and staff members alike.

16. The Dispute Tribunal's four-year experience shows that the initial level of funding for the Tribunal, as well as that for the Office of Administration of Justice, underestimated the actual costs of operation. The lack of adequate resources has put at risk the proper functioning of the system of administration of justice, as outlined below.

17. The judges understand that a partial solution to the problem has been offered in the corrective action taken by the Executive Director of the Office of Administration of Justice in the context of the proposed programme budget for the period 2014-2015, and urge the General Assembly to positively consider the budget proposal put before it.

Staffing

18. The judges reiterate that the current staffing resources of the Dispute Tribunal's Registries, exacerbated by the abolishment of three posts of Associate Legal Officer (P-2) on 1 January 2012, do not allow for the provision of proper substantive, administrative and technical support to the judges.

Funding for plenary meetings of the Dispute Tribunal judges

19. The General Assembly has, in various resolutions, called for the decentralization of the system of administration of justice. In this decentralized system the judges are located in three duty stations and time zones. They need to meet regularly in person to address matters of jurisprudence, practice directions, rules of procedure, standardization of practices, issues raised by the Assembly and generally to attend to housekeeping issues. The extended discussions necessary to resolve those important issues are difficult to conduct by e-mail and videoconference.

20. It is evident from the experience of the past four years that, ideally, a minimum of two plenary meetings per year is necessary, during which the judges and the registrars meet in person.

21. The judges recall that, although article 2 (1) of the Dispute Tribunal's rules of procedure provides for more than one plenary meeting per year, no funds were allocated for a second plenary meeting. In 2012, it was critical for the judges to hold two such meetings and the Office of Administration of Justice was forced to draw on other resources to cover the cost of a second plenary meeting. That state of affairs left the system without funding for a plenary meeting in 2013 and the judges had no option other than to take note of the funding crisis.

22. The judges strongly believe that the lack of sufficient funds for plenary meetings must be addressed, given that it is an impediment to their compliance with their legal duties under article 2 (1) of the rules of procedure, which states that "the Dispute Tribunal shall normally hold a plenary meeting once a year".

23. The judges understand that, given the financial situation of the Organization, the proposed programme budget for the period 2014-2015 put forward by the Office of Administration of Justice recommends the allocation of funds to ensure three plenary meetings per biennium and, while they support such a proposal as an

interim measure, they maintain their view that a minimum of two plenary meetings per year will enhance the Dispute Tribunal's efficiency and effectiveness.

Travel funds for Registry staff

24. The Registries have experienced even greater difficulties than the judges because no travel funds were allocated in the past four years for annual meetings of the staff of the Registries of the three duty stations. During this period, it has proved challenging and at times impossible to properly work on ensuring the consistency and standardization of practices among the Registries. Similarly, travel funds should be specifically allocated to the Principal Registrar to properly oversee the work of all three Registries.

Transcripts of hearings

25. Professional and reliable records of proceedings are essential for the transparency of the system of administration of justice. The Appeals Tribunal has underlined the importance of proper records and has ruled that failure to have them entails a mistrial of a case (see *Finniss* (2012-UNAT-210)). The judges recall that upon the creation of the new system of administration of justice no funds were allocated for recordings or for the transcriptions of hearings. These are important for matters taken on appeal, especially in cases in which there are complicated or numerous factual findings.

26. The judges support the allocation of sufficient funds for the production of professional recordings and transcripts of hearings in all duty stations of the Dispute Tribunal.

Information and communications technology resources

27. Feedback received from stakeholders proves that the currently available web-based search engine for accessing and researching judgements and orders of the Dispute Tribunal remains rudimentary and does not allow effective searches of published rulings.

28. Accordingly, sufficient funding should be allocated to assist the Office of Administration of Justice in establishing an effective online search tool to facilitate dissemination of the jurisprudence of the new professionalized internal justice system.

F. Adequate representation of applicants before the Dispute Tribunal

29. The experience during the four-year existence of the system of administration of justice shows that a significant number of unrepresented applicants hinder the Dispute Tribunal's ability to adequately focus on managing its caseload. Such applicants often do not understand the legal process and tend to file numerous irrelevant documents and submissions, swamp the Registries with unnecessary or inappropriate queries and requests and generally bog down the system, causing delays in proceedings.

30. The right to representation is an essential element of the new system of administration of justice. It is guaranteed by the Universal Declaration of Human Rights and enshrined in the principle of equality of arms. The necessity to ensure

that parties before the Dispute Tribunal, applicants in particular, have adequate legal representation was recognized by the General Assembly as a requirement for the United Nations to be an exemplary employer and is a key matter to be monitored regularly.

31. The judges stress that the role of the Office of Staff Legal Assistance should continue to be that of assisting staff members to not only process their claims, but also to represent applicants before the Tribunals, irrespective of the source of funding for the Office.

