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Appointment of the judges of the United Nations Dispute Tribunal

Administration of justice at the United Nations

Administration of justice at the United Nations

Report of the Internal Justice Council

Summary

The objective of the present report — the final one of the second Panel — is to assist the General Assembly in its consideration of the recommendations of the Interim Independent Assessment Panel by discussing those recommendations which the Panel considered central to the objectives formulated by the General Assembly. Moreover, the Internal Justice Council limited its comments to matters on which it considered that it could provide views that would assist the Assembly in its consideration of the report of the Interim Independent Assessment Panel, based on its experience with the new system that it has gathered during its four-year term of office as an independent observer.

In considering the report, the Panel has always kept in mind the stated objectives of the General Assembly 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.

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I. Introduction

A. Fundamental considerations

1. Background

1. The Charter of the United Nations envisions a world based on the rule of law.

2. The Universal Declaration of Human Rights lends force to this objective when it provides in article 7 that "all are equal before the law and are entitled without any discrimination to equal protection of the law". This declaration, while general in scope, has direct application to the Organization and its workforce.

3. Still greater precision to the application of the "rule of law" to the internal workings of the Organization was given by the General Assembly itself in paragraph 4 of resolution 61/261 where it 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". This was reaffirmed in resolution 63/253 (second preambular paragraph). Each of these words was carefully chosen and has an independent significance.

4. It was understood, of course, that the Organization would continue to be led by managers, but the General Assembly in these resolutions affirmed that managers are expected to operate within a framework of regulations, rules and administrative issuances enforced by Tribunals presided over by an independent and professional judiciary.

5. It is part of the mandate of the Internal Justice Council to ensure that the internal justice system lives up to the expectations of the General Assembly by drawing its attention to any problems or deficiencies. A particular challenge in this respect, as noted by the Interim Independent Assessment Panel,[1] is the creation of an adequate system of justice for individuals who are in reality employees of the Organization but who are not staff members, as will be discussed later in the present report.

6. It is a characteristic of a mature legal system that all three elements of high authority — the Legislature, the Executive and the Judiciary — respect the separation of powers. This requirement is challenging especially in a hierarchical organization such as the United Nations, but it is nevertheless essential if the rule of law is to be respected.

7. In this final report of the present Panel of the Internal Justice Council, an attempt will be made to assist the General Assembly by providing additional information and discussing some of the ramifications of the recommendations of the Interim Independent Assessment Panel. In doing so, however, we wish to anchor ourselves firmly in the objectives set for the internal justice system by the General Assembly itself.

[1] The establishment and mandate of the Interim Independent Assessment Panel are discussed in paras. 32 to 33 below.

2. Independence and separation powers

8. This is the first and perhaps most critical element insisted upon by the General Assembly in paragraph 4 of resolution 61/261. The administration of any justice system worthy of the name is based on the rule of law and there can be no rule of law without an independent judiciary, as declared in article 10 of the Universal Declaration of Human Rights. The United Nations judges must not only be, but be seen to be, wholly independent of management and its lawyers. As the General Assembly will have noted, United Nations judges have in recent years been preoccupied with the appearance and reality of their independence. The issue will be addressed in the present report.

9. Although the Secretary-General is the respondent in all cases involving the United Nations before the tribunals, the rule of law requires the Secretary-General as the chief administrative officer of the Organization to implement judicial orders until and unless they are reversed on appeal. It is in the nature of the separation of powers that judges have no physical means to enforce their own decisions. In a mature judicial system, the Executive undertakes compliance with the law and judicial orders as a matter of constitutional responsibility. This obligation, in the view of the Internal Justice Council, applies to the Secretary-General and is an issue which will be addressed again later in the present report.

3. Transparency

10. This is the second element in paragraph 4 of resolution 61/261. The principle of transparency calls for the regulations, rules and administrative issuances of the United Nations, which govern the conduct of staff members, including managers, are comprehensible, internally consistent and accessible. At present, as noted by the Interim Independent Assessment Panel, there are many examples of overlapping and inconsistent issuances so it is not always clear what the legislator had in mind. A further problem is difficulty encountered in the use of search engines to find the applicable law. The Internal Justice Council understands that the Office of Administration of Justice search engine for tribunal jurisprudence is undergoing further improvements. The Official Document System search engine can find United Nations documents but is of less assistance in finding a specific subject matter within documents.

11. A proper system of justice requires that the law be certain so that managers will know the limits of their authority and staff will know the limits of their entitlements. Lack of transparency in applicable law creates misunderstanding and litigation. Litigation creates costs and workplace disruption. In the view of the Council, the requirement of transparency called for by the General Assembly has not yet been achieved. Revision and consolidation of enactments must be a high priority in the years to come, as the Interim Independent Assessment Panel recommended, and as will be further discussed in the present report.

4. Professionalism

12. The General Assembly expects the internal justice system to function according to a high professional standard (see para. 4 of resolution 61/261). Thus it requires its candidates for judgeships to be professional judges.[2] They are not to be

[2] In the case of Appeals Tribunal appointments, 5 of the 15 years of the required judicial experience can be academic experience combined with experience in arbitration or its equivalent (article 3.3 (b) of the statute of the Appeals Tribunal).

recruited from the ranks of retired public servants. Moreover, in the view of the Council, professional legislative drafting assistance is required to remedy some of the problems of the lack of transparency in the regulations, rules and administrative issuances.

13. Professionalism also requires that lawyers acting for the Secretary-General appreciate that their professional role is not to win cases, but to see that justice is done. In mature legal systems, government lawyers appreciate that the Government, while engaged in litigation, neither wins nor loses. Whatever the outcome of a particular case, the job of the government lawyer is help the Tribunal to deliver decisions that are consistent with procedural fairness and the law. Similarly, United Nations entities are not expected to advance their own causes at the expense of justice. This can be particularly demanding within an institution such as the United Nations where many litigants are self-represented. The professionalism of the judges and lawyers engaged in the internal justice system will be the subject of further discussion in the present report.

14. The various groups of legal advisers within the Organization, including the Administrative Law Service of the Office of Human Resources Management, the Office of Legal Affairs, the various legal services of the funds and programmes and the Office of Staff Legal Assistance, will properly and vigorously advocate their clients' positions before the tribunals, but they all have a common interest in making the internal justice system the most accessible and fair system it can be. Such is one of the demands of professionalism.

5. Adequately resourced

15. All participants in the internal justice system are acutely aware that the United Nations is under severe budgetary pressure to discharge its many mandates and that unnecessary expenses are unacceptable. Additional costs in one part of the system will likely have to be offset by savings elsewhere. On occasion, additional resources can be found, as in the experimental scheme of the voluntary staff supplemental funding mechanism to the Office of Staff Legal Assistance.

16. Direct costs, of course, are only one side of the cost/benefit analysis. There is a high cost to be paid if the justice system does not function properly. A good deal of staff time is wasted, for example, because of the difficulty in locating the applicable law. There are claims brought which would not have been brought but for a misunderstanding of the applicable law and consequent entitlements. Unclear laws breed litigation. The Office of Staff Legal Assistance does much good work in weeding out unmeritorious claims, but as the General Assembly has acknowledged in the past, the Office is underresourced.[3] The Internal Justice Council also noted previously that the Office is underresourced (see A/70/188, para. 47). Additional resources for the informal justice system may lighten the load on the formal justice system, thereby reducing the overall cost of workplace justice.

