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Report of the Internal Justice Council

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I. Introduction

1. This is the second report of the second panel of the Internal Justice Council. The tenure of all members of the second panel of the Council expires on 12 November 2016.

2. The current membership of the Internal Justice Council consists of five members: two distinguished external jurists, one nominated by United Nations staff and one by United Nations management, one representative nominated by the staff and one representative nominated by management, and a distinguished jurist nominated by the four members to be the Chair (resolution 62/228, para. 36). The Secretary-General appoints the persons so nominated to the Council. The current members of the second panel of the Council are external jurists Sinha Basnayake (Sri Lanka, nominated by management) and Victoria Phillips (United Kingdom of Great Britain and Northern Ireland, nominated by staff). The representatives are Carmen Artigas, Uruguay (Economic Commission for Latin America and the Caribbean (ECLAC), nominated by staff) and Anthony J. Miller, Australia (former member of the Office of Legal Affairs, nominated by management). The Chair is Justice Ian Binnie, Canada, former Justice of the Supreme Court of Canada.

3. The Internal Justice Council held telephone conferences on 20 January, 25 February and 7 April 2014 to discuss its work programme and plan for its 2014 annual session. Much of the preparatory work and preparation of the report of the Council was undertaken by e-mail.

4. The Chair met with the judges of the United Nations Dispute Tribunal and Registrars at their plenary session in Geneva on 28 April 2014, having previously met with the judges of the United Nations Appeals Tribunal in Washington, D.C., on 2 April 2014. The purpose of these meetings was to have an exchange of views regarding the current operation of the internal justice system.

5. The Internal Justice Council met in New York from 30 April to 3 May 2014, and met with stakeholders who were available in New York or who were available to be contacted by video conference or telephone, in particular with the following: the Presidents of both the United Nations Dispute Tribunal and the United Nations Appeals Tribunal and a number of judges from the Dispute Tribunal, the Under-Secretary-General for Management; the Executive Director and representatives of the Office of Administration of Justice, the Principal Registrar and Registrars of the Dispute Tribunal and the Administrative Tribunal, the Ombudsman and a member of his staff, the Chief and representatives from the Office of Staff Legal Assistance, representatives from the United Nations Office at Geneva Staff Coordinating Council, a representative of the Management Evaluation Unit, and representatives of the Staff Union of the United Nations Development Programme, the United Nations Population Fund, the Office for Project Services and the United Nations Entity for Gender Equality and the Empowerment of Women, the Bar Association for Intergovernmental Organizations; an association of external counsel who represent United Nations staff members in the internal justice system, the Director of the Ethics Office, the Assistant Secretary-General for Human Resources Management and representatives from her Office, including the Administrative Law Section, a representative from 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 staff.

II. Vacancies in the United Nations Dispute Tribunal and the United Nations Appeals Tribunal

6. By paragraph 37 (b) of resolution 62/228, the General Assembly required the Internal Justice Council to "provide its views and recommendations to the General Assembly on two or three candidates for each vacancy in the Dispute Tribunal and the Appeals Tribunal, with due regard to geographical distribution". In paragraph 57 of resolution 63/253, the Assembly decided that "for future appointments the Internal Justice Council shall not recommend more than one candidate from any one Member State for a judgeship on the United Nations Dispute Tribunal, or more than one candidate from any one Member State for a judgeship on the United Nations Appeals Tribunal".

7. Judge Jean-François Cousin resigned from his position as a judge of the Dispute Tribunal effective 1 April 2014.

8. Judge Jean Courtial resigned from his position as a judge of the Appeals Tribunal effective 31 December 2013.

9. The recommendations and views of the Internal Justice Council to the General Assembly for replacements for these two vacancies are being transmitted to the General Assembly in a separate report.

III. Mandate of the Internal Justice Council

10. The General Assembly, in its resolution 62/228 of 22 December 2007, by which it established the Internal Justice Council, stressed "that the establishment of an internal justice council can help to ensure independence, professionalism and accountability in the system of administration of justice" (para. 35). Since the sixty-sixth session, the General Assembly requested the Council to include the views of both Tribunals as part of its report (see resolution 66/237, para. 45). Accordingly, the views of the Dispute Tribunal are annexed as annex I to the present report, and the views of the Appeals Tribunal are attached as annex II to the present report.

11. The Internal Justice 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.

12. In addition to the general mandate contained in resolutions 62/228 and 65/251, the General Assembly has asked the Internal Justice Council to perform a wide range of specific tasks that have varied from year to year.

13. Section IV of the present report responds to a specific request made of the Internal Justice Council in resolution 68/254. Sections V to VIII deal with matters under its general mandate. Section IX is a summary of the recommendations made by the Council to the General Assembly in the body of the report.

IV. General Assembly request concerning interim judgements and orders

A. Introduction

1. The request

14. The General Assembly, in paragraph 29 of its resolution 68/254 of 27 December 2013, "requests the Internal Justice Council to report on the impact of the request contained in paragraph 33 of resolution 67/241, taking into account the views of all relevant stakeholders".[1] Paragraphs 33 and 34 of resolution 67/241, referring to resolution 66/237, asked the Tribunals to amend their rules of procedure whenever a decision of the General Assembly entails a change in the rules of procedure. Paragraph 35 of resolution 66/237 affirmed that judgements, orders or rulings "imposing" financial obligations on the Organization are not executable until the time for appeals expires.

15. The underlying objective of paragraphs 33 and 34 of resolution 67/241 was to establish that interlocutory judgements, orders and rulings "imposing" financial obligations should not be executable until the time for appeals had expired.

16. The request raises a number of questions and the potential impact of answers to those questions:

(a) To what extent are interlocutory procedures appealable under the present system?

(b) What could be the financial and practical effect of expanding the class of interlocutory orders subject to appeal?

(c) What is the effect on the principle of the independence of the tribunals, which may formulate (subject to the approval of the General Assembly) its own rules of conduct and procedure to implement the respective statutes of the Tribunals?

(d) What is the scope of "judgements, orders or rulings that impose financial obligations on the organization"?

2. Consultation with stakeholders

17. Pursuant to the above mandate, the Internal Justice Council undertook to consult with stakeholders.

18. Written comments (listed in order of receipt) were received from the judges of the Dispute Tribunal, the Office of Staff Legal Assistance, the Bar Association for Intergovernmental Organizations and the United Nations Office at Geneva Coordinating Staff Council. These comments are noted at various points in the analysis, with comments on proposed changes to the statutory texts summarized in

[1] The Internal Justice Council asked stakeholders to submit views by 16 June 2014 and has taken account of views received by 8 July 2014. The Council advised potential commentators that all communications will, on request, be kept confidential and in that case will be identified only as "one view expressed" to the Council or words to that effect, but failing such request, the person or entity making the comment will be identified. No stakeholder requested confidentiality.

section D below. The complete texts of all comments are readily available to delegations from the Office of Administration of Justice.

3. Background to the current debate

19. In his report to the General Assembly at its sixty-sixth session, the Secretary-General concluded that the "right of the Dispute Tribunal to enforce compliance with interlocutory orders must be balanced against the right of the parties to appeal interlocutory orders in good faith, particularly in cases in which the Secretary-General would otherwise be required to execute an interlocutory order issued by the Dispute Tribunal that contradicts the established jurisprudence of the Appeals Tribunal" (A/66/275 and Corr.1, para. 265). An interlocutory order is, by definition, an order made by a Tribunal in the course of proceeding prior to its determination on the merits. An interim order is an interlocutory order of a specified duration. In the discussion that follows the terms "interlocutory" and "interim' are often used interchangeably.

20. The Secretary-General accordingly recommended that "the Assembly amend article 7.5 of the statute of the United Nations Appeals Tribunal to clarify that appealing an interlocutory order issued by the Dispute Tribunal shall have the effect of suspending the execution of the contested order. The related provisions of the rules of procedure of the Tribunals would also need to be amended" (para. 266).[2]

21. As will be discussed, however, the types of interlocutory orders capable of being appealed under the present rules are extremely limited.

4. Prior published views of the judges

22. The judges of the Dispute Tribunal and the Appeals Tribunal note that, under the present rules of procedure, interlocutory orders may be appealed in appropriate circumstances and that changes in the rules are the responsibility of the Tribunals and not the General Assembly.

23. The judges also express a concern about protecting judicial independence.

24. In 2013 the judges of the Appeals Tribunal, in their memorandum to the General Assembly, summarized paragraph 35 of resolution 66/237 and paragraph 34 of resolution 67/241, and concluded that it was "neither necessary nor logical that paragraph 35 of resolution 66/237 merits an amendment of the rules of procedure of the Tribunal" (A/68/306, annex I, paras. 14 to 16).

25. The judges of the Dispute Tribunal, in their 2013 memorandum to the General Assembly, summarized the resolutions and then noted that they had a number of concerns on the request in the resolutions (see A/68/306, annex II, paras. 32-37):

(a) "[T]he 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

[2] Para. 35 of resolution 66/237 recalled "article 11, paragraph 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 are not executable until the expiry of the time provided for appeal in the statute of the Appeals Tribunal or, if an appeal has been filed in accordance with the statute of the Appeals Tribunal, until the Appeals Tribunal has completed action on such appeal in accordance with articles 10 and 11 of its statute".

resolution 66/237 contains no references to or requests for amendments to the rules of procedure" (para. 34);

(b) There is already a provision in the rules of procedure that deals with enforceability of its decisions that replicates the provision in article 11.3 of its statute and "the judges see no need for a further amendment" (para. 35);

(c) "[T]he 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" (para. 36);

(d) The changes requested by the Assembly to its rules of procedure would effectively deprive the Dispute Tribunal "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" and "implementation of paragraph 35 of resolution 66/237 may make some case management orders non-executable (for example, 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" (para. 37).

B. Policy impact of the request on the operations of the Dispute Tribunal

26. This section of the report addresses the impact of the changes sought by the General Assembly on the operation of the Dispute Tribunal. The report first examines some cases where the Appeals Tribunal has explained the need for trial judges to control the proceedings and the potentially disruptive effect of appeals from interim orders made prior to any decision on the merits. This is an aspect of case management (although not necessarily limited to article 19 of the rules of procedure, which has "case management" as a title and empowers orders "for the fair and expeditious disposal of the case and to do justice to the parties"). The general approach of the Appeals Tribunal has been to permit "appeals" from interim orders and rulings in the limited cases of manifest excess of jurisdiction or competence. As such actions are null and void as a matter of law, the Internal Justice Council considers that this limited class of interlocutory appeals is perfectly appropriate.

27. Our next task is to examine the jurisprudence of the Appeals Tribunal that has sought to ensure that the limits currently established by the statutes are strictly observed. Although the Appeals Tribunal has stated that a party must respect and implement an interim order until it is vacated on appeal, it has made it equally clear that the Dispute Tribunal acts "unlawfully" if it goes beyond the limits of its statutory powers in relation to interim orders (see the recent Full Bench Appeals Tribunal decision in *Igbinedion*, 2014-UNAT-410, see paras. 45-46 below).

1. Interlocutory or interim orders and rulings are generally considered non-appealable

28. It is not surprising that the efficient disposition of disputes at the first level of adjudication leaves much to the discretion of the trial judge. The judge must decide what evidence or documents are needed and may order the parties to produce such documents even though they strenuously object, for example, on the basis of confidentiality, the effort involved in locating the documents or the cost of compliance. The philosophy behind enabling the trial judge to control the proceedings, even if an appellate court would have handled the case differently, is that if every interim order and ruling made during the conduct of a trial could be appealed it is unlikely that any case could be disposed of speedily. The Appeals Tribunal statute at first glance seems to reflect this philosophy because the right of appeal is "against a judgement rendered by the United Nations Dispute Tribunal" (art. 2.1), while the statute of the Dispute Tribunal refers to many procedures that are not denominated as "judgements" that will occur prior to final disposition of the case on the merits.[3]

29. An additional policy concern is that if a claim is eventually dismissed on the merits the various interlocutory or interim orders made at an earlier point in the proceedings become moot, and the time and expense involved in their appeal would simply be costs thrown away.

30. Nevertheless it seems obvious to the Internal Justice Council that for any interlocutory or interim orders and rulings to be valid, they must be made within the jurisdiction or competence of the Dispute Tribunal. If they do not meet this basic test they are legal nullities, and so there must be a way for a party to go to the appellate level to establish that the interim order or ruling was null and void because it was beyond the competence or jurisdiction of the Dispute Tribunal to make. As the statute of the Appeals Tribunal makes no provision for such a challenge, except in the context of an appeal filed against a "judgement rendered by the United Nations Dispute Tribunal" (art. 2.1 of the Appeals Tribunal statute), the Appeals Tribunal has had to develop procedures to dispose of such issues.

31. Early in its first session, the Appeals Tribunal looked at the policy behind the various provisions noted above and stated that the "UNAT [United Nations Appeals Tribunal] statute does not clarify whether UNAT may review only a judgement on merits, or whether an interlocutory decision may also be considered a judgement subject to appeal. But one goal of our new system is timely judgements. This Court holds that generally, only appeals against final judgements will be receivable. Otherwise, cases could seldom proceed if either party was dissatisfied with a procedural ruling" (*Tadonki*, 2010-UNAT-005, para. 8).