G. Changes to the rules of procedure of the Dispute Tribunal

32. The judges noted the General Assembly's remark in resolution 67/241 that changes in the rules of procedure of the Dispute Tribunal had not been made and its reference therein to paragraph 35 of its resolution 66/237 on the enforceability of the Dispute Tribunal's decisions. In the latter paragraph, the Assembly recalled article 11 (3) of the statute of the Dispute Tribunal and affirmed that judgements of the Dispute Tribunal, including judgements, orders or rulings, imposing financial obligations on the Organization were not executable until the expiry of the time provided for appeal in the statute of the Appeals Tribunal or, if an appeal had been filed in accordance with the statute of the Appeals Tribunal, until the Appeals Tribunal had completed action on such appeal in accordance with articles 10 and 11 of its statute.

33. The judges have a number of concerns with regard to paragraph 35 of resolution 66/237 and paragraph 34 of resolution 67/241.

34. First, the reasons for the General Assembly's reference in resolution 67/241 to changes in the rules of procedure are unclear, given that paragraph 35 of resolution 66/237 contains no references to or requests for amendments to the rules of procedure.

35. Second, the judges respectfully draw the General Assembly's attention to the fact that article 32 (1) of the Dispute Tribunal's rules of procedure replicates the wording of article 11 (3) of its statute. There is therefore a provision in the rules that addresses the enforceability of its decisions and the judges see no need for a further amendment.

36. Third, the judges note that the Tribunals operate within the statutory framework adopted by the General Assembly, including its decision, expressed in several resolutions, to establish an independent system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process. Although the Assembly may have certain views as to how the statute may be amended and has the power to do so, suggestions as to how the Tribunals should interpret and apply existing legal instruments would appear to be contrary to the principle of judicial independence.

37. Fourth, changes to the statute or the rules of procedure based on paragraph 35 of resolution 66/237 could have negative implications of which the General Assembly may not have been made aware. For example, the Dispute Tribunal would be effectively deprived of its statutory power specifically granted to it by the Assembly when it approved the statute to issue judgements/orders for urgent interdicts or interim measures under articles 2 (2) and 10 (2) of the statute, given

that some of them may impose financial obligations. Furthermore, implementation of paragraph 35 of resolution 66/237 may make some case management orders non-executable (e.g. an order under article 17 of the rules of procedure requiring that a witness located at one duty station attend a hearing held at another duty station in person). This provision would have the effect of undermining the proceedings.

H. Draft code of professional conduct for external counsel

38. Article 12 of the rules of procedure of the Dispute Tribunal provides for self representation, representation by the Office of Staff Legal Assistance, representation by external counsel authorized to practice law in a national jurisdiction or representation by a staff member or former staff member of the United Nations or one of the specialized agencies.

39. It is important to recall that the General Assembly, in its resolution 67/241, stressed the need to ensure that all individuals acting as legal representatives, whether staff members or external counsel, were subject to the same standards of professional conduct applicable in the United Nations system and requested the Secretary-General, in consultation with the Internal Justice Council and other relevant bodies, to prepare a code of conduct for legal representatives who were external individuals and not staff members and to report thereon to it at the main part of its sixty-eighth session.

40. In line with the above, a code of conduct for external counsel was drafted and shared with the Dispute Tribunal judges. The judges are of the view that having a code regulating the conduct of external counsel results only in the creation of differing standards of conduct for several different groups of representatives appearing before the Tribunal. Therefore, while the General Assembly requested the same standard of conduct for all representatives, a code exclusively for external counsel runs counter to such request.

41. It cannot be legitimately argued that the standards of conduct prescribed in the current draft code for external counsel already inherently exist in the current Staff Rules and Regulations of the United Nations governing staff members of the Office of Staff Legal Assistance, the Administrative Law Section and the Office of Legal Affairs, as well as other staff members who may appear before the Dispute Tribunal. The Staff Rules and Regulations of the United Nations contain very broad standards of conduct that do not match those envisaged for external counsel appearing before the Tribunal. Moreover, the very specific duties and obligations itemized in the current draft code cannot be implied as applying to the respondent's counsel.

42. While the Secretary-General does have the power to discipline staff members, it is quite distinct from the power of the Dispute Tribunal to oversee its bar. For example, misbehaviour before the Tribunal may amount to a violation of the code of conduct without being regarded as misconduct under the Staff Rules and Regulations of the United Nations, and vice versa.

43. The Dispute Tribunal judges are therefore opposed to the approval of a code of professional conduct governing exclusively a subgroup of counsel appearing before the Tribunal, namely external counsel. They further urge the General Assembly to re-examine this matter and ensure that a single code of professional conduct governing all counsel appearing before the Tribunal be drafted.