17. Moreover, a sense of grievance and exclusion is felt by those retained under various types of service contracts, but who are in fact under the control and direction of the United Nations in the way that they work, that is to say, those who,

[3] The increased operational needs of the Office of Staff Legal Assistance were the basis for the experimental and voluntary staff supplemental funding mechanism (see paras. 33-36 of resolution 68/254).

despite the formal terms of their engagement, are in reality employees, but who are not staff members, and who work alongside staff members, especially in humanitarian and peacekeeping operations. Innovative procedures will need to be devised to address the grievances of non-staff personnel.

18. Article 8 of the Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by the competent national tribunals. The Organization's immunity from the jurisdiction of national tribunals requires that it provide an effective method of settling disputes. Such an effective remedy for all non-staff personnel can be provided, in the view of the Internal Justice Council, at a relatively low cost, as will be discussed.

19. The Council understands and accepts that, for the most part, any improvements in the internal justice system that require additional resources will either have to be self-supporting or achieved by a reallocation of existing resources within the system.

6. Accountability

20. Legal representatives who appear before the tribunals must conduct themselves in a professional manner. Thus, the General Assembly has instructed the Office of Administration of Justice to finalize the code of conduct applicable to all legal representatives appearing before the tribunals, which was not finalized in 2015 but the Council understands that, once consultations with stakeholders are finished, it will be presented to the General Assembly at its seventy-first session.

21. As another element of accountability, the General Assembly, in paragraph 40 of resolution 70/112, approved the mechanism by which complaints can be brought against the judiciary and handled in a professional manner that is consistent with the independence of the judiciary (resolution 70/112, annex). Of course, accountability of participants in the justice system, including the judges, is an important element of the rule of law.

22. Accountability was a further central objective of the new system and the General Assembly introduced into the statutes of the tribunals another tool — the power to refer cases to the Secretary-General to decide whether action needs to be taken to enforce accountability — to help the Secretary-General to discharge his obligation to hold managers and subordinate staff members accountable. This is discussed further in the present report.

7. Decentralization

23. Finally, by establishing chambers of the Dispute Tribunal in Geneva, Nairobi and New York, and the establishment of the Office of Staff Legal Assistance in Addis Ababa, Beirut, Geneva, Nairobi and New York, it was clearly an objective of the General Assembly to broaden the distribution of legal representational work from New York to other duty stations. However, the system is still very much anchored in New York. Yet there are reforms suggested in the present report, such as a very simplified arbitration procedure to be made available in the field, that should promote both cost savings and decentralization.

B. Organization of the report

24. Section II of the present report deals with aspects of the mandate of the Internal Justice Council and a recommendation of the Interim Independent Assessment Panel for the judges to submit their comments directly to the General Assembly, rather than through the Council; section III contains the observations and recommendations of the Council on the report of the Panel; section IV presents options to the General Assembly for the speedy recruitment of three Dispute Tribunal judges should the Assembly decide to accept the recommendation of the Panel to replace the three ad litem positions by three permanent positions; and section V deals with the Office of Administration of Justice.

25. Annex I to the present report contains a summary of the recommendations of the Council; annex II contains a brief listing of documents concerning prior consideration by the General Assembly of access to effective remedies by non-staff personnel; and annex III deals with the organization of the session of the Council. Annexes IV and V transmit the comments of the Appeals Tribunal and of the judges of the Dispute Tribunal, respectively.

II. Mandate of the Internal Justice Council

A. Transmission of comments of the appeals and dispute judges to the General Assembly

26. Since the sixty-sixth session, the General Assembly has requested the Internal Justice Council to include the views of both Tribunals as part of its report (see resolution 66/237, para. 45). As in prior years, the Council has attached the views of the Appeals and Dispute Tribunals, without comment or editing by the Council, in annexes IV and V to the present report.

27. Members of the Council are not shown copies of the views of the Tribunals until after the report and its annexes are sent to the Department of General Assembly and Conference Management for editing, translation and publication.

B. Recommended clarification concerning the nature of Internal Justice Council “representatives” selected by management and staff

28. The current membership of the Internal Justice Council includes one “representative” nominated by the staff and one “representative” nominated by management, in addition to three other members (see resolution 62/228, para. 36). The Secretary-General appoints the persons so nominated to the Council.

29. In its report to the General Assembly at its sixty-eighth session, the Council recommended that the Assembly confirm that the use of the word “representative” did not mean that such a person was to act as an advocate or counsel of the staff or management, or act in conformity with any mandate other than that established by the Assembly, but simply meant that management or the staff, as the case may be, could nominate persons in whom they had confidence to help the Council to

discharge its mandate, given their background and experience in the United Nations system (see A/68/306, para. 13).

30. The Interim Independent Assessment Panel supported that recommendation (see A/71/62/Rev.1, para. 388) and the Internal Justice Council recommends that the General Assembly specifically endorse this approach so that it becomes part of the terms of reference of the Council.

C. Current membership of the Interim Justice Council

31. The current membership of the Interim Justice Council, whose terms of office expire on 12 November 2016, consists of five members: two "distinguished external jurists" — one nominated by staff and one by management, one "representative" nominated by the staff, one "representative" nominated by management, and a "distinguished jurist" nominated by the four members to be the Chair (see resolution 62/228, para. 36). The Secretary-General appoints the persons so nominated to the Interim Justice Council. The current members of the second Council panel 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, 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).

III. Internal Justice Council focus on the recommendations of the Interim Independent Assessment Panel: effective access to a qualified and independent judiciary operating within a transparent and effective system of justice

A. Introduction

32. General Assembly 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 new 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). Upon consultation with staff representatives, the Secretary-General thereafter created an Interim Independent Assessment Panel to carry out that assessment.

33. On 2 November 2015, the Panel submitted its report, which was circulated for comments by the Secretary-General to stakeholders on 25 November 2015, with a deadline of 18 January 2016, and was first published as an official document on 11 December 2015 (A/71/62), later issued in revised form on 15 April 2016 (A/71/62/Rev.1). The Internal Justice Council was invited to submit comments to the Secretary-General and/or to submit comments to the General Assembly as part of its independent mandate. In a letter to the Secretary-General dated 15 January 2016, the Chair of the Council stated that it was not feasible for it to provide this

information prior to the 18 January 2016 deadline, but that the Council expected to provide more observations in its annual report.

34. The General Assembly will soon be considering these recommendations in the light of the Secretary-General's comments on the 58 recommendations of the Interim Independent Assessment Panel, the report of which will take into account the views of stakeholders in the United Nations justice system. Almost every recommendation of the Panel will probably be subject to some comment from stakeholders. Accordingly the Council will limit its comments to matters where it considers it can provide views, based on its experience with the new system that it has gathered during its four-year term of office as an independent observer and it is hoped that these comments will assist the General Assembly in its deliberations on the recommendations of the Panel.