32. This approach was amplified later in that first session in *Calvani*, 2010-UNAT-032, where, after setting out article 9.2 of the Dispute Tribunal statute and articles 18.2 and 19 of its rules of procedure, the Appeals Tribunal held that "it follows from these provisions that the Tribunal has discretionary authority in case management and the production of evidence in the interest of justice. Should the Tribunal have committed an error in ordering the production of a document that was immaterial, non-existent or deemed confidential under the relevant provisions of the Organization, or have drawn erroneous conclusions in law or in fact in the final

[3] Articles 2.2, 2.3, 2.4, 8.3, 9.1, 9.2, 9.3, 10.1, 10.2 and 10.4 use both the term judgement and decision.

judgment handed down at the request of an applicant as a result of failure to produce a relevant document, it would be the responsibility of the respondent to appeal that judgment" (para. 9). The Tribunal concluded that:

> "We view as non-serious the argument that the Dispute Tribunal exceeded its authority in issuing the contested order and that the order is thus subject to appeal. The Dispute Tribunal decided on a measure of inquiry, the necessity of which it had sole authority to assess. We do not see any basis in the internal system of justice of the Organization or that it is in the interest of that system of justice for considering an appeal against a simple measure of inquiry receivable" (para. 10).

33. In *Calvani* the Appeals Tribunal recognized the distinction between, on the one hand, interim orders and rulings made within the competence of the Dispute Tribunal even though as a practical matter the Appeals Tribunal may have reached a different conclusion, and those interim orders and rulings that are in effect a legal nullity because they go beyond the competence of the Dispute Tribunal. This is supported by the discussion in *Wamalala*, 2013-UNAT-300, where the Appeals Tribunal noted that it "is firmly of the view that cases before the UNDT would seldom proceed if either party were able to appeal to the Appeals Tribunal when dissatisfied with interlocutory decisions made during the course of the proceedings" (para. 16). It then observed that "the UNDT enjoys wide powers of discretion in all matters relating to case management and that it [the Appeals Tribunal] must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for the dispensation of justice. For this reason, and in accordance with articles 2 (2) and 10 (2) of the UNDT statute, appeals against decisions taken in the course of proceedings and relating to procedure, such as matters of proof, the production of evidence, or interim measures, are not receivable [i.e., not appealable], even where the judge of first instance has committed an error of law or fact relating to the application of the conditions to which the grant of a suspension of action is subject or a procedural error"[4] (para 17). The Tribunal noted that there were exceptions when the Tribunal clearly exceeded its competence or jurisdiction (para. 18), and this is dealt with in paragraphs 41 to 49 below.

Comments by the judges

34. In their written comments, the Dispute Tribunal judges reiterated the views that they had expressed last year (see A/68/306, annex II, para. 37) that

> "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 (for example, an order under

[4] See also *Tadonki*, 2010-UNAT-005, para. 8; *Tiwathia*, 2012-UNAT-327, para. 10; *Kananura*, 2012-UNAT-258, para. 17; *Baron*, 2012-UNAT-257, para. 22; *Bali*, 2012-UNAT-244, para. 8; *Benchebakk*, 2012-UNAT-256, para. 37; and *Nwuke*, 2013-UNAT-330, paras. 19 and 20.

> 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).”

35. The Dispute Tribunal judges, in their written comments, also emphasized that if a right of appeal were allowed against all interlocutory orders, this would greatly impact the timely disposal of all cases, and they cited *Cooke*, 2013-UNAT-380, where the Appeals Tribunal held that

> “it appears to this Tribunal that the Dispute Tribunal failed to show proper consideration for judicial economy and efficiency. With full knowledge of the appeal by the Secretary-General, the UNDT chose to proceed with a hearing on the merits of Mr. Cooke’s application — ignoring the possibility that its Judgment on Receivability might be reversed (as it was). Certainly, the better or preferred practice would have been for the Secretary-General to have sought a stay of the hearing from the UNDT or for the UNDT to have stayed *sua sponte* the hearing pending the Judgment of the Appeals Tribunal” (para. 9).

The judges added that it

> “is clear from that decision that whenever there is an appeal filed against an interlocutory order the case cannot proceed. The UNDT is therefore caught between two fires: on the one hand when cases are delayed the General Assembly expresses concern and on the other hand the Dispute Tribunal is enjoined by UNAT to put cases on hold pending the determination of appeals on interlocutory orders”.

Comments by stakeholders

36. The Office of Staff Legal Assistance, in its written comments, deals with the case of orders that decline to dispose of a proceeding such as the dismissal of a motion for summary judgement or orders that only address part of a proceeding. Although there are arguments for permitting an immediate appeal of such rulings, the Office favours that all arguments on such rulings should be made during any appeal from the final judgement on the merits.

37. The Office of Staff Legal Assistance agrees that there must be limits on appeals from procedural questions, particularly if such an appeal has an automatic suspensory effect. It suggests that errors of procedure could be addressed by an appeal from a judgement or order on the merits under article 2.1 (d) of the statute of the Appeals Tribunal (that provision gives as a ground of appeal “Committed an error in procedure, such as to affect the decision of the case”).

38. The Office of Staff Legal Assistance also recommends that applications to the Dispute Tribunal for temporary relief should be treated differently since “the statutes prescribe no kinds of error that would warrant overturning such relief”. It recommends that if amendments to the statutes are made to permit appeals from such orders, they should be made “through an express process of interlocutory appeal, and upon express grounds” because the attempt to draw “a distinction between excess of jurisdiction (Appeals Tribunal statute, art. 2 (1) (a)), a failure to exercise jurisdiction (Appeals Tribunal statute, art. 2 (1) (b)) and “simple” error of law (Appeals Tribunal statute, art. 2 (1) (c)) is likely too fine to be practically drawn”.

39. The United Nations Office at Geneva Staff Coordinating Council recommends no further change is needed because the statute of the Dispute Tribunal already defines the limits of the powers of the Tribunal in relation to interlocutory order satisfactorily, as illustrated by *Tadonki*, 2010-UNAT-005. It also considered that permitting such appeals would delay consideration of cases, citing *Wasserstrom*, 2010-UNAT-060.

Views of the Internal Justice Council

40. The Internal Justice Council agrees with the judges of the Dispute Tribunal that if appeals against interim orders and rulings made within the jurisdiction or competence of the Dispute Tribunal are permitted, at least without carefully defined limits, the work of the Dispute Tribunal will be seriously impeded.

41. On the other hand, the general non-appealability of interim orders and rulings has no application if the interim order or ruling is itself in excess of the jurisdiction of the Dispute Tribunal or in any way violates any of its provisions, because, if that occurred, that interim order or ruling would likely be a legal nullity.

42. The Appeals Tribunal has recognized that interim orders and rulings that manifestly exceed the jurisdiction or competence of the Dispute Tribunal cannot be allowed to stand, although the analysis may not specifically be in terms that such orders or rulings were null and void. The approach of the Appeals Tribunal, in the context of an appeal at its first session against a suspension of action pursuant to article 2.2 of the Dispute Tribunal statute, was to note that

> "the exclusion of the right to appeal a decision on the suspension of action of an administrative decision constitutes an exception to the general principle of law of the right of appeal and should therefore be interpreted strictly. It thus follows that this exception can be applied only to jurisdictional decisions ordering the suspension of implementation of an administrative decision when a management evaluation is ongoing" (*Kasmani*, 2010-UNAT-011), para. 8).

The Appeals Tribunal then observed that an order to suspend

> "the implementation of the contested administrative decision beyond the date on which the management evaluation is completed, cannot be considered as falling within the scope of the exception to the right of appeal"(para. 8).[5]

43. In *Tadonki*, 2010-UNAT-005, the Tribunal pointed out that

> "the prohibitions on appeals in articles 2 (2) and 10 (2) of the UNDT statute cannot apply where the UNDT issues orders that purport to be based on these articles but in fact exceed its authority. For instance, if UNDT were to award punitive damages as an "interim measure", this judgment could be [immediately] appealed before UNAT, because such a judgment would exceed the authority of UNDT" (para. 10).

Moreover, the Tribunal emphasized,

> "Article 2 (2) authorizes the UNDT to order a suspension of a contested decision only 'during the pendency of the management evaluation' and only

[5] Followed in *Onana*, 2010-UNAT-008, paras. 18-20, *Benchebakk*, 2012-UNAT-256, para. 32 and *El-Komy*, 2013-UNAT-324, para. 19.

> when it is clear that the UNDT has exceeded its jurisdiction will a preliminary matter be receivable" (para. 11).

The Full Bench of the Appeals Tribunal in *Bertucci*, 2010-UNAT-062, (para. 21) approved this analysis.[6] In other words, the Appeals Tribunal held that the interim orders or rulings were in essence a legal nullity because the Dispute Tribunal had no authority to make them.

44. The statement in *Tadonki* that the Dispute Tribunal has to "clearly" exceed its jurisdiction before an appeal of an interlocutory order will lie has been repeated in many cases.[7] Conversely, the Tribunal has held that such excess of jurisdiction will be "manifest" if the provisions in the statute are not respected.[8] Moreover, the Appeals Tribunal, in *El-Komy*, 2013-UNAT-324, emphasized that articles 2.2 and 10.2 of the statute and articles 13 and 14 of the rules of procedure must be read together to ensure that action is strictly within the limits defined by the statute and that interim orders must also strictly comply with the limits in the rules of procedure approved by the General Assembly.[9]

45. At its spring session in 2014, the Appeals Tribunal constituted a Full Bench, pursuant to article 10.2 of its statute, in *Igbinedion*, 2014-UNAT-410, to consider a case where the Dispute Tribunal extended a suspension of action beyond the period of a management evaluation, which was permitted by articles 2.2 and 10.2 of its statute. The Appeals Tribunal held that its jurisprudence creates precedents that bind the Dispute Tribunal and that "the Dispute Tribunal acted unlawfully in issuing an Order in direct contravention with the Appeals Tribunal's jurisprudence" (para. 25). The Appeals Tribunal also reiterated its jurisprudence in *Villamoran* (see paras. 50-55 below) as follows:

> "Article 8(6) of the rules of procedure of the Appeals Tribunal provides that '[t]he filing of an appeal shall suspend the execution of the judgment contested'. This provision however does not apply to interlocutory appeals. It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration cannot refrain from executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.
>
> "... This Court emphasizes that a party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body's jurisdiction, because it is not for a

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[6] See also *Onana*, 2010-UNAT-008, para. 18; *Kasmani*, 2010-UNAT-011, paras. 6-8; *Tiwathia*, 2012-UNAT-327, paras. 9-10; *Khambatta*, 2012-UNAT-252, paras. 14-15; *Hersh*, 2012, UNAT-243, paras. 9-11; *Bali*, 2012-UNAT-244, para. 8; and *Benchebakk*, 2012-UNAT-256, para. 32).

[7] See, for example, *Wasserstrom*, 2012-UNAT-060, para. 18), *Wamalala*, 2013-UNAT-300, para. 18 and *El-Komy*, 2013-UNAT-324, para. 22.

[8] *Nwuke*, 2012-UNAT-330, para. 19; *Hersh*, 2012-UNAT-243, para. 10; *Rawat*, 2012-UNAT-223, paras. 19-20.

[9] In *Igunda*, 2012-UNAT-255, the UNAT considered a case where it had issued an order to suspend action two days after its receipt without seeking views of respondent but directing appellant with the assistance of the OSLA to file a more "articulated" submission by the end of the five-day period provided in the rules of procedure. The Tribunal upheld the order "because a certain degree of discretion must be awarded to the trial court to consider and resolve urgent matters such as interim measures" (para. 25). But it emphasized that "the time limits clearly stated by the Rules must be respected: the five working days period for consideration of the application and the prohibition to suspend the implementation beyond management evaluation" (para. 26).

party to decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures" (para. 30, citing *Igunda*, paras. 31-32, and *Villamoran*, para. 48).

46. The appealing party will have to establish to the satisfaction of the Appeals Tribunal that there was excess of jurisdiction, rather than a simple error of law or a palpably wrong conclusion of fact by the Dispute Tribunal. The Appeals Tribunal has emphasized that an excess of jurisdiction must be "clear" or "manifest". In other words, the onus is on the party appealing to establish this lack of jurisdiction. However, the Appeals Tribunal has now expressly reaffirmed that the Dispute Tribunal is bound by established jurisprudence of the Appeals Tribunal because the "principle of *stare decisis* applies creating foreseeable and predictable results within the system of internal justice" (*Igbinedion*, 2014-UNAT-410, para. 24).

47. The jurisprudence of the Appeals Tribunal ensures that what appears on a textual analysis to have been the intention of the General Assembly is respected; i.e., that interim orders must be obeyed unless the orders are held by the Appeals Tribunal to be a legal nullity because they are not within the strict limits of articles 2.2 and 10.2 of the Dispute Tribunal statute.

48. The problem of deciding whether an interim order or ruling is in excess of jurisdiction arises mostly in cases of suspension of action, but it can also arise in a variety of other circumstances. For example, in *Wasserstrom*, 2010-UNAT-060, the Secretary-General appealed a decision of the Dispute Tribunal that an appeal against a determination of the Ethics Office that there was no retaliation was receivable. The Tribunal noted that not every appeal alleging excess of jurisdiction meets that high standard. In this case, the "question of whether the determination made by the Director of the Ethics Office that no retaliation occurred constitutes an administrative decision ... requires an adjudication on the merits and can therefore not be subject to an interlocutory appeal" (para. 20). In other words, in the terms of the analysis in the present report, until the merits were examined it was not possible in that case to determine whether the interim order or ruling was in excess of jurisdiction and therefore a legal nullity. The Tribunal reached a similar conclusion with relation to appeals concerning the production of documents.[10]

49. *Wamalala*, 2013-UNAT-300, is another example of an appeal against an interim order not involving suspension of action. The Secretary-General appealed a determination that a management evaluation was not necessary to consider an appeal under appendix D to the Staff Rules (workers' compensation). The Appeals Tribunal noted that the appeal concerned article 8.1 (c) of the Dispute Tribunal statute, which makes it clear that the jurisdiction of the Dispute Tribunal requires a prior request for a management evaluation (para. 30) and, as there was no such request, the Dispute Tribunal did not have jurisdiction and so the appeal was allowed (para. 32).