35. In establishing the new system of internal justice, the General Assembly consistently gave guidance on the goals for that system. In the view of the Internal Justice Council, what is essential is to assess the recommendations of the Interim Independent Assessment Panel in the light of whether those recommendations will help to achieve the goals set by the General Assembly.

36. The Panel noted that an important element of the rule of law is a qualified and independent judiciary operating within a transparent and effective internal justice system, making decisions on merits without fear or favour from the Administration. Transparency is key to enabling individuals subject to its jurisdiction to gain confidence that it is operating as such (see A/71/62/Rev.1, para. 190). It is on these features of the internal justice system that the Internal Justice Council will focus its observations and recommendations. They are discussed in sections B to H below.

B. Access to a qualified and independent judiciary

37. Effective access to justice requires that it is not only independent, but also seen to be independent by all those subject to its jurisdiction. In a hierarchical organization such as the United Nations, both the fact and appearance of independence may be more difficult to achieve than in a national jurisdiction. The Secretary-General is the chief administrative officer of the Organization and the respondent in appeals involving the Organization against decisions made by him or (more commonly) by those delegated to act on his behalf. It is important, therefore, that the Secretary-General and the senior members of the executive refrain from initiatives or conduct that may be interpreted as diminishing the authority and independence of the Tribunals, which have to rule on the validity of the exercise of that authority.

1. Separation of powers

Introduction

38. While much progress has been made since 2009 towards instilling the values of the rule of law and the independence of the judiciary among the participants in the internal justice system, there is still work to be done.

39. At the interview between the Internal Justice Council and the General Legal Division of the Office of Legal Affairs, the latter brought to the attention of the Council an issue that, in the view of the General Legal Division constituted an

improper interference by the Judge President of the Dispute Tribunal with what the Division called "the independence of the administrators." It goes without saying that one of the functions of an independent judiciary is to subject the unfettered "independence of the administrators" to the rule of law.

40. In the circumstances, the Council felt obliged to investigate this issue carefully, as it appeared to raise questions of judicial independence and the separation of powers, as well as the independence of the Office of Administration of Justice, and more generally, the understanding of those concepts on the part of some of the lawyers who regularly advise and represent the Secretary-General. In the light of the seriousness of the issues, the circumstances that occurred will now be set out in some detail, keeping in mind that it is a fundamental principle of the rule of law that the orders and directions of a judge should be respected until varied by the judge or reversed on appeal.

Background and decision of the judges

41. The background to this controversy is as follows. Prior to the middle of August 2012, the Registrars of the Dispute Tribunal, in addition to serving judgments of the Dispute Tribunal on Counsel of Record who had appeared for the Secretary-General in the cases before the Dispute Tribunal in respect of which the judgments had been given, had as a matter of courtesy sent copies of those judgments to the General Legal Division. The distinction between receipt of a judgment by Counsel of Record and the sending of a courtesy copy to other individuals or organizations is that the relevant statutes and rules require an appeal to be filed within 60 calendar days of the receipt of the judgment of the Dispute Tribunal.[4] "Receipt" by Counsel of Record starts the time limit for launching an appeal.

42. In the litigation under discussion, Counsel of Record for the Secretary-General was the Administrative Law Services. The Appeals Tribunal has interpreted its statute and its rules of procedure to mean that time to appeal begins to run when judgments of the Dispute Tribunal are received by Counsel of Record (in this case the Administrative Law Services), which is then expected to "liaise with the Office of Legal Affairs regarding an appeal" (see also the report of the Secretary-General to the General Assembly on the Administration of Justice in which it is stated that when a final judgment is issued, the Administrative Law Section liaises with the Office of Legal Affairs, which determines whether to appeal the Dispute Tribunal judgment to the Appeals Tribunal (see A/65/373, dated 16 September 2010, para. 85).

43. On the 16 August 2012, the President of the Dispute Tribunal, with the concurrence of all the Dispute Tribunal judges, decided and communicated to the Office of Administration of Justice that, henceforth, the Dispute Tribunal Registries would only serve judgments on Counsel of Record on behalf of the parties, or if there was no such counsel, on the parties,[5] and that the practice of the Registries sending courtesy copies to other stakeholders (such as the General Legal Division)

[4] Article 7(1)(c) of the statute of the Appeals Tribunal.

[5] Article 25.4 of the Dispute Tribunal rules of procedure provides "The Registrars shall transmit a copy of the judgment to each party. An individual applicant or respondent shall receive a copy of the judgment in the language in which the original application was submitted, unless he or she requests a copy in another official language of the United Nations".

would be discontinued. However, the letter also stated that this decision did not prevent the Executive Director of the Office of Administration of Justice from performing her duties with regard to the dissemination of information about Dispute Tribunal judgments or the mandate of the Principal Registrar to ensure the publication of decisions, orders and judgments rendered by the Tribunal.[6]

Transmission of courtesy copies of Dispute Tribunal judgments to the General Legal Division since 2012

44. In every case involving the United Nations Secretariat or the funds and programmes, the respondent is the Secretary-General. As stated, where a party is represented by a Counsel of Record before the Dispute Tribunal (in the situation under discussion this would have been a lawyer from the Administrative Law Service) receipt by Counsel of Record starts the time running for an appeal by the Secretary-General. That is one of the reasons the lawyer is called "Counsel of Record". The rules of procedure say nothing of courtesy copies.[7]

45. On 31 August 2012 the Executive Director informed the President that she had received a communication from the Chef de Cabinet of the Secretary-General requesting that copies of Dispute Tribunal judgments and orders be transmitted to the Secretary-General as a party to proceedings before the Tribunal at a specially

[6] Section 3.6 of Secretary-General's bulletin ST/SGB/2010/3 provides that "The Executive Director is responsible for disseminating information regarding the formal system of administration of justice".

Section 4.3 of Secretary-General's bulletin ST/SGB/2010/3 provides that "The core functions of the Principal Registrar are … (b) Coordinating and monitoring the maintenance of the Tribunals' registers and the publication and dissemination of the decisions, rulings and judgments rendered by the Tribunals".

Article 21 of the rules of procedure of the Dispute Tribunal provides:

> "1. The Dispute Tribunal shall be supported by Registries, which shall provide all necessary administrative and support services to it.
>
> "2. …
>
> "3. The Registrars shall discharge the duties set out in the rules of procedure and shall support the Dispute Tribunal at the direction of President or the judge at each location. In particular, the Registrars shall:
>
> "(a) Transmit all documents and make all notifications required in the rules of procedure or by the President in connection with proceedings before the Dispute Tribunal;
>
> "(b)....
>
> "(c) Perform any other duties that are required by the President or the judge for the efficient functioning of the Dispute Tribunal".

[7] On 28 August 2012, the Executive Director of the Office of Administration of Justice received a telephone call from the Director of the General Legal Division of the Office of Legal Affairs (the Division of the Office of Legal Affairs which appears on behalf of the Secretary-General in all appeals to the Appeals Tribunal) describing certain difficulties that would arise from the stopping of the courtesy copies of Dispute Tribunal judgments, in that the General Legal Division could not be certain of receiving judgments promptly from the legal officers representing various entities of the United Nations before the Dispute Tribunal. The Director of the General Legal Division requested that a method under which Dispute Tribunal judgments would be received by that Division promptly after issue be devised because it was concerned about the commencement of the appeal period without being aware that the judgment had been issued. Various options were discussed, including the creation by the Secretary-General of a mailbox in his name for receipt of copies of Dispute Tribunal judgments and orders, since the Registrars already transmitted copies of judgments to both the staff member as a party to the proceedings and to the counsel of record (the Secretary-General, as a party to the proceedings, could arrange for his copy to be directed to the General Legal Division).

designated e-mail address, in addition to the judgment transmitted to Counsel of Record. The Principal Registrar had also conveyed the Chef de Cabinet's message to all Dispute Tribunal Registrars. The President acknowledged receipt of this communication on 3 September 2012, and the arrangement described above continued thereafter.

46. The Internal Justice Council wishes to note at this point that, firstly, the 2012 communication from the Chef de Cabinet was carefully worded. It was a request, thus accepting the fact that, as set out in the opening words of section 2.1 of Secretary-General's bulletin ST/SGB/2010/3, the Office of Administration of Justice 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. Secondly, the communication did not specify who was to send the judgments to the e-mail address, and thus did not intrude into the area of work of the Registrars in relation to the communication of judgments to those directly affected for the purpose of triggering appeal rights, which is an area forming part of judicial activity. Thirdly, although it created a double sending of judgments and orders to the Secretary-General, the double sending was to a party to the Dispute Tribunal proceedings.

47. The General Legal Division is not a party to proceedings before the Dispute Tribunal and does not represent the Secretary-General in those proceedings.

Ocokoru judgment and its aftermath

48. These arrangements continued until 2016 when, apparently to save itself embarrassment over a lack of communication between the Administrative Law Service and the General Legal Division in the case of *Ocokoru v. Secretary-General* (2015-UNAT-604), the General Legal Division argued before the Appeals Tribunal that it did not have to seek an extension of time to appeal because, as far as it was concerned, its time to appeal did not begin to run until it had itself received the Dispute Tribunal judgment.[8] In *Ocokoru*, the Dispute Tribunal judgment had been transmitted on 16 January 2015 to the lawyer from the Administrative Law Service, which had appeared in the Dispute Tribunal on behalf of the Secretary-General. If an appeal was to be receivable by the Appeals Tribunal, it had therefore to be filed within 60 calendar days of the receipt of the judgment of the Dispute Tribunal by the Counsel of Record, that is, by 17 March 2015 (see 2015-UNAT-604 (*Ocokoru*), para. 37). The appeal was, however, filed only on 6 April 2015 and so was out of time.

49. The Appeals Tribunal held that (a) in the absence of any published rule or practice direction providing that transmission of the Dispute Tribunal judgment to the General Legal Division was required to trigger the time limits within which an appeal might be taken by the Secretary-General, and (b) in the circumstances of the case, where the Dispute Tribunal judgment was transmitted to the Administrative Law Service on 16 January 2015, it was not permissible for General Legal Division to give itself an extension of time by deeming the start date to be 3 February 2015, being the date when, apparently, the judgment was transmitted to the designated e-mail address (2015-UNAT-604 (*Ocokoru*), para. 34).

[8] Prior to *Ocokoru*, the Appeals Tribunal had decided in *Thiam* (2011-UNAT-144) (cited in *Ocokoru* (2015-UNAT-604), para. 39) that the time limit for an appeal commenced to run when the judgment was served on the parties.

50. The Appeals Tribunal also took note of the fact recorded in an e-mail exchange between the General Legal Division and the Administrative Law Service on 30 January 2015, that the Division was in fact aware on that date that this judgment had been given and was on file with the Administrative Law Service, and that work was ongoing on the preparation of a brief for the General Legal Division on the case and that therefore the Secretary-General's assertion that he had received the judgment of the Dispute Tribunal on 3 February 2015 was not legally or factually sustainable (2015-UNAT-*Ocokoru*, paras. 29 and 33). In other words, the General Legal Division had had the papers available for about six weeks before expiry of the appeal period and had simply failed to launch an appeal in a timely way.

51. Moreover, the Internal Justice Council was informed that Dispute Tribunal judgments are posted on the Office of Administration of Justice website on or about the same day as issued.

52. The result of the General Legal Division argument, rejected by the Appeals Tribunal, would have been two inconsistent appeal periods, namely 60 days from service of the judgment on the applicant and the Administrative Law Service (or other Counsel of Record appearing for the Secretary-General before the Dispute Tribunal), and an extended time limit in excess of 60 days available only to the General Legal Division, depending on when it had itself received the Dispute Tribunal judgment.[9] Such inconsistent treatment is not compatible with due process.

53. The judges support the distribution of Dispute Tribunal judgments far and wide through the United Nations system, including to the General Legal Division. Such "outreach" is considered highly desirable. However, informal "distribution" and posting on the Office of Administration of Justice website has nothing to do with the commencement of time for appeal, which is the issue that preoccupied the Appeals Tribunal in *Ocokoru* (2015-UNAT-604).

54. The General Legal Division decided that, instead of fixing the internal problem of lack of proper communication between the Administrative Law Service (the lawyers at first instance and Counsel of Record) and itself (the lawyers who would take any appeal on behalf of the Secretary-General) the job of keeping the General Legal Division informed should be imposed on the Registries.

55. On 1 March 2016, the President of the Dispute Tribunal wrote to the Dispute Tribunal Registrars and Registry staff, with copy to the Principal Registrar, quoting paragraph 34 of the Appeals Tribunal judgment in *Ocokoru* to the effect that communication of a Dispute Tribunal judgment to Counsel appearing for the Secretary-General in a case before the Dispute Tribunal was sufficient communication to him, and once more repeated his direction, on behalf of the Dispute Tribunal, that the Dispute Tribunal Registrars should only transmit judgments to Counsel of Record appearing for the Secretary-General, thereby establishing the commencement of the appeal period.

56. The President obviously took the view that his direction concerned an interpretation of the Tribunal's statute and rules of procedure, which is a judicial

[9] The inconsistency arises because (a) there would be an "early deadline" applicable to applicants and to the Secretary-General commencing on the date of communication to the applicant and to Counsel of Record before the Dispute Tribunal; and (b) a special later deadline available only to the General Legal Division, depending on the date of receipt of the judgment, despite it being neither a party nor Counsel of Record before the Dispute Tribunal.

function. On the other hand, the General Legal Division had apparently decided that the Tribunal had inserted itself into management by purporting to deal with an administrative issue. This gave rise to its complaint to the Internal Justice Council about the President's interference with the independence of the administrators (see para. 39 above), ignoring the fact that the authoritative interpretation of the Tribunal's statute and rules of procedure is for judges and not for the General Legal Division.

57. At this stage, the proper response would have been for the General Legal Division to go back to the President to obtain a clarification of his written direction to the Registries to ensure that his ruling was limited to formal service of judgments by the Registry and did not extend to the distribution of judgments by the Office of Administration of Justice or the Principal Registrar as part of the process of publicizing the judgments of the Dispute Tribunal.