2. Interlocutory appeals permitted in exceptional circumstances

50. In *Villamoran*, 2011-UNAT-160, the Appeals Tribunal was faced with a case where the Dispute Tribunal received an application for suspension of action in relation to two administrative decisions concerning the implementation of new contractual arrangements that required, inter alia, that staff be selected on a

[10] See also *Wamalala*, 2013-UNAT-300, para. 19.

competitive basis as a result of resolution 63/250, which took effect from 1 July 2009, but with a two-year transitional period ending in 2011 (para. 16).

51. The first administrative decision was non-renewal of a fixed-term appointment and the second, announced on 18 January 2011 to departments but not to staff, was that there be a 31-day break in service after which staff not selected competitively, including the Applicant, could get a temporary appointment. Despite that letter, staff of the department were informed at a "town hall" meeting on 25 May that there would be no break in service and the applicant in fact had received approval for home leave based on continuing service (para. 7). On 16 June she was orally informed that a memorandum from the OHRM indicated that she could not take home leave and that there would be a 31-day break in service (para. 13) in her contract, which was due to end on 7 July (para. 19). On 21 June Applicant requested the written notification, which she received on 23 June, and filed a management evaluation request on that day (para. 16). On 5 July she sought suspension of action (para. 18) and on 7 July the Dispute Tribunal suspended the administrative decisions up to 12 July, which was within the five-day period permitted by article 13 of the rules of procedure (para. 20). On 12 July the Dispute Tribunal dismissed the request to place her on a temporary appointment upon the expiry of her fixed-term appointment (para. 21), but suspended the decision to place her on a 31-day break in service until the date of the management evaluation (para. 21).

52. The Secretary-General appealed, arguing that the Dispute Tribunal exceeded its jurisdiction because it did not examine the criteria for suspension (para. 25) and that "the last minute submission of an application for suspension of action does not provide a legally sustainable basis to grant such a suspension" (para. 27). The Secretary-General also noted that the interim orders of the Dispute Tribunal "may potentially result in substantial losses for the Organization", as many staff members were in a similar situation (para. 25).

53. The Appeals Tribunal first reaffirmed its consistent jurisprudence that appeals against interim orders are appealable only on the basis of excess of jurisdiction (para. 36). The Appeals Tribunal agreed that the rules of procedure enabled the trial judge to immediately suspend, but only within the limits in the statute, so that the judge could consider the merits of the application for suspension because to "find otherwise would render article 2 (2) of the statute and article 13 of the UNDT rules meaningless in cases where the implementation of the administrative decision is imminent" (para. 43).

54. As to the merits, the Appeals Tribunal noted that the decision on a break in service was notified in writing to Applicant on 23 June, and she sought management evaluation on the same day and sought suspension on 1 July but used the wrong form. After being required by the Registry to use a corrected form, she submitted her application on 5 July so "the urgency was not self-created" (para. 45). The Appeals Tribunal agreed that the urgency of the second decision to place Applicant on a temporary appointment after the expiration of her fixed-term appointment was "self-created", but found that the "two decisions were closely interrelated and the UNDT did not err in suspending them for a preliminary period of five days" (para. 45). The Tribunal concluded that the "interlocutory appeal is not receivable" (para. 46).

55. The Internal Justice Council notes that it is not surprising that a trial judge would try to come to grips with such a confused and unfair factual situation where a

staff member is initially told one thing and at the last moment told the opposite.[11] Moreover, the break in service requirement was not announced in an Administrative Instruction available to all staff, but rather in a letter sent to departments, which the staff member's department did not discuss during the town hall meeting. In the view of the Council, any expenses that resulted from this case were not due to flaws in the statutes, but instead arose from the unusual, if not bizarre, factual situation that had to be adjudicated by both Tribunals.

C. Legal impact: statutes and rules of procedure of the Tribunals

56. The process of amendment of the rules of procedure established by the statutes of the Tribunals differs from the process of amendment set out in resolution 67/241.

57. Article 13 of the Dispute Tribunal and article 12 of the Appeals Tribunal statutes both provide that each "statute may be amended by decision of the General Assembly".

58. Articles 7.1 and 6.1 of the statutes of the Dispute Tribunal and the Appeals Tribunal, respectively, provide that, subject to the terms of the respective statutes, each "Tribunal shall establish its own rules of procedure which shall be subject to approval by the General Assembly". As a result, the rules of procedure of both Tribunals empower the Judges to adopt amendments that operate provisionally until approved by the General Assembly (art. 37 of the Dispute Tribunal rules of procedure and art. 32 of those of the Appeals Tribunal). The jurisprudence of the Appeals Tribunal has made it clear that the rules of procedure of each Tribunal must be consistent with the statute of that Tribunal and the statutes strictly bind the Tribunals until they are amended by the General Assembly (for example, *El-Komy*, 2013-UNAT-324, para. 17).[12]

59. The General Assembly, in its resolution 67/241, requested that the rules of procedure of both Tribunals be amended "whenever a decision of the General Assembly entails a change in the rules of procedure" (para. 33). The statutes currently empower the judges to decide on their own rules of procedure, subject to approval by the General Assembly. Accordingly, the request in resolution 67/241 would require that the Assembly amend the statutes to reflect the reduction in judicial autonomy envisaged in resolution 67/241. If such an amendment to the statutes were to be made, the judges would have to conform their respective rules of procedure to their respective amended statutes.

1. Comments by the judges

60. The prior published comments of the judges indicate that, in their view, resolution 67/241 did not amend the statute of either Tribunal and that they believe

[11] In *Rawat*, 2011-UNAT-236, para. 25, the Appeals Tribunal noted that "where execution of an administrative decision is imminent, through no fault or delay on the part of the applicant, and takes place before the expiry of the five-day period provided for in article 13 of the rules of procedure of the UNDT, and if the UNDT is not in a position to take a decision under article 2 (2) of its statute (i.e., because it needs further information or time to reflect on the matter), it must have the discretion to grant a suspension for those five days. To find otherwise would render article 2 (2) of the UNDT statute and article 13 of its rules of procedure meaningless in cases where implementation of the administrative decision is imminent".

[12] See also Gehr, 2013-UNAT-293, para. 32.

the existing rules of procedure accurately reflect the existing statutes (see paras. 24-26 above).

2. Comments by stakeholders

61. The United Nations Office at Geneva Staff Coordinating Council argues that it is essential for the independence of the Tribunals that the Tribunals continue to establish their rules of procedure and that the statutes should not be changed to alter this key principle.

3. Provisions in the Dispute Tribunal statute and rules of procedure dealing with judgements, orders and rulings

62. For ease of reference, it might be helpful to set out the current statutory framework governing appeals, and in particular, the sometimes confusing nomenclature that is applied.

Judgements finally disposing of an appeal

63. Article 11.3 of the statute of the Dispute Tribunal provides that the "judgements of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the statute of the Appeals Tribunal."

64. The reference in article 11.3 to "judgements of the Dispute Tribunal" generally means the judgement on the merits subject to appeal pursuant to article 2 of the Appeals Tribunal statute. However, paragraph 35 of resolution 66/237 refers to "judgements, orders or rulings" which groups together both final judgements and interim orders and rulings made prior to a final judgement on the merits. The Dispute Tribunal itself has not always been explicitly consistent in the nomenclature.[13]

Comments by stakeholders

65. The Office of Staff Legal Assistance suggests that, generally speaking, in addition to those decisions that finally dispose of a proceeding on the merits, a "judicial decision" finally determining an issue or having final effect should also be titled "judgements" and be subject to appeal without waiting for a decision on the merits: see generally, Order No. 42 (UNDT/GVA/2010) (*Allen*).

66. In other cases, the Office of Staff Legal Assistance suggests that the determination of the appropriate nomenclature may be difficult, and it may be preferable to look to the substance rather than the titling of the decision to determine, for example, appeal rights: 2010-UNAT-010 (*Tadonki*). The Appeals Tribunal relies upon the outcome of the decision to determine appeal rights (i.e., a decision dismissing a motion for summary judgment is not final, a decision granting one is (2010-UNAT-060 (*Wasserstrom*)).

[13] For example, see 2013-UNAT-300 (*Wamalala*), appeal from Judgement UNDT/2102/052); 2012-UNAT-244 (*Bali*), appeal from Judgement UNDT/2011/155. More frequently, the appeals are from orders, for example, 2013-UNAT-324 (*El-Komy*), appeal from Order No. 118 (NY/2013); 2013-UNAT-330 (*Nwuke*), appeal from Order No. 103 (NBI/2012).

67. The United Nations Office at Geneva Staff Coordinating Committee agrees that there is confusion in the terminology, but it considers that an interim order or an interlocutory order is clearly distinguishable from a judgement on the merits.

Views of the Internal Justice Council

68. This report will, however, refer to "judgements" in article 11.3 as meaning a "final judgement on the merits" and any judicial orders prior to that final judgement as "interlocutory" or "interim orders and rulings", except where language equivalent to these concepts are quotations from legislative texts or comments made by stakeholders.

"Interlocutory and interim orders and rulings" made prior to a judgement finally disposing of an appeal

69. The statute of the Dispute Tribunal contains a broad range of "interim orders and rulings" made during the conduct of a case, specifically making some of them not subject to appeal.[14]

70. It is well established that the rules of procedure of the Dispute Tribunal cannot grant power to the Dispute Tribunal in excess of that conferred on it by the statute (*El-Komy*, 2013-UNAT-324, para. 17).[15]

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[14] Art. 2.2: "The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal"; art. 7.2 (in relevant part): "The rules of procedure of the Dispute Tribunal shall include provisions concerning ... (j) Suspension of implementation of contested administrative decisions"; art. 8.3 (in relevant part): "The Dispute Tribunal shall not suspend or waive deadlines for management evaluation"; art. 9.1: "The Dispute Tribunal may order production of documents or such other evidence as it deems necessary"; art. 9.2: "The Dispute Tribunal shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance"; art. 10.2: "At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination".

[15] Art. 13 of the rules of procedure deals with applications for suspension of action pending a management evaluation; art. 14 deals with interim orders that provide temporary relief in cases of urgency including suspension of action "except in cases of appointment, promotion or termination"; both arts. 13.3 and 14.3 provide that the Dispute Tribunal shall consider such actions within five working days from service of the papers on Respondent; art. 16.5 provides that "If the Dispute Tribunal requires the physical presence of a party or any other person at the hearing, the necessary costs associated with the travel and accommodation of the party or other person shall be borne by the Organization"; art. 17.1 provides, inter alia, that "The Dispute Tribunal may make an order requiring the presence of any person or the production of any document"; art. 19 provides that "The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties".

71. Articles 2.2 and 10.2 of the statute of the Dispute Tribunal specifically empower the trial judge to issue non-appealable interim orders and rulings dealing with suspension of action. These provisions are procedurally implemented in articles 13 and 14 of the rules of procedure of the Dispute Tribunal. Implementing resolution 66/237 to make all interim orders and rulings appealable if they imposed financial obligations on the Organization would require amendments to articles 2 and 10, which would then require the judges to conform the rules of procedure to the amended statute.

72. Articles 9.1 and 9.2 of the statute, dealing with evidence and witnesses, leave open whether interim orders and rulings made under these provisions are appealable, as do the related articles 16.5, 17.1 and 19 of the rules of procedure. But all these provisions, relating to case management, seem to place such interim orders and rulings in a somewhat different category to a final judgement disposing of the appeal on the merits. Broadening the right of appeal of such interim or interlocutory orders would create endless opportunities for delay.

Comments by stakeholders

73. The Office of Staff Legal Assistance considers that resolution 66/237 should be interpreted as referring only to "orders that directly and by their express terms impose financial obligations", because if all orders that impose financial obligations are automatically suspended until the time provided for the filing of an appeal has expired or until the Appeals Tribunal has completed action on the appeal, this would deprive article 2.2 of the statute of the Dispute Tribunal of substantially all effect.

74. The United Nations Office at Geneva Staff Coordinating Council noted that implementing the resolution would enable a party to delay or obstruct justice because even an order for production of documents might have significant financial implications. It considered that the statutes of the Dispute Tribunal already has sufficient limitations on the appeal of interim or interlocutory orders and making changes that further undermine the authority of the judges of the Dispute Tribunal would decrease staff confidence in the system.

D. Recommendations

1. Comments by judges

75. The Dispute Tribunal judges, in their written comments, concluded that the right of appeal against interim orders should be strictly limited to cases where the Dispute Tribunal exceeded its jurisdiction. They also suggested that there be an amendment to the statute of the Appeals Tribunal to require a party wishing to appeal an interim order to obtain leave to appeal from a single duty judge of the Appeals Tribunal, and they recommended that there be a provision that allows a party appealing an interlocutory or interim order to request a stay of execution from the Appeals Tribunal judge who hears the application for leave to appeal.

2. Comments by stakeholders

76. The Office of Staff Legal Assistance submitted that if an amendment permitting appeals to a duty judge were introduced, it would seem that that

article 9.4 of the Appeals Tribunal statute[16] would have to be amended to remove the requirement that such relief be consistent with the judgement of the Dispute Tribunal. The Office indicated that it considered that the independent review group that the General Assembly was expected to establish could examine the matter and make appropriate recommendations to the General Assembly.