58. Unfortunately, the General Legal Division lawyers did not go back to the Judge President, even though the Internal Justice Council understands that this course of action was suggested to the Division by the Office of Administration of Justice, but that the Division said that it would not do so.

59. Instead — as far as the Council understands — the General Legal Division apparently wrote to the Chef de Cabinet seeking an administrative direction to the Registries to disregard what was understood by the Division to be the direction of the Judge President, and to carry on sending judgments to the designated e-mail address, which would be redirected to the General Legal Division.

60. The Council understands that, between 15 March to early April 2016, the General Legal Division indicated to the Executive Director of the Office of Administration of Justice and the Principal Registrar that they should direct the Registrars to disregard the 1 March direction of the Judge President, because the view at the time of the General Legal Division was that this direction was ultra vires the Judge President. In the view of the General Legal Division at the time, the Executive Director and the Principal Registrar, as United Nations staff members, would have to comply with an instruction from the Secretary-General to disregard the Judge President's direction. Fortunately, such instructions — which would have been a serious violation of judicial independence as well as the independence of the Office of Administration of Justice — were never issued because, on 5 April 2016, representatives of the Office and the General Legal Division met in the office of the Deputy Chef de Cabinet and agreed on the practical solution described in paragraph 61 below.

61. The General Legal Division apparently had misunderstood the situation. In a discussion that the Executive Director of the Office of Administration of Justice and the Principal Registrar had with the Judge President, the latter indicated that he had no objection to transmission by the Principal Registrar of Dispute Tribunal judgments to the designated e-mail address. His concern was and is with the clarity and certainty of the commencement of the 60-day appeal period.

62. Of course, the existing close liaison between lawyers in the Administrative Law Service and in the General Legal Division could be strengthened to ensure that a copy of the Dispute Tribunal judgment will be sent to the General Legal Division as soon as the Administrative Law Service receives it. With regard to other United Nations entities whose Counsel appear before the Dispute Tribunal, the Executive

Office of the Secretary-General could request that the same facility be granted without fail to the General Legal Division. The legal units of those entities must in any event liaise with the General Legal Division, which is the only entity whose counsel appear on behalf of the Secretary-General in the Appeals Tribunal.

Conclusion

63. The concern of the Internal Justice Council is with the initial methods adopted in opposition to a written direction from the President to the Dispute Tribunal Registries. Rather than writing to the Judge President to seek clarification, what occurred was an attempt to sidestep the President and instead carry the grievance to the higher echelons of the Secretariat to seek a reversal of that ruling by administrative means. Such disrespect and disregard of the independence of the judiciary and the independence of the Office of the Administration of Justice when executing judicial orders was, to say the least, regrettable.

2. Direct reporting line to the General Assembly

64. The Interim Independent Assessment Panel has recommended that the Tribunals submit their reports directly to the General Assembly because this would enable direct interaction between the Tribunals, on the one hand, and the Member States on the other, without undermining the independence of the Tribunals (see A/71/62/Rev.1, para. 183).

65. The Internal Justice Council supports this recommendation, which would have the additional benefit of ensuring an appropriate separation between the reports of the Tribunals and the Council. However, care must be taken to ensure that the new process serves to strengthen, not undermine, the independence of the United Nations judiciary. The Council, for example, appreciates the invitations extended to its Chair or other representative in recent years to discuss its report with the Sixth Committee. If the judges were to be offered and accept a similar opportunity, it would be important that the occasion not be used to interrogate a judge about individual judgments or comments by other judges in individual cases. Calling a judge “to account” for individual cases would suggest a hierarchical relationship inconsistent with the independence of the United Nations justice system. In such hearings, the decisions reached in individual cases should not be the subject of discussion. On the other hand, a discussion of systemic justice issues would not pose such a threat, and may well be welcomed by the judiciary.

3. Qualifications of judges

66. The Interim Independent Assessment Panel noted that the current criteria for the appointment of judges require several years of judicial service in the national jurisdiction and recommended that provision be made for knowledge of human rights law and international law. Proven practical experience in administrative law and criminal justice is of course desirable. Relevant institutional knowledge would also be useful (see A/71/62/Rev.1, para. 210).

67. The Internal Justice Council considers that the most essential background required by a judge of either Tribunal is a knowledge of, and judicial experience in, employment or administrative law. Without this judicial background it is hard to be an effective judge resolving disputes between an employer and employee. While knowledge and experience in human rights and criminal law is desirable the Council

considers that if these aspects are unduly emphasized, applicants with a profile not really suited to the judicial work of the Tribunals may apply and others who in fact do possess relevant qualifications may be dissuaded from applying.

68. In its 2015 report, the Internal Justice Council noted that in 2014 the General Assembly, in its resolution 69/203, amended the qualifications of the judges of the Appeals Tribunal. The Council recommended that the qualifications of judges of the Dispute Tribunal be brought into line by amending article 4.3 of the Dispute Tribunal statute to read: "(a) Be of high moral character and impartial; (b) Possess at least 10 years of aggregate judicial experience in the field of administrative law, employment law or the equivalent within one or more national or international jurisdictions; and (c) Be fluent, both orally and in writing, in at least one of the languages of the United Nations Dispute Tribunal" (see A/70/188, para. 88). If this amendment is made, the Council considers that the current qualifications set out in the statutes respond to the needs of the United Nations internal justice system.

4. Attracting qualified national judges to apply for judgeships in the Tribunals

69. The first element of an effective recruitment process — the mandate of the Internal Justice Council — is to be able to recruit qualified judges to serve on the two Tribunals who have relevant judicial experience in the major legal systems of the world.

70. This Panel of the Internal Justice Council notes that it has experienced difficulty in attracting sufficient numbers of qualified candidates (as opposed to the absolute numbers of candidates) from Africa and Asia in the two recruitment exercises that it has conducted,[10] but the reasons for this are unclear because vacancies are advertised in five publications with regional and international coverage and vacancy announcements are sent to some 5,000 outreach contacts, such as United Nations information centres, chief justices of national jurisdictions, professional associations, non-governmental organizations, etc. Advertising in national newspapers of all Member States would be prohibitively expensive but formal notes verbale concerning the vacancies are also sent to all permanent missions.

71. Perhaps the General Assembly may wish to indicate whether Member States would need more time than the six to eight weeks that vacancies are normally open to allow them to publicize effectively the vacancies and to encourage qualified members of their judiciary to apply.

72. Another factor, which may increase the pool of qualified judicial applicants, is the active assistance of Member States to encourage their national judiciaries to grant a leave of absence to judges to serve on the Dispute Tribunal where there is normally only one non-renewable term of office of seven years, and also to grant a leave of absence of three weeks at least three times a year to judges who serve on the Appeals Tribunal,[11] where again there is only one non-renewable term of office of seven years, and make these concessions widely known.

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[10] The Internal Justice Council received the following applications for the vacancies in both Tribunals in the last recruitment exercise: Africa, 45; Asia, 12; Eastern Europe, 15; Latin America, 24; and Western Europe and others, 84.

[11] Because of limitations on the leave of absence granted to serving national judges who are members of the Appeals Tribunal, it is only possible to hold three sessions of two weeks each.

73. The Internal Justice Council notes that there is an additional practical problem in attracting the needed number of qualified candidates for the Dispute Tribunal. Since 2015 the Dispute Tribunal in Nairobi has experienced a substantial spike in the number of cases in which the appeal or the supporting documentation is in French. The Council was informed that, prior to 2015, such cases were generally fewer than 10 per cent of the workload, whereas in 2015, some 38 per cent of the cases fell into this category.[12] It had always been understood that there was a need for a French-speaking judge in Geneva, but the need seems even more important in Nairobi, now that this location has responsibility for appeals from peacekeeping missions in Africa and the Arabian Peninsula.[13]

74. Again, the assistance of Member States will be crucial to ensure that a large pool of qualified candidates capable of conducting proceedings in French apply for positions in locations that require such language skills.

5. Structure and organization of the Appeals Tribunal

75. The Interim Independent Assessment Panel noted that it had verified, by reference to Appeals Tribunal judgments, that there was ground for the complaints about decisions of the Tribunal being delivered without or with insufficient reasons (see A/71/62/Rev.1, para. 197). Various structural impediments were described that made the task of the Appeals Tribunal more difficult (see A/71/62/Rev.1, paras. 377-381).

Remuneration model

76. The Interim Independent Assessment Panel noted the heavy burden that is placed on the Appeals Tribunal to dispose of its cases in three two-week sessions (see A/71/62/Rev.1, para. 380). It suggested an extension of the sessions, balancing the extra costs by creating more permanent positions and reducing the number of judges from seven to five and, at the same time, empowering the President to deal with interlocutory matters by making his or her position on a compensated half-time basis or by having the President routinely assign cases to panels at an early date and making the reporting judge responsible for all interlocutory matters (see A/71/62/Rev.1, para. 380).

77. With regard to the solution of the Appeals Tribunal having longer sessions, the Internal Justice Council considers that, although this option appears attractive, it would be feasible, while maintaining the required high level of Appeals Tribunal judges, only if chief justices or other relevant national judicial authorities were to increase the time appellate (and therefore senior) national judges are released from their judicial duties for service on the Appeals Tribunal (see para. 72 above).

78. The Internal Justice Council notes that reducing the number of Appeal Tribunal judges to five but making even only some of them full-time would be very

[12] The Internal Justice Council was informed that in 2010 there were 11.3 per cent cases where French was necessary to dispose of the case; 9.8 per cent in 2011; 14 per cent in 2012; 6.25 per cent in 2013 and 3.6 per cent in 2014.

[13] The Geneva Registry accepts applications from staff members in Europe and Asia (including the Pacific); the Nairobi Registry accepts applications from staff members in Africa and the Arabian Peninsula (including Iraq, Israel, Jordan, Lebanon, the Syrian Arab Republic and Palestine); and the New York Registry accepts applications from staff members in the Americas and the Caribbean (see www.un.org/en/oaj/dispute/distribution.shtml).

costly[14] but, more importantly, it would reduce the number of geographical areas, legal systems and judicial backgrounds represented on the Appeals Tribunal.

79. The Council also notes that the current remuneration model is based on the payment system for the International Labour Organization (ILO) Administrative Tribunal, where the reporting judge (the judge who drafts the judgment) is paid $2,400 and the other two judge-signatories are paid $600 each.

80. The problem with the ILO Administrative Tribunal remuneration model is that its very nature favours an "error correction" appellate court approach, which is applicable in some legal systems. The essence of this "error correction" system is that the appellate court simply and briefly identifies the error made by the court below and renders judgment accordingly. However, the system created by the General Assembly has another important role, namely, that of providing guidance to the Organization and all its staff members on the proper interpretation and application of United Nations regulations, rules and administrative issuances (see the Interim Independent Assessment Panel's detailed description of the role of the Appeals Tribunal in A/71/62/Rev.1, para. 381). The current payment model does not compensate judges for this sort of jurisprudential role, envisaged by the new justice system created by the General Assembly, which emphasizes (in para. 4 of resolution 61/261) the need for the Appeals Tribunal to be transparent, in this instance by giving clearly reasoned decisions when it either affirms, reverses or varies a judgment of the Dispute Tribunal. It also ignores the work performed between sessions dealing with interlocutory orders and motions by the parties.

81. The Internal Justice Council considers that it is important that the remuneration model recognize the tasks to be performed by the appellate body in the United Nations internal justice system. This could be done, for example, by remunerating work done between sessions at a daily rate with a maximum cap. That maximum cap should be higher for the President, since the judge holding that office has to routinely deal with all urgent matters that arise in between sessions, as well as allocate work to the panels of judges, etc.

Meeting General Assembly goals in case disposition

82. In section 7(b) of the Code of Conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, the General Assembly has required that judgments or rulings in a case must be given promptly and that judgments should be given no later than three months from the end of the hearing or the close of pleadings or, in the case of the United Nations Appeals Tribunal, from the end of the session in which the matter is decided, unless there are exceptional circumstances (see General Assembly resolution 66/106, annex).

83. There have been anecdotal accounts to the Internal Justice Council that there are increasing delays in the Dispute Tribunal or at least with some judges. The

[14] The Internal Justice Council was informed that Dispute Tribunal judges are remunerated at a level equivalent to D-2 step IV on the United Nations salary scale. For indicative purposes, the annual net salary levels at the D-2 step IV single rate, including cost-of-living adjustment, in effect as at 1 January 2015 are as follows: US$ 183,043.27 (New York), $218,509.96 (Geneva) and $153,835.40 (Nairobi). In addition, various allowances, e.g., representation allowance, assignment grant, education grant, rental subsidy, may be payable, but not all allowances are applicable to each judge. Presumably, full-time judges of the Appeals Tribunal would be paid at a somewhat higher rate.

Council has examined the published statistics but we have found it difficult to determine from this data whether such complaints have any basis.

84. While organization of the work of the judges is solely for the judges and performance measurements may already be in place, the Internal Justice Council notes that in many national courts the Chief Justice or Court President circulates internal lists to all the judges of that court showing the date a case is received, the date it is assigned to a judge, the date that the pleadings by the parties are completed and the date of the end of the oral hearing, if any, and the date of final disposition. In some jurisdictions judges agree on performance targets for the period between lodging an appeal and the final hearing and between the final hearing and the judgment and performance against these targets is published. Should this type of system be introduced it will soon become clear to stakeholders if the target established in the Code of Conduct for Judges is being regularly met. Any criticisms would then be based on fact, rather than supposition. At the very least, in the view of the Internal Justice Council, such statistics should be kept and circulated internally to all the judges of the Dispute Tribunal and the Appeals Tribunal, if this is not already being done.

6. The term of the President of the Tribunals

85. The Interim Independence Assessment Panel recommended that the term of the President of the Dispute Tribunal should be extended from one year to a longer period, such as three and one-half years, which would enable the provision of consistent leadership and a longer term of office will also be helpful for managing the direct reporting line to the General Assembly (see A/71/62/Rev.1, para. 371).

86. While the Council believes there is merit in this suggestion, the Dispute Tribunal judges, who are most familiar with the everyday needs of the Tribunal, are against this recommendation. They noted that the powers of the President are not defined in the statute, and that at present it was generally accepted that the powers of the Judge President only extend to convene three-judge panels of the Dispute Tribunal and to decide on requests for recusal of a judge.