77. The United Nations Office at Geneva Staff Coordinating Council considered that the difficulty with resolution 66/237 was that a "financial consequences" approach implied that only "zero-cost" justice was acceptable.

78. The United Nations Office at Geneva Staff Coordinating Council also emphasized repeatedly that limiting the ability of the judges of the Dispute Tribunal to make binding non-appealable interim orders would be a retrograde step with serious consequences for the proper operation of the system of justice. It also expressed doubts that, if such a system were introduced by the General Assembly, there would be sufficient funds made available to enable the Appeals Tribunal to dispose of such appeals rapidly. It also opposed suggestions that the Staff Rules and Staff Regulations be amended to provide for any recovery of amounts paid under interim orders that were later overturned on appeal by the Appeals Tribunal.

79. The external counsel members of the Bar Association for Intergovernmental Organizations were of the view that "whatever system is agreed upon in terms of the right to appeal interlocutory orders, it should be consistent. Presently the Appeals Tribunal is perceived as having one criterion for appeals by the Administration and another for appeals by staff. If such appeals are allowed, there has to be system in place for adjudicating them quickly and for suspending action until they are final".

3. Internal Justice Council recommendations

80. The statutes of the Tribunals reflect a policy choice that was made by the General Assembly. On the one hand is the principle that administrative decisions operate from the date on which they are to take effect. On the other hand, justice requires that there may be a need for a stay or other relief, at least in the carefully defined terms of the statute. The Appeals Tribunal has required a strict application of the provisions in the statute, and has now ruled that it is "unlawful" for the Dispute Tribunal not to follow and apply its jurisprudence. Of course, *Villamoran* (see paras. 50-55 above) illustrates that there may be cases where unusual factual situations may cause expense, but that will occur in unusual fact situations no matter how often legislative provisions are amended.

81. The recommendation suggested by the Secretary-General in his 2011 report (A/66/275 and Corr.1) (see para. 20 above) would enable either party to delay any case for lengthy periods of time. But the recommendation was predicated upon a concern that the Dispute Tribunal was ignoring the "established jurisprudence" of the Appeals Tribunal. This problem was settled definitively by the Appeals Tribunal in *Igbinedion* (see paras. 45-46 above). The impact of the remedies suggested by the General Assembly in resolution 66/237 would obviously be less disruptive because they were to apply only to interim orders and rulings imposing financial obligations

[16] Article 9.4 provides: "At any time during the proceedings, the Appeals Tribunal may order an interim measure to provide temporary relief to either party to prevent irreparable harm and to maintain consistency with the judgement of the Dispute Tribunal".

on the Organization, rather than to all interim orders and rulings. Yet the problem of the scope and degree of "financial consequences" remains.

82. The Internal Justice Council has already acknowledged the disruptive effect of a system that would enable appeals against interim orders and rulings or even the lesser alternative of those orders and rulings that imposed "financial obligations".

83. The disruption would be aggravated under the current organizational system where the Dispute Tribunal meets full time in three locations and the Appeals Tribunal meets only three times a year for about two weeks.

84. The potential for delay in these circumstances is obvious. The Assembly could provide additional resources to establish a system where there was a full-time judge of the Appeals Tribunal to promptly hear appeals from interim orders and rulings, but even then care would have to be taken to ensure that such a system does not cripple the ability of the trial judge to manage cases that come before him or her.

85. Nevertheless, if the General Assembly were to decide to have a full-time appeals judge or judges, then a system as suggested in paragraph 33 of resolution 67/241 may be able to operate without undue delay, at least if penalties (such as adverse cost consequences) were established for unmeritorious appeals from interim orders and rulings to discourage parties from delaying a decision on the merits.

86. It also might be possible to at least partially achieve the objectives of the General Assembly by an amendment to the Staff Rules, rather than amending the statutes. For example, a rule could provide "when the contract of a staff member is extended pursuant to an interlocutory or interim order of the Tribunal and that order is later vacated or set aside, the Secretary-General may set off against final payments that are otherwise payable to the staff member any salary and emoluments paid under the extended contract period pursuant to the interim order, unless the staff member has actually worked during the period, or part thereof, of the interim order".

87. The Internal Justice Council reiterates its concern that the requests set out in resolutions 66/237, 67/241 and 68/254 raise policy questions with regard to parties delaying judicial proceedings in the Dispute Tribunal by a multitude of appeals against interim orders, but we also note that the jurisprudence of the Appeals Tribunal provides a remedy to applicants against whom interim orders have been made by the Dispute Tribunal in excess of its competence or jurisdiction.

88. The Internal Justice Council also accepts as correct the well-known convention that, while it is the undoubted right of legislative bodies to enact or amend legislation, or even reverse through legislation a line of judicial authority, it is also the privilege of judicial bodies to interpret independently legislation after it is enacted.

89. The Assembly is expected to establish an independent review panel to conduct an interim assessment of the internal justice system, which the Internal Justice Council believes should have members who are judges or practitioners experienced in both trial and appellate level work, to look at the operation of the entire system of justice in the light of experience gained since 2009. Accordingly, it would seem that this review group would be well placed to consider this complex issue that has generated so much litigation and recommend to the General Assembly whether any changes to the statutes are needed. While the Council recognizes that all legislative

instruments need interpretation, it believes that the time is ripe to take stock of the situation, and to consider whether some of the provisions of the statutes need revision.

V. The Tribunals

90. The views of both Tribunals are annexed to the present report, in line with the request in paragraph 57 of resolution 67/241. In order to respect the independence of the Tribunals, the Internal Justice Council will not comment directly on those views, which are submitted to the General Assembly exactly as received, nor will it comment on matters solely the province of the Tribunals. However, there are a few matters concerning the Tribunals that affect not only the Tribunals, but also the parties and their legal representatives or affect assessment of the system as a whole so the Council offers a few recommendations on those matters.

A. Finding the law

91. A crucial issue facing an applicant or his or her legal representatives at both the trial and appellate level is to have some objective means of assessing whether an appeal has a reasonable chance of success. But this requires that the jurisprudence of the Tribunals be quickly accessible by an effective search engine. Unmeritorious cases waste the time of all concerned, and the Internal Justice Council has already noted the crucial role of an effective search engine for the disposition of cases (see A/68/306, paras. 41-48).

92. The Internal Justice Council notes that there have already been obvious improvements to the search engine and understands that further work is under way to make the search engine better.

93. Given the importance of a first-rate search engine, especially if the General Assembly accepts our suggestion that volunteers be encouraged to give advice to United Nations staff members on prospects of an appeal and to ensure equality of arms, given that the OHRM and the Office of Legal Affairs are represented by trained counsel (see paras. 114-116 below), the Internal Justice Council considers that the Assembly should ensure that these further improvements become operational.

B. Delays

94. It appears from some unofficial data given to the Internal Justice Council by several stakeholders during its last session that the period of time for a case to be finally disposed of may be gradually lengthening. On the other hand, the Council understands that the Secretary-General, in his forthcoming report on administration of justice, will show that the number of cases that remained pending at the end of 2013 represented approximately one year of work for the Tribunals, which is consistent with previous reports of the Secretary-General.

95. The Internal Justice Council understands that the Dispute Tribunal is altering, from 1 July 2014, the allocation of cases among duty stations to more equally distribute the work, and this will help speed up consideration of cases.

96. In view of the importance of addressing the issue of delay, the Internal Justice Council makes a few observations, which the General Assembly may find of assistance in its examination of this issue.

97. A number of the members of the Internal Justice Council have had litigation experience in their own countries and measures such as fast tracking cases, both at the trial level and the appellate level, have sped up the disposition of appeals, especially as fast-track judgements tend to be brief. Such a system might be applied to cases that are out of time, have not had a mandatory Management Evaluation Unit review or appear to have no chance of success because of established jurisprudence of the Appeals Tribunal. The other advantage of such a fast tracking system is that it may also help discourage unmeritorious claims. However, fast tracking, unless carefully monitored, may unduly divert resource from substantive cases.

98. There may also be merit in instituting more comprehensive case management procedures to ensure that cases proceed through the system at a pace that enables them to be finished in a year. The Internal Justice Council appreciates that at times this may be difficult because suspension of action hearings must be finalized in five days, which, when there is a spike in such hearings, obviously causes delays in the consideration of other cases. However, as the jurisprudence of the Appeals Tribunal on suspension of action is now established, perhaps these cases can start to be disposed of in summary fashion.

99. There is the further problem emphasized by the judges of the Dispute Tribunal that appeals against interim orders, though available only in respect of orders made without jurisdiction, obviously delay adjudication of the merits by the Dispute Tribunal.

100. The practice of the judges of the Dispute Tribunal varies in dealing with the preliminary issue of receivability of an application. Some judges will enable a preliminary issue of receivability to be disposed of first, which, if the appeal is not receivable, avoids much unnecessary work. However, other judges will require that the case be fully argued so that receivability and merits, if receivable, are dealt with at the one time. This may be a considerable burden, since witnesses may be in remote locations and arranging for testimony that ultimately is not needed, because the case is found to be non-receivable, will not only be time consuming, but also expensive.

101. The Internal Justice Council realizes that any case management proposals may have resource implications especially at the appellate level where there is no duty judge who is available to speedily deal with the receivability of appeals. At the moment this is done on a voluntary basis (the current President performs this role, which is quite time consuming). But the return on investment in financing a duty judge may be high.

102. The Internal Justice Council recommends that the General Assembly encourage the Tribunals to consider any longer-term measures that might be feasible in practice, and with the knowledge that resources are limited, to ensure that the system is able to dispose of cases as rapidly as possible over the coming years and at least meet the goal that cases are normally disposed of in one year.

103. A further problem that does not help the speedy resolution of cases by the Tribunals is delay in the recruitment of judges to replace those who leave during their terms, a problem previously noted by the judges of the Dispute Tribunal (see

A/67/98, annex II, para. 27). It is for this reason that the Internal Justice Council is developing a small roster of qualified candidates in conjunction with the current recruitment process to be used in case any further unexpected vacancies occur during the Council term, which ends in 2016. This initiative will be described in our report containing recommendations and views to the General Assembly on filling the two vacancies in the Tribunals. Of course, the next time the regular terms of judges are nearing their end a full recruitment exercise would have to be undertaken.

C. Discouraging unmeritorious cases

104. The Internal Justice Council notes that various suggestions have been made to discourage obviously unmeritorious applications and appeals, for example, whether it would be effective to have measures such as the imposition of costs where a Tribunal finds that it was clear that a case had no reasonable chance of success because of the established jurisprudence of the Tribunals or whether it would be effective to impose a filing fee on all applicants and appellants that the Tribunal hearing the application or appeal would order refunded if an application or appeal was reasonably brought (see A/68/306, paras. 92-134).

105. There are two principal difficulties with filing fees and cost penalties for unmeritorious cases. The first is that such fees and costs are in effect a barrier to access to justice. The second is that for such a system to have some semblance of equity, staff members need to have easy access to legal advice on their claims. It is one thing to have such a system if, for example, resources of the Office of Staff Legal Assistance enabled them to represent all who requested assistance; it is quite another to have such a system where there is over 50 per cent of applicants before the Dispute Tribunal who are self-represented and the Secretary-General is always professionally represented.

D. Provision of data to the General Assembly

106. The Judges have, from time to time, noted with concern that the Registries must provide data to the Office of Administration of Justice for inclusion in the report of the Secretary-General or in the activity reports (see, for example, A/67/98, annex II, paras. 7-8).

107. The Internal Justice Council considers that an important function of a Registry is the provision of data for the General Assembly so that it is kept fully informed of how the Tribunals are processing the cases. It would thus seem reasonable that the Registry be required to supply data to the Office of Administration of Justice, of which they are an integral part and which Office is responsible for the overall administration of the system. Indeed, this activity is described as a “core function” of the Registries (see ST/SGB/2010/3, para. 5.4 (d)). It is hard to see how officials outside the Registries could properly perform this work as efficiently as the Registries, which have immediate and first-hand knowledge of their caseloads and their unrestricted access to the Court Case Management System.

VI. Office of Administration of Justice

108. The Internal Justice Council notes, as it has in its prior 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 this 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".[17] The Council is grateful to the Office and particularly to the Office of the Executive Director for the assistance provided to it during its session and during the recruitment process.

VII. Matter impacting the system of administration of justice

Self-represented litigants

109. The Internal Justice Council notes that in cases before the Dispute Tribunal some 57 per cent of litigants are self-represented and some 42 per cent are self-represented before the Appeals Tribunal (see chart nos. 3 and 7 of the seventh activity report of the Office of Administration of Justice, 1 January-31 December 2013).[18] The judges of the Dispute Tribunal have noted that this sits uneasily with the goal of professionalization (see A/68/306, annex II, paras. 39-41; and A/67/98, annex II, paras. 25-26).

110. A large proportion of self-represented litigants clearly places a particular burden on Dispute Tribunal judges and their Registries, who have to expend time and resources to sift through often irrelevant pleadings in order to isolate the legal essence of a claim or have to try to assist an applicant who has no training in how to introduce oral evidence or to question a witness.

111. It also appears that lack of representation may generate unmeritorious appeals from decisions of the Dispute Tribunal. The seventh activity report shows that only 28 per cent of staff appeals from decisions of the Dispute Tribunal were successful, as opposed to 82 per cent of appeals lodged by the professionally represented Secretary-General (see charts 6a and 6b). Clearly, the Secretary-General only appeals decisions of the Dispute Tribunal that his legal advisers consider have a reasonable prospect of success. By contrast, a self-represented appellant will usually have little objective idea of the prospects of success, focusing mainly on his or her unsatisfied grievance.

[17] ST/SGB/2010/3, sect. 2.1.

[18] These charts show that in cases before the Dispute Tribunal the Office of Staff Legal Assistance represented 21 per cent (62 cases) with private counsel representing 16 per cent (46 cases) and current or former staff members representing 5 per cent (15 cases). In cases before the Appeals Tribunal, the Office of Staff Legal Assistance represented 25 per cent (32 cases) with private counsel representing 21 per cent (26 cases) and current or former staff members representing 7 per cent (9 cases); the Office of Staff Legal Assistance of the United Nations Relief and Works Agency for Palestine Refugees in the Near East represented 5 per cent (6 cases).

112. It has been suggested that the lack of representation may be less of a problem in the Appeals Tribunal, which has few oral hearings, but the data discussed in the preceding paragraph seems to show that the absence of legal representation may result in frivolous appeals or, more often, appeals that proceed on the basis that the unrepresented appellant is dissatisfied with the Dispute Tribunal decision and simply reargues the merits, while a represented client focuses on the five grounds of appeal set out in article 2.1 of the statute of the Appeals Tribunal. There is also the risk that unrepresented clients may overlook a ground of appeal that could legitimately be presented to the Appeals Tribunal. In either alternative the goals of the system of administration of justice are thwarted by lack of legal representation.

113. In the view of the Internal Justice Council one of the most important aspects of professional representation is to advise clients when they have a reasonable prospect of success and when it would be a waste of time to institute an application or an appeal against a decision of the Dispute Tribunal. This is why the Council emphasizes the importance of institutions that assist in representation, notably the Office of Staff Legal Assistance, which represented some 21 per cent of applicants before the Tribunals in 2013 and also settled some 69 cases (see chart nos. 7 and 10 of the seventh activity report), as well as any staff union-funded or supported legal representation scheme.

114. It is noted that there do not seem to be current incentives to encourage legally trained staff with some United Nations experience to volunteer their services to help appellants navigate the formal justice system. Some early General Assembly resolutions requested the development of a system of incentives to encourage qualified staff to assist their colleagues who are considering a formal application to the Dispute Tribunal or an appeal to the Appeals Tribunal (for example, resolution 62/228, para. 18). The Internal Justice Council realizes that preparation of a case for, and representation before, the Tribunals is very time consuming and probably not possible for many staff members. However, even if qualified staff members were available only to advise on whether grounds exist on which to launch an appeal against a decision of the Dispute Tribunal, that could help to ensure that claimants at least understand what an appeal involves, even if they do not accept the advice.

115. Finally, the Internal Justice Council wishes to emphasize that the Redesign Panel noted that self-representation by an appellant, when management was professionally represented, also impacted on equality of arms (see A/61/205, paras. 100-111).

116. The Internal Justice Council recommends that the General Assembly encourage the re-establishment of a volunteer system with incentives to attract qualified staff to assist applicants and appellants in the system of administration of justice.

VIII. Independent assessment

A. Introduction

117. In paragraph 4 of resolution 61/261 of 4 April 2007, the General Assembly decided “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".

118. The General Assembly, in its resolution 68/254, decided that the Secretary-General should submit, to it at its sixty-ninth session, a proposal for an interim assessment of the system of administration of justice "with particular attention to the formal system and its relation with the informal system, including an analysis of whether the aims and objectives of the system set out in resolution 61/261 are being achieved in an efficient and cost-effective manner" (para. 12).

119. The Internal Justice Council considered it might be helpful to the review group selected to conduct the assessment if the Council were to set out some comments based on the work of the Council in discharging its mandate. These reflections will first deal with the general mandate of the Council based on its experience with the new system and then will turn to specific issues that have arisen during the course of its work.

120. The Internal Justice Council wishes to emphasize that this part of the report is not meant to constitute recommendations to the General Assembly. It is hoped that the discussion will assist the review group in its work to make recommendations to the General Assembly in accordance with its mandate and in the exercise of its judgement.

B. Independence and accountability

121. The general mandate of the Internal Justice Council is to "help to ensure independence, professionalism and accountability in the system of administration of justice" and to "provide its views on the implementation of the system of administration of justice" (resolution 62/228, paras. 35 and 37 (d)).

1. Independence

Role of general principles of law and the Charter of the United Nations

122. Paragraph 7 of resolution 67/241 provides that "recourse to general principles of law and the Charter by the Tribunals is to take place within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances". The problem with this formulation is that, at the very least, administrative instructions and rules promulgated by the Secretary-General have to comply with higher norms in the Charter and not the other way around. It would also seem clear that the Charter governs the way that the United Nations, including the General Assembly, must operate.

123. The judges of the Dispute Tribunal have also commented on this issue (see A/67/98, annex II, paras. 1-6, and A/68/306, annex II, paras. 8-10).

124. It is recommended that the review group examine this issue and recommend to the General Assembly the avenues open to it to change the law to deal with a Tribunal decision that it considered incompatible with United Nations legislative instruments.

Independent reporting line for judges to General Assembly

125. The judges have indicated that their independent status requires that they have an independent and direct reporting line to the General Assembly (for example, see A/68/306, annex II, paras. 11-12).

126. The Internal Justice Council notes that the General Assembly in resolution 66/237, paragraph 45, recognized the importance of the independence of the system and thus asked the Secretary-General to "entrust the Council with including the views of both the Dispute Tribunal and the Appeals Tribunal in its annual reports". Since the adoption of this resolution in December 2011, the views of the judges have always been transmitted as received. Indeed, members of the Council do not even see the memorandums of the judges (which are annexed to the Council annual report) until after the entire annual report is sent for editing, translation and reproduction. In fact, again in 2013, the General Assembly stressed "that the Council can help to ensure independence, professionalism and accountability in the system of administration of justice, and requests the Secretary-General to entrust the Council with including the views of both the Dispute Tribunal and the Appeals Tribunal in its annual reports" (resolution 68/254, para. 39).

127. Nevertheless, the Internal Justice Council would be content for the judges to report directly to the General Assembly if the review group considers and the General Assembly accepts that such direct reporting would be appropriate.

C. Role of the Office of Staff Legal Assistance

1. Importance

128. The Redesign Panel pointed out that "to guarantee equality before courts and tribunals, access to lawyers and legal services is crucial" (see A/61/205, para. 10) and its recommendations for an "office of counsel" were the basis for the formation of the Office of Staff Legal Assistance. It is important to note that the Redesign Panel pointed out that the establishment of such an office "will not preclude voluntary service … by retired staff members of organizations in the United Nations system who are qualified lawyers, as a back-up to full-time counsel. Nor will it preclude the possibility of recourse to outside counsel either on a pro bono basis or paid for personally by staff members" (para. 108).

129. The General Assembly has repeatedly stressed the positive role played by the Office of Staff Legal Assistance in the system of administration of justice and has stressed that all staff members should have access to its services (see resolutions 68/254, paras. 32 and 35, 67/241, para. 45, 66/237, para. 26, 65/251, para. 36). The General Assembly has also stressed that "professional legal assistance is critical for the effective and appropriate utilization of the available mechanisms within the system of administration of justice" (resolution 65/251, para. 35). This importance is shown by the data. For example, at the Management Evaluation Unit stage the Office of Staff Legal Assistance settled some 33 cases in 2013 (see seventh activity report, chart no. 10) and, in addition to representing 105 staff members before the Tribunals (see seventh activity report, table 4), it handled 488 cases of "summary legal advice", which, although they vary in nature, "often involve identifying strengths and weaknesses of a case and advising staff members on options for seeking redress and likely outcomes and implications of a particular action or

approach" (seventh activity report, para. 63). In other words, the Office of Staff Legal Assistance plays a key role in the internal system of justice.

2. Funding

130. The General Assembly has put into place, on an experimental basis in 2014-2015, a scheme whereby staff members are encouraged to make voluntary contributions to the financing of the Office of Staff Legal Assistance in order that its resources may be strengthened (resolution 68/254, paras. 33-34).

131. If this basis proves to be unsatisfactory, or results in a low participation rate, the Internal Justice Council is of the view that this is a matter, at least in the first instance, that the staff unions and management should discuss within the context of the Staff Management Committee in order to present a unified recommendation to the Assembly.[19] Accordingly, the Council does not consider that it should engage in the debate on funding the obviously crucial need for an increase in the resources and staff of the Office of Staff Legal Assistance.

3. Access to services of the Office of Staff Legal Assistance

132. It is clear to the Internal Justice Council that the role of the Office of Staff Legal Assistance is vital to the system of administration of justice since it is crucial that staff have access to legal advice and, if necessary, to representation. That is not to say that there should not be other avenues open to staff members such as assistance being offered by staff unions. The reality, however, is that the Office of Staff Legal Assistance is the one institution that is widely available, with offices in New York, Geneva, Nairobi, Beirut and Addis Ababa, and is intimately familiar with the United Nations system.

133. There is one issue on the operation of the Office of Staff Legal Assistance on which the Internal Justice Council wishes to comment. During its session the view was expressed that there was a lack of clarity as to the basis on which cases are accepted and declined by the Office. The Council noted that the Office had even declined representation in a case where a Dispute Tribunal judge had recommended that the Office represent the applicant and the judgement regretted that action.[20]

134. The Internal Justice Council noted data showing that, of the cases in which the Office of Staff Legal Assistance declined legal representation, 35 per cent were rejected on the merits of the claim, 31 per cent were rejected because of evidentiary problems and 20 per cent were rejected because of time bars, with the balance being rejected for a variety of substantive reasons. Data also showed that representation was distributed among all regions and advice and representation was for staff at all ranks divided fairly evenly between Professional and the other categories of

[19] Prior reports of the Internal Justice Council discussed the role of the Office of Staff Legal Assistance at length (see A/68/306, paras. 143-145; A/67/98, paras. 45-53; A/66/158, paras. 35-43 and A/65/304, paras. 61-73).

[20] In UNDT/2014/023 (*Kashala*) the Tribunal stated "it is a matter of immense regret that the OSLA declined to represent the Applicant in this matter. Its submissions on what is essentially a novel point of law and fact before the UNDT could have served to assist the Applicant in comprehensively canvassing the issue of receivability after the Respondent chose to fall back on the oft beaten track of *ratione temporis* instead of exploring the real reasons for the late filing of the Application before the UNDT" (para. 40).

personnel. The Council also understands that if assistance is refused, the staff member is given an explanation.

135. The Internal Justice Council was informed that the Office of Staff Legal Assistance is in the process of setting out criteria for acceptance or rejection of cases on its website, and the Council welcomes such a development, which should be of assistance to staff. The Council also understands that the Chief of the Office of Staff Legal Assistance is travelling to field duty stations for outreach and training and to ensure that the objective criteria of the Office for provision of assistance to staff members are properly applied.

136. Nevertheless, the Internal Justice Council considers that the criteria for obtaining assistance from the Office of Staff Legal Assistance should be publically specified in detail and that, regardless of the criteria used by the Office, when a Tribunal makes a specific request to the Office for assistance for an applicant, such a request should normally be granted. If for any reason, such as conflict of interest, the request of the Tribunal cannot be granted, detailed and compelling reasons for the refusal should be given to the Tribunal.

137. The Internal Justice Council recommends that the review group consider effective ways in which the criteria for provision of assistance by the Office of Staff Legal Assistance should be brought to the attention of staff members.

D. Accountability

1. Lessons learned

138. The annual reports of the Secretary-General on administration of justice have described in general terms the various accountability measures that are in place (for example, see A/68/346, paras. 154-159). In this regard, the Internal Justice Council was informed that the Management Evaluation Unit routinely makes recommendations to management after it reviews a case, including needed changes or reforms in the way cases of similar nature should be handled in the future.

139. In 2010 and 2011, management published a total of three issues of "Lessons learned from the jurisprudence of the system of administration of justice: a guide for managers". These "Lessons learned" publications set out the factors that need to be taken into account in making proper administrative decisions of all types.

140. It is hard to judge from published data whether managers are effectively implementing "lessons learned" from cases litigated before the Tribunal.

141. The Management Evaluation Unit is crucial as the first stage of the formal system of administration of justice by reviewing management decisions to ensure that decisions that do not conform to the established jurisprudence of the Tribunals are brought into line with that jurisprudence.

142. The Internal Justice Council recommends that the review group consider how to ensure that lessons are effectively learned by staff and management from the jurisprudence of the Tribunals.

2. Accountability measures and referrals

143. The Management Evaluation Unit notes that the management evaluation process generates recommendations on accountability measures and policy issues as appropriate. The results of such measures are not publicized in order to protect the privacy of those concerned. "The Management Evaluation Unit, in addition, provides feedback to managers at all levels, individually and collectively, regarding its observations of systemic issues and trends" (Biannual Report on the Activities of the Management Evaluation Unit for the period 1 January until 30 June, vol. 11, 12 November 2013, para. 2).

144. The Internal Justice Council supports the provision of individual feedback to managers, but notes that there has been no feedback to the Registries of the Tribunals, even in general terms, when a judge has referred a staff member for possible action in regard to accountability pursuant to article 10.8 of the Dispute Tribunal statute (art. 9.5 of the Appeals Tribunal statute grants a similar power to Appeal Tribunal judges).