87. While the organization of how the Tribunals deal with their workload is solely for the Tribunals to decide, the Council suggests, by way of an alternative model to consider, that the judges of both Tribunals extend the term of their next President by six months to 18 months (i.e., from 1 July 2017 to the end of 2018) and, thereafter, revert to the yearly presidency, but from 1 January to 31 December. This would mean that when the Presidents have to prepare or coordinate the comments of the judges to the General Assembly, they would have been in office for some six months and, by the time the General Assembly considered reports of the internal justice system, they would have the experience to speak authoritatively on behalf of the Tribunals. Should the Tribunals have a direct reporting line to the General Assembly (see paras. 64-65 above) this would be even more important, as they may be invited to address the Sixth Committee, as the Chair of the Council has been in recent years.

7. Half-time judges of the Dispute Tribunal

88. The Interim Independent Assessment Panel was in favour of continuing two half-time judges in the Dispute Tribunal (see A/71/62/Rev.1, paras. 367-369). The Internal Justice Council supports this recommendation, as these half-time judges,

who are subject to assignment by the President to whichever location of the Dispute Tribunal that needs assistance, play a vital role in assisting the permanent and ad litem judges in coping with the caseload, which may vary over time and location.

89. The Council was informed that the half-time judges 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 judgments. Whether it would be feasible to have the half-time judges at a duty station fulltime during their periods of three-month service as judges depends on the impact of this arrangement on the work of the Tribunal and on the personal circumstances of the judges concerned.

8. An induction course for newly recruited judges

90. The Interim Independent Assessment Panel recommended a thorough induction process, which would help to familiarize judges with the framework of laws and rules, established jurisprudence, the ethos and inner functioning of the United Nations, the goals of both justice and a harmonious work environment (see A/71/62/Rev.1, para. 211).

91. The Redesign Panel had focused on a practical type of training as it was not realistic to expect that new judges would come to the job with the necessary level of specialized expertise in what might broadly be called United Nations law. The Panel noted that judges should be provided with training to familiarize them with the Organization and its funds and programmes, in particular their administrative structures (see A/61/205, para. 117).

92. The Internal Justice Council supports the recommendation on training for new judges and notes that programmes have already been put in place by the Presidents of the two Tribunals, with support from the Office of Administration of Justice for the new judges who will commence their terms of office on 1 July 2016. The Council has also been informed by the Office of Administration of Justice that training programmes are also in place for counsel appearing before the Tribunals (such as advocacy skills and negotiation skills) and there are training programmes for support staff. The Council enthusiastically supports these types of initiatives.

C. Creation of a clear and effective regulatory framework

1. Introduction

93. Article 97 of the Charter of the United Nations makes the Secretary-General "the chief administrative officer of the Organization". Accordingly, the Secretary-General is responsible for the promulgation of a clear and consistent set of subsidiary rules to implement regulations established by the General Assembly[15] and other decisions of the General Assembly affecting the staff of the Organization.

94. The real problem with issuances that are not clear, consistent and readily accessible is that they may be even overlooked, or interpreted, by the litigants,

[15] Article 101, paragraph 1, of the Charter provides "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly".

counsel and Tribunals in ways not foreseen by those who promulgated those rules. A clear and consistent set of rules that is easily discoverable will benefit both management and staff.

95. The Internal Justice Council will first examine the current mechanism for ensuring that administrative issuances are clear, consistent and up to date and will outline the comments of the Interim Independent Assessment Panel on this system. It will then suggest ways to start to address some of the serious problems identified by the Panel.

2. Mechanism for ensuring consistency in administrative issuances

Brief outline of current system

96. In 1997, the Secretary-General introduced a new system to ensure consistency among administrative issuances, entitled "Procedures for the promulgation of administrative issuances" (ST/SGB/1997/1). Various changes were made in 2009 when that bulletin was abolished and replaced by ST/SGB/2009/4. However, the essential system was maintained, except that the 2009 bulletin expressly provided that administrative issuances shall not apply to separately administered funds and programmes unless those funds and programmes have "accepted their applicability" (sect. 2.3).

97. The Internal Justice Council addresses only the United Nations Secretariat system for administrative issuances. The funds and programmes have their own systems tailored to their own substantive and operational needs.

98. The bulletin establishes two categories of administrative issuances: Secretary-General's bulletins and administrative instructions (sect. 1.1). Secretary-General's bulletins promulgate rules for implementation of regulations, resolutions and decisions of the General Assembly and of resolutions and decisions of the Security Council, rules governing staff members and any other important decision of policy decided by the Secretary-General (sects. 3.1 and 3.2). Administrative instructions prescribe instructions and procedures to implement the Staff and Financial Regulations and Rules and Secretary-General's bulletins (section 4.1).

99. Sections 5 and 6 of the bulletin establish various mechanisms to ensure that each administrative instruction identifies the authority for its issuance, is up to date and that obsolete issuances, or parts thereof, are abolished, as well as ensure that issuances are consistent with each other, are clearly and concisely expressed and have been cleared by the Office of Legal Affairs. A "central registry" is established to ensure that all this occurs.

100. Secretary-General's bulletin ST/SGB/1997/2, dated 28 May 1997, on information circulars, provides that information circulars contain general information on, or explanation of, established rules, policies and procedures, as well as isolated announcements of one-time or temporary interest and shall not be used for promulgating new rules, policies or procedures (sects. 1.1 and 1.2).

3. Core observation of the Interim Independent Assessment Panel on the regulatory system

101. The Panel stated (after giving specific examples) that there were myriad rules, regulations and administrative issuances that had not been consolidated or updated

and were within the knowledge of management but not of staff members. It was generally acknowledged that rules and regulations were both difficult to understand and to gain access to (see A/71/62/Rev.1, para. 200). The Panel described consequent difficulties faced by the Tribunals in dealing with this inconsistency (see A/71/62/Rev.1, paras. 201-206) and considered that it was important that the rules be properly consolidated so that those deficiencies were remedied (see A/71/62/Rev.1, para. 205), pointing out that prescribed law had, of course, to be clear. United Nations rules and regulations were far from achieving that standard. The Panel encouraged that this matter be given proper attention as soon as practicable (see A/71/62/Rev.1, para. 239, footnote 74).

102. The observations on the problems created by the "myriad" of administrative issuances acquire urgent importance in the light of statements of the Appeals Tribunal that staff members must be presumed to know the legal rules applicable to them[16] and that ignorance of the law is no defence,[17] even where the law is misleading because of poor drafting.[18]

4. Reflections and recommendations of the Internal Justice Council on the system

Initial observations

103. The Council will examine the issue under three main headings: (a) abolition of prior outdated issuances or specific provisions in them; (b) inconsistencies between issuances in force and their complexity; and (c) failure to consolidate issuances.

Abolition of prior outdated issuances or provisions therein

104. There does not seem to be a systemic problem with the application of the procedure for the abolition of issuances or provisions in them.

Inconsistencies between issuances in force

105. The Interim Independent Assessment Panel described in some detail a number of Tribunal decisions that revealed inconsistencies between administrative issuances on gender equality and those on staff selection and promotion (see A/71/62/Rev.1, paras. 200-204).