145. The Internal Justice Council understands that to date there have been about 15 referrals for accountability by the Tribunals (of which 3 or 4 involved the legal representatives of the Respondent), and also understands that these referrals are in fact examined, unless the case is appealed, and if the Appeals Tribunal upholds the referral, the case is then examined. If the referral is quashed, no action is taken (see, for example, 2013-UNAT-311, *Pirnea*). The Council also understands that a reason for lack of feedback is the need for confidentiality, especially if the staff member whose conduct has led to referral has not yet been able to enjoy the due process protection of being able to defend or at least put that conduct into some perspective.

146. The Internal Justice Council understands the need for confidentiality, but considers that the concern for privacy is somewhat exaggerated. First, the judge making the referral already had knowledge of the facts that led to the referral. Secondly, the real value of publicity of the results of a referral can be obtained without disclosing the name of the official or Department but with a description of what went wrong and the actions taken to remedy the situation. For example, was the real cause of the problem overly complex rules that led management to make a mistake or, by way of further example, was there improper motive and what action was taken as a result? On the other hand, when a referral is not supported when all relevant facts become known, why was the Tribunal not made aware of the exoneration and the reasons for it?

147. The Internal Justice Council recommends that the panel examine this issue and make recommendations to the General Assembly on how some sort of "feedback" could be made available to the judges while preserving the need for confidentiality in the accountability process, which may be the first opportunity the staff member has had to present his or her side of the matter.

148. The Internal Justice Council anticipates that the review group may find the goals of accountability of assistance in conducting its review of issues relating to accountability, established by the General Assembly in paragraphs 13 to 24 of resolution 68/264.

E. Other issues

1. Expedited appeal process

149. The Internal Justice Council draws attention to the fact that "the Appeals Tribunal in the 2014 *Igbinedion* case has made it clear that a party must respect and implement an interim order until it is vacated on appeal" (see paras. 45-46 above). The Appeals Tribunal has made it equally clear that the Dispute Tribunal acts "unlawfully" if it goes beyond the limits of its statutory powers in relation to interim orders, and has also emphasized that the Dispute Tribunal "is expected to follow the clear and consistent jurisprudence of the Appeals Tribunal" (2012-UNAT-256, *Benchebbak*, para. 38).

150. The Internal Justice Council considers that the review group might wish to consider the possibility of an expedited appeal process to a duty judge of the Appeals Tribunal that can be used when a decision appears to conflict with the established jurisprudence of the Appeals Tribunal.

2. Staffing and personnel

151. A goal of the General Assembly in establishing the new system of administration of justice was that it be "adequately resourced" (resolution 61/261, para. 4). It is not for the Internal Justice Council to comment on most matters relating to the staffing and personnel needs of the formal system because the Office of Administration of Justice, including the Registries, and the judges have the detailed data needed to effectively address this issue and present their recommendations to the review group. However, there are a few issues of a more general nature relating to personnel on which the Internal Justice Council wishes to comment because they impact directly on the system of administration of justice. In addition, the Internal Justice Council makes some comments on the Office of the Executive Director of the Office of Administration of Justice.

3. Ad litem judges

152. The first panel of the Internal Justice Council recommended that the status of the three ad litem judges be regularized so that judges were not dependent on a series of one-year appointments, which sits uneasily with the concept that a judge must be independent from the legislative body, that is, the General Assembly, that appointed him or her (see A/66/158, para. 10, and A/67/98, para. 21).

153. The Dispute Tribunal judges have, since 2012, sought without success an additional permanent judge at each duty station to replace the three ad litem positions (see A/68/306, paras. 38-39; A/68/306, annex II, paras. 2-4; A/67/98, annex II, paras. 13-15).

154. The Internal Justice Council notes that the continuing caseload of the Dispute Tribunal seems to indicate that the caseload supports the notion that there will be a permanent need for two Dispute Tribunal judges at each of the Tribunal duty stations (see, for example, the seventh activity report, tables 1a to 1c).

155. The Internal Justice Council recommends that the review group give consideration to this issue and make appropriate recommendations to the General Assembly.

4. Half-time judges

156. There are two half-time judges in the Dispute Tribunal. The Internal Justice Council was informed that they work for two three-month periods, with usually two weeks of work in their country of residence prior to a session reviewing cases that they will work on at the duty station and two months at the duty station (which may depend on where an extra judge is most needed) and then two weeks of work in their country of residence finalizing judgements.

157. The Internal Justice Council understands that these judges play a vital role in assisting the permanent and the ad litem judges in coping with the caseload.

158. The Internal Justice Council considers that the review group might examine the issue of part-time judges in the context of its overall review of the needs of the Tribunals to perform their work.

5. Remuneration for Appeals Tribunal judges

159. The Internal Justice Council notes that the current payment system for the judges of the Appeals Tribunal was fixed at $2,400 for the judge who writes the judgement and $600 for the others judges who sign. This system was based on the honorarium paid to judges of the International Labour Organization Administrative Tribunal in 2005 (see A/61/758, para. 33). Five years of experience with this system illustrates a number of problems caused by this piecework system of payments.

160. The judges of the Appeals Tribunal have already set out the defects with this system of remuneration (A/67/98, annex I, paras. 4-10). The 2012 memorandum from the Appeals Tribunal judges noted that the unpaid assignment of duty judge (see para. 162 below) was becoming so burdensome that the judges may be compelled to cease performing this work, leaving it to the registries or for the sessions (see A/67/98, annex 1, para. 8).

161. The first problem is that this payment system does not differentiate between types of cases. A simple case may be disposed of very quickly, whereas a complex case may take months of work, including preparation time before starting to write the judgement; yet the remuneration for each is the same. Other cases may require extensive interim orders and directions as to how to proceed for which there is no payment at all. Moreover, there is no payment for the “duty judge” who has to deal with matters between sessions. Many of these matters are time consuming.

162. A further problem is that of the “duty judge”, which until now has been rotated among the Appeals Tribunal judges. There is much material, especially urgent interim matters, that is transmitted electronically to the duty judge who must print the sometimes voluminous documentation on their personal printers, which over the year is an expensive proposition without any allowance for cartridges and paper, among other items.

163. The Internal Justice Council, which has previously noted problems with this payment system (see A/67/98, para. 34), recommends that the review group examine the payment structure for judges of the Appeals Tribunal and its suitability given the development of the system of internal justice over the last five years.

6. Privileges and immunities of the judges

164. The Internal Justice Council had recommended to the General Assembly in 2012 that the judges have the privileges and immunities of diplomatic envoys (which could be done without altering the terms and conditions of employment of the judges) because of the potential need to assert immunity quickly before national courts. The Council also recommended that these privileges and immunities be set out in the statutes of the Tribunals (see A/68/306, paras. 63-67). The Assembly agreed that the status of the judges be set out in the statutes, but did not agree to confer upon them the privileges and immunities of diplomatic envoys, as that would have involved a change in their rank and status (see resolution 68/254, para. 31).

165. The rank and status of the judges within the United Nations personnel system has been a perennial concern to the judges since they consider themselves under-graded regarding the importance of their work in a hierarchical Organization where rank is highly regarded.[21]

166. The Internal Justice Council considers that, because of the concern of the judges, the review group could examine this matter and make any recommendations it sees fit to the General Assembly.

7. Staffing of the Office of the Executive Director of the Office of Administration of Justice

167. The Internal Justice Council notes that the Office of Administration of Justice consists of the three Dispute Tribunal registries, the Appeals Tribunal Registry, the Office of Staff Legal Assistance and the Office of the Executive Director. The Office of the Executive Director of the Office of Administration of Justice consists of the Executive Director (D-2), the Principal Registrar (D-1), the Special Assistant to the Executive Director (P-4), an Administrative Assistant (G-6), an Information Technology Officer (P-4) and an Information Technology Assistant (G-6). The substantive work of the Office of the Executive Director consists of monitoring the work of the Registries and their staff, supervising the provision of facilities to the Judges and to the registries (for example, courtrooms, research facilities, travel, legal assistance, publication and translation of judgements), the recruitment of Registry staff and having the lead role in preparing the report of the Secretary-General on the administration of justice.

168. The Internal Justice Council considers that, with regard to its substantive workload, this cadre is insufficient. For example, for the sixty-ninth session, in addition to the work described in paragraph 108 above, the Office of the Executive Director has been involved, along with other stakeholders, in the preparation of a code of conduct for external legal representatives, a complaints mechanism in respect of judges, the revision of the statutes to incorporate the juridical status of the judges and revised qualifications for Appeals Tribunal judges. In addition, 2014 being a year in which recruitment of judges is being undertaken (2016 will be another such year), the Office has heavy administrative burdens associated with the recruitment procedures that the Council must undertake. The Council recommends that the review group consider the workload and staffing of the Office.

[21] See A/68/306, annex 1, paras. 1-5; A/67/98, annex 1, paras. 1-3; A/67/98, annex II, paras. 9-12.

8. Representation of the Respondent in disciplinary cases

169. In its report for 2012 (A/68/306), the Internal Justice Council made recommendations on representation by the Respondent in challenges by staff to disciplinary actions at the dispute Tribunal locations away from Headquarters (i.e., Geneva and Nairobi). The Council noted "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" (see A/68/306, para. 50). The Respondent therefore is often represented across several time zones by counsel through electronic links that are subject to breakdown.

170. The Internal Justice Council still 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" (ibid, para. 51). The same argument applies to Geneva, although there are fewer oral hearings at that location. The Council recommends that the review group consider this matter.[22]

9. Outreach and training

171. Some views expressed to the Internal Justice Council noted that a number of appeals that were rejected indicated that staff members did not know of the need to seek a timely management review, nor of the defined grounds on which an appeal may be made to the Appeals Tribunal against a judgement of the Dispute Tribunal. It also appeared that staff members, particularly in the field, did not have much idea of the resources for the informal settlement of disputes that were available at the early stages of a dispute, particularly in the field.

172. The Internal Justice Council understands and welcomes that there have been recent efforts to increase outreach and training, which will be set out in the 2014 report of the Secretary-General. Funds have also been made available to enable the Office of Staff Legal Assistance to visit various peacekeeping missions. The Office of Administration of Justice is in the process of updating its website to make more information available in a clearer format, and the Executive Director will undertake an outreach mission in 2014. The Council notes that the Management Evaluation Unit is also engaged in outreach activities with managers.[23] The Council also understands that system-wide training is expensive.

173. The Internal Justice Council considers that, given the importance of staff members understanding how the system works, it recommends that the review group consider whether some investment in systematic and periodic training might help in reducing the number of appeals or limiting the number of unmeritorious applications and appeals to the Tribunals.

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[22] For various proposals to decentralize aspects of the "pre-Tribunal" stage of disciplinary proceedings see A/68/346, annex VII.

[23] Biannual Report on the Activities of the Management Evaluation Unit, 1 January-30 June 2013, paras. 40-41.

10. One code of conduct for all representatives

174. In paragraph 44 of resolution 67/241, the General Assembly "stressed the need to ensure that all individuals acting as legal representatives, whether staff members or external counsel, are 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 Counsel and other relevant bodies, to prepare a code of conduct for legal representatives who are external individuals and not staff".

175. In 2012, the Internal Justice Council explained why it favoured one code of conduct for all counsel in the following terms:

> "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 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" (A/68/306, paras. 137-142).

176. In paragraph 38 of its resolution 68/254, the General Assembly, while stressing that all counsel "are subject to the same standards of professional conduct applicable in the United Nations system", requested "the Secretary-General to present the code of conduct for external legal representatives, including appropriate sanctions for breaches thereof as safeguards against frivolous applications, to the General Assembly at its sixty-ninth session". The Internal Justice Council understands that a text is being drafted in accordance with the decision of the General Assembly.

177. The Internal Justice Council notes that there are three main arguments against having one code of conduct for all legal representatives. The first argument is that any measures to control proceedings given to judges in a code of conduct would be disciplinary measures, which only the Secretary-General, and not the Tribunals, can impose. The second argument is that the conduct of staff members appearing as legal representatives before a Tribunal is regulated by the Staff Rules and Staff Regulations, and therefore applying a code of conduct to staff member legal representatives would be duplicative and superfluous (see A/67/265 and Corr. 1, annex VIII, para. 2). The third argument is that the judges have been given the power to refer appropriate cases to the Secretary-General for possible action to enforce accountability, which is the control mechanism that judges should use if staff member legal representatives misbehave during legal proceedings (arts. 10.8 and 10.4 of the Dispute Tribunal and Appeals Tribunal statutes) (see A/67/265 and Corr.1, annex VIII, para. 3).

178. With regard to the first argument, there is no doubt that only the Secretary-General can impose disciplinary measures on staff members for misconduct, following the due process rules set out in the Staff Rules and Staff Regulations. But he can impose only the disciplinary measures set out in staff rule 10.2. However, the Council considers that most issues of conduct that arise in the context of representation of a client before the Tribunals relate to matters concerning control by the judges of court proceedings; for example, directing a legal representative who is being prolix when to

cease speaking, requiring a legal representative to focus on relevant documents and address certain points necessary to decide the case, requiring the legal representative to observe proper court decorum, and not, for example, browbeat witnesses or insult them. While giving the Tribunals the power to take corrective measures in such situations, the code of conduct should not include the power to impose any of the disciplinary measures set out in staff rule 10.2.

179. With regard to the second argument, the Council notes that the Staff Rules and Staff Regulations were drafted without any consideration for the duties of legal representatives to the Tribunals or to the system of justice. It is therefore difficult to extract from those regulations and rules standard obligations that legal representatives owe to the Tribunals and their clients; for example, to give full information on available legal strategies to the client, to make full disclosure of relevant evidence to the Tribunals, and to treat the judges and opposing legal representatives with courtesy and respect. In this connection, the Council notes that staff members who are not legally qualified and not called to the Bar of a member State are entitled to appear before the Tribunals, either as representing themselves, or representing other staff members. Such staff members in particular will not be able to extrapolate from the Staff Rules and Staff Regulations the proper conduct appropriate to legal representatives, and will require guidance from a code stipulating the permissible conduct and its limits when a legal representative tries to do justice to his client's case, while observing duties owed to the Tribunal and the opposing side. This has indeed been noted by the Secretary-General in his report on administration of justice, as follows):

> "It is also the view of the Secretary-General that the regulatory framework that governs the conduct of legal representatives who are staff members should include obligations that are substantially similar to those established in a code of conduct for legal representatives who are not staff members. Thus, following the preparation of a code of conduct, the Secretary-General would examine the existing legal regime for staff members acting as legal representatives and, as necessary amend or supplement it through administrative instructions." (A/67/265 and Corr.1, annex VIII, para. 14).

This time consuming exercise could be avoided if the code of conduct applied to all legal representatives. Moreover, it is important that all legal representatives appearing before any tribunal, including the United Nations Tribunals, be seen to be treated equally. It is contrary to the appearance of justice for external counsel to be seen as governed by rules different to those of legal representatives who are United Nations staff members in regard to the conduct of a case.

180. With regard to the third argument, as the preceding examples show, control of proceedings by a judge requires prompt action. Referring a staff member for possible action to enforce accountability is normally taken at the conclusion of the hearings. Such a referral will result in a lengthy procedure involving an investigation of the staff member's action in question, an administrative or disciplinary measure imposed or not, depending on the investigators' view of the action in question, and a possible challenge to such action before the Dispute Tribunal. Meanwhile, the offending staff member can continue to act as a legal representative throughout the proceedings, possibly repeating his or her offensive conduct. The referral procedure, therefore, is not practical as a means of enabling the judge to control proceedings.

181. The Internal Justice Council notes that the judges of the Dispute Tribunal have set out in detail why they were in favour of a single code of conduct for counsel appearing before the Tribunals (see A/68/306, annex II, paras. 38-43).

182. Moreover, in the case of *Igbinedion* (2014-UNAT-410), where findings of contempt were made against staff members in the Dispute Tribunal (UNDT/2013/024, paras. 79, 85 and 87), the Appeals Tribunal stated:

> "The Secretary-General contends that the power of the Dispute Tribunal is limited by its statute, and, as such, cannot be interpreted as extending to the power to conduct contempt proceedings. The Appeals Tribunal cannot agree. The ability to promote and protect the court, and to regulate proceedings before it, is an inherent judicial power. In the opinion of the Tribunal, it is essential to, inter alia, a tribunal's case management and ability to conduct proceedings."

183. The inherent powers described above are both implicit and explicit in the statutes of the Tribunals and their rules of procedure and Practice Directions, and necessarily extend to the ability of the Tribunals to take measures of control in respect of the conduct of all legal representatives in appropriate cases, and codifying them would lead to certainty and predictability for legal representatives in a Tribunal procedure.

184. The Internal Justice Council recommends that the review group examine the issue of whether there should be one code of conduct for all counsel which is designed specifically for those who appear before the Tribunals or whether there should be a specific code for external counsel leaving staff members to be regulated by the Staff Rules and Regulations, including any further changes to the rules dealing with this issue promulgated by the Secretary-General.

11. Terms of reference of the Internal Justice Council

185. As noted in paragraph 10 above, the general mandate of the Internal Justice Council is to "help to ensure independence, professionalism and accountability in the system of administration of justice" and "to provide its views on the implementation of the system of administration of justice to the General Assembly" (resolution 62/228, paras. 35 and 37 (d)). In addition, the General Assembly has assigned various specific tasks to the Internal Justice Council over the years and asked it to submit its views on those topics to the Assembly (see resolutions 68/254, para. 29, 67/241, paras. 42, 44, 48 and 57, 66/237, paras. 28 and 45, 65/251, para. 52, and 62/228, paras. 35 to 37).

186. The staff unions had made formal recommendations to management concerning comprehensive reforms to the terms of reference for the Internal Justice Council (see paper submitted by the Staff Council of ECLAC) with the support of the United Nations Staff Union, the New York and the Geneva Staff Coordinating Council to the Staff Management Committee, Arusha, June 2012) but, because of suspension of the Staff Management Committee, no progress was made on these proposals.

187. It is recommended that the review group might consider examining the role of the Internal Justice Council, which was initially envisaged by the Redesign Panel as a mechanism for making recommendations for the election of judges (see A/61/205, paras. 127-128), with a view to considering whether, given the expanded role assigned to it by the General Assembly, detailed terms of reference would be an improvement over the current system of general terms of reference supplemented by specific tasks assigned to it by the Assembly from time to time.

12. Encouraging settlement informally

188. The General Assembly, in paragraph 12 of its resolution 68/254, required the independent assessment to "examine the system of administration of justice in all its aspects, with particular attention to the formal system and its relation with the informal system". The mandate of the Internal Justice Council is expressed in terms of the formal system and the Council is assisted by the Office of Administration of Justice, which provides secretariat services and assists the Council as requested and is responsible for "the overall coordination of the formal system of administration of justice" (ST/SGB/2010/3, para. 2.1). Nevertheless, there are a few aspects of the informal system that directly impact the formal system so those impacts are briefly discussed.

189. One of the issues in the formal system is delay. To some extent delay is a function of caseload. A proper screening mechanism in the informal system would reduce the caseload. The seventh activity report notes that in 2013 the Office of Staff Legal Assistance settled some 71 cases (see chart no. 10) and the Management Evaluation Unit report cited above notes that some 157 cases were rendered moot or settled after its evaluation (see Biannual Report on the Activities of the Management Evaluation Unit for the period 1 January until 30 June, vol. 11, 12 November 2013, table 2). It seems, therefore, that there is greater opportunity to dispose of cases at the point of entry into the formal system. (The report of the first panel had a section emphasizing the importance of the informal system for the formal system: see A/65/304, paras. 79-81).

190. The Internal Justice Council considers that strengthening aspects of the informal system would have an immediate beneficial effect on the formal system by reducing the number of formal appeals through earlier and quicker resolution of disputes. Accordingly, the Internal Justice Council offers a brief discussion of two general issues involving the informal system that directly impact the formal system, although in rather different ways.

13. Management Evaluation Unit efforts prior to appeals

191. Although the Management Evaluation Unit is part of the formal system, it does operate prior to the submission of applications to the Dispute Tribunal and so, in this sense, it performs a role similar to entities of the informal system that try to avoid litigation. The 2013 report of the Secretary-General also notes that cases were settled at times by counsel for the parties "including following judicial intervention or case management by the Dispute Tribunal" (A/68/346, para. 15).

192. The Internal Justice Council was told during its session that the funds and programmes encouraged informal resolution of cases and the Council was struck by the following observation in the report of the Secretary-General on administration of justice: "With respect to the funds and programmes, most of the cases were resolved at the management evaluation stage" (A/68/346, para. 12).

193. The review group may wish to investigate which factors make it possible to settle more disputes amicably in the funds and programmes and consider whether the techniques used in that context may have wider application.

14. Entities that conduct investigations

194. Although investigations are a formal process carried out by the Secretary-General as a prelude to any disciplinary action, they are not part of the formal system of administration of justice. However, because the initial investigation is at the core of each disciplinary case that comes before the Dispute Tribunal, the Internal Justice Council will make a few brief observations on this essential topic.[24]

195. Various initiatives with respect to the process of United Nations investigations are discussed in the 2013 report of the Secretary-General (see A/68/346, annex V, para. 16). The Ombudsman has also commented on the problems caused by the current system of investigations and has noted efforts to address these issues (see A/67/172, paras. 140-146). The recently concluded Staff Management Committee, which met in Valencia, Spain, between 23 and 28 June 2014, adopted the terms of reference of a working group on investigations and disciplinary matters with the participation of all investigative entities and decided that it would start work immediately, with a view to making recommendations to the Secretary-General at the latest by the end of the first quarter of 2015.

196. The Joint Inspection Unit recently noted that in the United Nations "many actors share responsibility for investigations: OIOS [Office of Internal Oversight Services], security services, heads of offices and programme managers, and the Office of Human Resources Management" (A/67/140, para. 17). The Redesign Panel had earlier recognized the impact of investigations and considered that reforms were needed (see A/61/205, paras. 24-27; 33-35).

197. The Tribunal has mandated that disciplinary penalties must be justified by "clear and convincing" evidence and this standard has therefore to be met by an investigation if it is to be an effective prelude to disciplinary action or to clear a staff member wrongly suspected of misconduct. However, the sheer number of different investigations, most of which are not performed by trained professional investigators, raises real difficulties. Many recent cases have criticized initial investigations, but it is inevitable, in the opinion of the Internal Justice Council, that, with so many actors involved in investigations, the quality of those investigations necessarily will be far from uniform.

198. The Internal Justice Council notes that faulty investigations can mean more work for the Tribunals, lack of respect for due process and more costs for the organization acting upon reports that do not meet required standards. Poorly executed investigations impact disciplinary cases that come before the Tribunals, whether it be violation of due process for staff or failure by management to succeed in separating or otherwise disciplining staff members who deserve sanctions for serious misconduct or misconduct.

199. The Redesign Panel noted that an effective justice system "means not only the protection of the rights of staff members and management, but accountability of managers and staff members alike" (A/61/205, para. 6). It is clear, therefore, that investigations, although not part of the formal system, have a direct and immediate impact on it. Accordingly, the Internal Justice Council recommends that the review group consider the current state of investigations and the means by which the level of transparency, accountability, fairness and effectiveness may be improved.

[24] See also A/65/304, paras. 89-94.

15. Conclusion

200. The Internal Justice Council stands ready to assist the review group in any way within its powers, and will be pleased to discuss any of these issues or any other matter concerning the system of administration of justice at the convenience of the review group. It is hoped that the extensive review of these issues in our report will be of assistance.

IX. Summary of recommendations to the General Assembly

201. Recommendations that were made to the review group expected to be established by the General Assembly are not summarized. The Internal Justice Council notes that these recommendations, organized under numerous headings, are set out in section VIII of this report.

Request in resolution 68/254: interim judgements, orders or rulings

202. The Internal Justice Council, after an extensive analysis of this issue and after carefully considering the views of stakeholders (see paras. 14-79 above), noted that the General Assembly was expected to approve the establishment of an independent review panel to conduct an interim assessment of the internal justice system and, accordingly, it would seem that this review group would be well placed to consider this complex issue (see paras. 80-89 above).

The Tribunals

203. The Internal Justice Council noted the current and planned improvements to the search engine and recommended that the General Assembly ensure that the planned further improvements become operational (see paras. 91-93 above).

204. The Internal Justice Council also recommended that the General Assembly encourage the Tribunals to consider longer-term measures that might help speed up the disposition of cases (see paras. 94-103 above).

Self-represented litigants

205. The Internal Justice Council recommended that the General Assembly encourage the re-establishment of a volunteer system with incentives to attract qualified staff to assist applicants and appellants in the system of administration of justice (see paras. 109-116 above).

(*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 Dispute Tribunal on systemic issues

A. Introduction

1. Further to their previous memorandum to the General Assembly in 2013 on systemic issues of the United Nations administration of justice system (A/68/306, annex II), the judges of the United Nations Dispute Tribunal hereby respectfully share with the General Assembly their views after five 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 11 and 12 of General Assembly resolution 68/254, an interim independent assessment of the system of administration of justice will be conducted by independent experts, including experts familiar with internal labour dispute mechanisms. 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 of experts and that the structural framework of the formal system remain unchanged during the assessment period.

Number of full-time judges in each duty station

3. While judges understand that it would be premature for the General Assembly to adopt any proposal regarding the number of permanent judges in each duty station before the completion of the interim independent assessment of the system of administration of justice will be conducted, they reiterate that after five years of the Dispute Tribunal's existence, the need for two full-time judges at each duty station is unassailable. The Tribunal statistical data continues to show that timely handling of the workload of the Tribunal calls for the appointment of two full-time judges at each of the Tribunal's duty stations. The number of cases filed with the Tribunal in 2013 was 289, which is an increase in the number of cases filed in 2012 (258).

4. While the judges took appropriate measures to further expedite the handling of cases, such as early proactive case management, judicial intervention with a view to settlement, fast tracking of non-receivable and manifestly inadmissible cases, and changes to the geographical distribution of cases, the number of cases filed each year remain high and cannot be disposed of without the assistance of two full-time judges at each duty station. The judges reiterate their previous view on this matter (see A/68/306, annex II) and recall that access to justice is denied if it is delayed.

5. It is the judges' considered 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 continuation of the ad litem judge system by extending the positions of ad litem judges and supporting staff beyond 31 December 2014.

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

Independence of the Dispute Tribunal

6. In the opening paragraphs of its resolution 68/254, the General Assembly recalled and reaffirmed previous resolutions on the functioning of the system of administration of justice and applicable legal principles. The Assembly reiterated, in paragraphs 5, 25 and 26, that decisions taken by the Tribunals shall conform with the provisions of the Charter and the resolutions of the General Assembly resolutions, in particular on human resources management-related issues, and that recourse by the Tribunals to general principles of law and the Charter is to take place within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances.

7. In paragraph 7 of the resolution, the General Assembly emphasized the importance of the principle of judicial independence in the system of administration of justice.

8. The judges reiterated that the core function of an independent judiciary is to apply and interpret legal provisions previously approved by the legislator. The independence of the judiciary required that any attempt, irrespective of its source, to influence the jurisprudence of the judiciary be rejected. An independent judiciary is also to independently review its procedures to ensure that it delivers its mandate fairly and efficiently. Judges review their procedures on a regular basis, during their plenary meetings, in order to ensure the fair and expeditious handling of cases. Recently, judges reviewed their procedure regarding the dismissal of manifestly inadmissible cases. Those are few in number and handled efficiently at the earliest possible stage, including through the rendering of summary judgments.

9. The judges recall the doctrine of separation of powers, which guarantees that the judiciary is a separate entity free from intrusions by the executive or legislative branches, and which draws clear lines between the competencies of each body. 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

10. In paragraph 39 of resolution 68/254, the General Assembly requested the Secretary-General to entrust the Internal Justice Council with including the views of the Tribunal in its annual reports. The judges recall that the lack of a direct reporting line from the Dispute Tribunal to the General Assembly remains an unresolved core systemic issue. 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 office of 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 entire 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.

11. 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.

Access to justice

12. The experience of the last five years has proved that the judges have no recourse to any appeal mechanism regarding decisions affecting their conditions of service and contractual rights taken by an administration that is itself under the jurisdiction of the tribunals. Moreover, negotiations by judges with an administration are indelibly viewed as political and as undermining the appearance of judicial independence.[a]

13. The judges view the lack of an appeal mechanism applicable to them as inimical to the independence of the judiciary. To preserve the rights enshrined under clause 11 of the United Nations Basic Principles on the Independence of the Judiciary (endorsed by the General Assembly in 1985)[b] requires the participation of an independent commission or body in the fixing and reviewing of judicial salaries and entitlements.[c]

14. The judges request the General Assembly to consider the establishment of a mechanism to provide them with recourse to an independent, effective and objective mechanism that will offer a guarantee of judicial independence.

D. Transparency of the system of administration of justice

Courtroom and access to the public

15. The judges are pleased to inform the General Assembly that on 11 March 2014 the second fully functional courtroom of the Tribunal in Geneva was inaugurated after almost five years of the Tribunal's existence, in line with paragraph 28 of the General Assembly resolution 68/254. The first fully equipped courtroom of the Tribunal in Nairobi was inaugurated in June 2013. The third and last courtroom in New York, while already functional since June 2014, will be fully completed once telecommunication equipment similar to that available in the other two courtrooms is provided.

Complaints mechanism

16. 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. Since the approval of the mechanism, no complaint has been received by the President of the Dispute Tribunal. During their eighth plenary meeting, the judges agreed upon the implementation of the necessary procedural framework, which is included in the report of the Secretary-General on administration of justice (A/69/227, annex VII).

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[a] *Manitoba Provincial Justices Association v Manitoba Minister of Justice* [1997] 3 S.C.R.

[b] Clause 1, "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law".

[c] *Valente v The Queen* [1985] 2 S.C.R.

E. Adequate resourcing

17. The judges note that, in its resolution 68/254, 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.

18. The judges note with appreciation paragraph 28 of resolution 68/254, in which the General Assembly reaffirmed the need for administrative requirements for the Tribunals to be met. The five-year experience of the Dispute Tribunal shows that while the achievements produced since the inception of the system of administration of justice, regarding both the disposal of the backlog and the disposal of new cases, are appreciated, the actual costs of operation of the Tribunal and the Office of Administration of Justice are underestimated. The lack of resources adequate to provide proper administrative and technical support has put at risk the proper functioning of the system of administration of justice, as outlined below.

Staffing

19. The judges reiterate that the current staffing resources 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 administrative and technical support to the Tribunal. In particular, Registry staff who provide judicial support also perform technical and administrative functions such as the compilation of statistics and other duties. The judges also note that the Office of the Executive Director of the Office of Administration of Justice has insufficient support, thereby rendering the fulfilment of the mandate of the Office difficult.

20. The judges are concerned that vacancies of key positions such as Registrars and legal officers are not filled within acceptable time limits. For example, the filling of the posts of Registrar in Geneva and Nairobi took more than 7 and 10 months, respectively. Currently, the position of Principal Registrar, which is responsible for the coordination of the substantive, administrative and technical support provided to the Tribunals, is vacant following the retirement of the incumbent of the post. In an office as small as that of the Office of Administration of Justice, the delay in filling key posts such as legal officers, Registrar and Principal Registrar, following the retirement or departure of the incumbents of the posts, has a direct impact on the performance of the Tribunal.

Travel and training funds

21. The Registries have experienced even greater difficulties than the judges because no travel funds were allocated in the past five 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 decentralized Registries.

22. A professionalized and adequately resourced system of administration of justice requires ongoing training and upskilling of all staff and judges within the new system of justice. Continuing judicial education required in terms of paragraph 7 (g) of the judges' code of conduct[d] demands that judges participate in training and information sharing conferences with other international judges in similar fields. A professionalized bench is best served by professionalized staff, counsel and all stakeholders in the new system of justice, as this serves to expedite cases and enhance service delivery. Allocation of funds for these purposes needs to be made.

Transcripts of hearings

23. The judges reiterate that 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. The judges are mindful of the allocation of funds for this purpose. However, the level of such funds is minimal and does not allow the systematic transcriptions of hearings, in particular hearings on merits. These are important for matters taken on appeal, especially in cases in which there are complicated or numerous factual findings. The judges support the allocation of sufficient funds for the systematic production of professional transcription of hearings in all duty stations of the Dispute Tribunal.

Information and communications technology resources

24. In paragraph 8 of its resolution 68/254, the General Assembly stressed the importance of ensuring access for all staff members to the system of administration of justice, regardless of their duty station. The launch of the Tribunals' case management system by the Office of Administration of Justice in July 2011 has allowed staff members who filed cases before the Tribunal to have access to their cases at all relevant times and from any computer. However, a number of necessary technological upgrades remain to be done to the system to ensure continued proper access to justice.

25. The judges note that the General Assembly, in paragraph 43 of its resolution 68/254, stressed the growing need for a modernized and upgraded search engine to facilitate streamlined access to the jurisprudence and outcomes of past relevant cases. Feedback received from stakeholders shows that the available web-based search engine for accessing and researching judgements and orders of the Dispute Tribunal is better than the previous rudimentary tool, but it is a work in progress and judges are hopeful that the next upgrade will bring the Tribunals' search engine to appropriate legal research standards.

26. The judges request that sufficient funding should be allocated to assist the Office of Administration of Justice in upgrading its Court Case Management System and establishing an effective online search tool to facilitate dissemination of the jurisprudence of the new professionalized internal justice system.

[d] Art. 7 (g) of the judges' code of conduct states that judges "must take reasonable steps to maintain the necessary level of professional competence and to keep themselves informed about relevant developments in international administrative and employment law, as well as international human rights norms" (resolution 66/106, annex).

F. Adequate representation of applicants before the Dispute Tribunal

27. The experience during the five-year existence of the system of administration of justice shows that a significant number of unrepresented applicants hinder the ability of the Dispute Tribunal 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.

28. 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.

29. 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, and in assisting in alternative resolution of dispute with or without the involvement of the Mediation services of the Office of the Ombudsman.

G. Status of the judges

30. By virtue of the doctrine of separation of powers and the independence of the judiciary, judges are not staff members, civil servants or officials of the organization. The judiciary is a separate independent entity, free from intrusion by the executive and legislative branches, and must enjoy financial, administrative and disciplinary independence.

31. The judges reiterate that their core task is to adjudicate matters relating to decisions taken or endorsed at a senior level in the relevant department or office, including at the Assistant Secretary-General or Under-Secretary-General level. In a hierarchical organization such as the United Nations, it is important that the judges are at the right level of seniority and status.

32. "Judging is not what it used to be. Judges are more important now; judges are more criticized. And judges face more difficult tasks than they ever have before".[e] The level of decision-making required of Dispute Tribunal Judges, which has far-reaching consequences within the United Nations system of more than 70,000 staff members, belies the D-2 status of the judges. The impact of some of these decisions has resulted in the clarification, the reconsideration and the promulgation of new administrative instructions, guidelines and practices, thus inculcating and promoting harmonious and good workplace relations within the United Nations at large.

33. The D-2 status of Dispute Tribunal judges is also anomalous with the status of others in the system. For example, most other international judges, such as those of

[e] "The Role of Judges in Modern Society", speech by the Rt. Hon. Beverley McLachlin PC, Head of the Supreme Court of Canada, 5 May 2001.

the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the specialized Tribunals, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon, are at the Under-Secretary-General level. The United Nations Ombudsman, who is part of the informal system of internal justice, is at the Assistant Secretary-General level, yet mediation agreements brokered by the Ombudsman can only be enforced by the judges of the formal system, who are at the D-2 level. For the above reasons, the judges of the Tribunal should be placed at the Assistant Secretary-General level.

H. Draft code of professional conduct for external legal representatives

34. 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.

35. It is important to recall that the General Assembly, in its resolution 68/254, stressed the need to ensure that all individuals acting as legal representatives, whether staff members or external counsel, are 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 present a code of conduct for external legal representatives, including appropriate sanctions for breaches thereof as safeguards against frivolous application.

36. 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.

37. 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 Staff 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 Staff 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.

38. While the Secretary-General has 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 Staff Regulations of the United Nations, and vice versa. An arrangement whereby a party

to the proceedings has disciplinary powers over counsel militates against the appearance of independence.

39. 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 prepared.

Annex II

Memorandum from the judges of the United Nations Appeals Tribunal

A. Need to reinstate and regularize the duty judge system

1. The Appeals Tribunal receives not only appeals against judgements, which the judges review and dispose of in three sessions every year, but also motions, which often require time-sensitive judicial attention. Most of these motions are filed, and have to be dealt with, when the Tribunal is not in session.

2. In order to cope with this situation, the Appeals Tribunal judges, in 2010, created a duty judge system, under which the judges took turns on a monthly basis performing judicial functions, as designated by the President, in between sessions. The duty judge system was set up entirely on the judges' own initiative and involved their working in their own free time in order to dispose of procedural motions in a timely manner.

3. This system has played a critical role in moving cases through different procedural phases in a timely manner and in safeguarding against potential due process violations. However, since the inception of the system, the amount of work required to be done between sessions has increased significantly.

4. The number of motions being filed has continued to rise. For the first five-and-a-half months in 2014 alone, the Appeals Tribunal Registry received 50 motions, which is more than the annual total for each of the past four years. This increase has made such inordinate demands on the free time being volunteered by the judges that it became inevitable that the system could no longer be sustained, especially in the absence of any remuneration scheme. Hence, the duty judge system ceased to be operational in April 2014. The burden of dealing with motions now falls upon the President, who decides urgent motions when necessary and adjourns all other motions to the next session of the Appeals Tribunal. The expected consequence is a backlog of cases, since it is not going to be feasible to decide all outstanding motions and all docketed appeals in a two-week session.

5. The ideal solution to the problem is for arrangements to be made for a permanent Appeals Tribunal judge to be stationed in New York. This would enable motions to be promptly disposed of without encroaching on the time necessary to hear appeals, thus ensuring that appeals are heard and determined as expeditiously as possible.

6. In the meantime, arrangements need to be made to restore the duty judge system on a sustainable basis.

B. Need for an additional legal officer

7. Since its establishment, the Appeals Tribunal has rendered a total of 194 orders over a range of procedural issues, in addition to 427 judgements issued. These orders have required a significant amount of time and attention not only from the judges, but also from the Registry, whose limited resources have been further stretched.

8. There is an immediate need to recruit an additional legal officer for the Registry in order to strengthen the ability of the Appeals Tribunal to provide administrative, legal and technical support to the judges of the Appeals Tribunal on a more sustainable and reliable basis.

9. The judges are mindful of their mandate as the only appellate body within the Organization charged with hearing and determining appeals and clarifying and settling legal issues as expeditiously as possible in order to remove uncertainty in the professional life of the staff concerned and to enable the Administration to manage in a more certain and informed legal environment. For this purpose, they strive to increase their workload each session.

10. However, despite the best efforts of all concerned, because a de facto maximum number of cases has been reached, the Registry (consisting of a Registrar, two Legal Officers and two Support Staff) has reached a limit in its capacity to deliver. The Registry's current staffing is manifestly inadequate for the tasks that it has been required to accomplish. Over the past five years the Registry staff have prepared more than 100 cases annually. Their work for each session typically involves identifying cases for review, copying case files for pouching to the judges, making logistical arrangements for the conduct of the Tribunal sessions (both in New York and abroad), drafting briefing notes setting forth facts, contentions, issues and relevant case law and administrative issuances, participating in panel deliberations, providing legal and administrative support in relation to oral hearings, preparing for and assisting during plenary meetings and editing, finalizing and publishing judgements. In addition to preparing three sessions every year, the Registry staff manage the daily operations of the Appeals Tribunal under the guidance of the President, including processing incoming communications, alerting the President (or, formerly, the duty judge) to new motions, preparing and processing judicial orders for the President (or, formerly, the duty judge) to dispose of procedural motions and responding to inquiries from the parties and stakeholders. The Registry staff also maintain the Tribunal Register and website, provide statistics and comments in respect of the Appeals Tribunal to be incorporated in the Office of Administration of Justice activity reports and the reports of the Secretary-General on administration of justice. There is simply no excess capacity within the Registry to be tapped.

11. There are currently over 120 appeals on the docket awaiting review, which represents more than a year's workload. To prevent the accumulation of a new backlog from emerging and to enable the judges and the Registrar's Office of the Appeals Tribunal to function on a more effective basis, the judges believe that at the very least another Legal Officer at the P-3 level is essential, if the Appeals Tribunal is to continue fulfilling its mandate given by the General Assembly.