106. The Internal Justice Council noted the recent 44-page issuance entitled "Staff selection and managed mobility system" (ST/AI/2016/1). This complex and lengthy document is not easy to understand and, as regards mobility, is in stark contrast — if not inconsistent — with the higher norm set out in staff regulation 1.1 (c) which contains only one fetter on the discretion of the Secretary-General in the assignment of staff by providing that staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the

[16] 2012-UNAT-209 (*Appellant*), at para. 40 and 2012-UNAT-260 (*Rahman*), at para. 24.
[17] 2010-UNAT-067 (*Diagne et al.*), at para. 22; 2012-UNAT-218 (*Christensen*), at para. 39.
[18] In 2014-UNAT-472 (*Nianda-Lusakueno*), an appeal involving a staff member of the International Civil Aviation Organization (ICAO) who had failed to request a review of an administrative decision within 30 days because, although the rule stated that the request must be made within 30 days, it also required that the staff member attempt to settle the case through informal channels. This was unsuccessful but by the time the failure to settle was clear the 30-day time limit had passed. The Appeals Tribunal held that the request for review was out of time, even though the ICAO Appeals Board had found that the rule was badly drafted and likely to confuse.

United Nations. In exercising this authority, the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

Failure to consolidate issuances

107. Another problem is the number of issuances listed as dealing with a given subject matter. For example, the Internal Justice Council was surprised at the large number of issuances governing only two apparently related topics: "managed mobility" and "staff selection system" in the human resources portal.[19] This large number of issuances makes it difficult, to say the least, for a reader who is not a skilled in-house lawyer or human resources specialist familiar with the United Nations staff regulatory system to understand what this large number of issuances means, let alone their impact on the immeasurably greater number of other issuances in effect.

108. In fact, the Panel concluded that the procedures for selection, promotion and performance management need to be improved, as they caused "too many disputes" (see A/71/62/Rev.1, para. 395). At a minimum, a reduction in the number of administrative issuances and clarity in their drafting would assist in achieving this goal because ordinary staff members would at least have a chance to understand their rights and obligations.

Recommendations of the Internal Justice Council

109. The analysis by the Interim Independent Assessment Panel demonstrates that the mechanism created to review issuances in Secretary-General's bulletin ST/SGB/2009/4 is not able to make an effective qualitative evaluation of potential inconsistencies in the regulations, rules and administrative issuances (see A/71/62/Rev.1, paras. 200-204). The Internal Justice Council considers that the confusing state of administrative issuances — which are the law of the organization — probably leads to unnecessary appeals and may lead judges to interpret these issuances in a way that differs from the intention of the drafters. There is also no doubt that a prolix and confusing regulatory structure is a barrier to justice.

[19] Under staff selection system were (a) ST/SGB/2014/2, Staff Regulations, article IV; (b) ST/SGB/2014/1, Staff Rules, Chapter IV; (c) ST/SGB/2001/4, Implementation of the report of the Panel on United Nations Peacekeeping Operations — filling of new posts; (d) ST/SGB/2002/17, Amendment to the Secretary-General's bulletin on the implementation of the report of the Panel on United Nations Peacekeeping Operations — filling of new posts; (e) ST/SGB/2002/5, Introduction of a new staff selection system; (f) ST/SGB/2011/17, Central review bodies; (g) ST/SGB/2016/2, Introduction of a new staff selection and managed mobility system; (h) ST/SGB/2016/3, Senior Review Board, (i) ST/SGB/2016/4, Global Central Review Board; (j) ST/AI/2010/3, Staff selection system; (k) ST/AI/2010/3/Amend.1, Staff selection system; (l) ST/AI/2010/3/Amend.2, Staff selection system; (m) ST/AI/2016/1, Staff selection and managed mobility system; (n) ST/IC/2005/17, Staff selection system; and (o) ST/IC/2016/3, Semi-annual staffing exercises for the Political, Peace and Humanitarian network. Under managed mobility were: (a) ST/SGB/2016/2, Introduction of a new staff selection and managed mobility system; (b) ST/SGB/2016/3, Senior Review Board; (c) ST/SGB/2016/4, Global Central Review Board; (d) ST/AI/2016/1, Staff Selection and managed mobility system; and (e) ST/IC/2016/3, Semi-annual staffing exercises for the Political, Peace and Humanitarian network.

110. The conclusion that the current mechanism is unable to meet the targets of the General Assembly of a clear regulatory system is not surprising. Awareness of the entire range of administrative issuances, and possible conflicts among them, requires a high level of human resources and legal experience, rather than what has obviously been assumed to be a routine administrative task not requiring specialized skills. It is therefore essential that those who are given the responsibility for ensuring a clear and effective regulatory system have not only the qualifications and experience to discharge this task, but also the authority to require that the necessary changes are made to issuances to ensure consistency between the new issuance and all prior issuances.

111. There are no easy solutions to this problem. The real issue is how to start to address it. What is clear to the Council is that it is not realistic in terms of available resources to immediately review all issuances.

112. The Internal Justice Council suggests that the problem be addressed in a phased way, perhaps based on subject areas that generate the most litigation. What areas are chosen and their order is for the Secretary-General to decide.

113. The next issue is how to address the problem. It appears that the revision process involves at least three sets of separate skills, two of which can be found in-house and one task that probably requires external assistance.

114. The initial review of a subject area could be done in-house with human resources specialists in the subject matter and lawyers who are experienced in administrative law and aware of the problems encountered by the Tribunals in interpreting the chosen texts. When a consolidated draft is established, the assistance of an experienced parliamentary draftsperson should be sought to review the revised text and to make suggestions for improvement.

115. With the experience of that first review, the team could propose a mechanism to ensure that instructions that have been revised are effectively updated to reflect and maintain the goal of transparency repeatedly insisted upon by the General Assembly in the annual resolutions on administration of justice. Once this has been done another subject matter area could be chosen. Once the litigation-prone areas are revised, it probably will be much easier and quicker to revise what remains.

116. The Internal Justice Council realizes that the task of clear rules is not made easier by the fact that language adopted by the General Assembly in setting mandates may itself be the result of compromises, as also occurs in administrative issuances that are considered by the Staff Management Committee and then recommended for adoption to the Secretary-General. However, even though no system can take care of all problems a proper review will improve the system and may identify inconsistent mandates that would have to be reported to the General Assembly for resolution or sent back to the Staff-Management Committee, explaining why the text or other existing inconsistent texts require change.

D. Effective access to documents

1. Access to documents at the Management Evaluation Unit stage

117. The Interim Independent Assessment Panel observed that a staff member contesting an administrative decision was required to place all documents on record

and to give a comprehensive explanation of his or her legal position during the management evaluation process (see A/71/62/Rev.1, para. 316). The Panel goes on to state that the information was made available to managers and legal officers responding on their behalf to questions put by the Unit. However, no information on the explanation offered or the documents produced to support the position taken by management was communicated to the aggrieved staff member. The lack of equal access to information by both sides affected the principles of transparency and equality of arms, especially if the case proceeded to litigation. In such a case, one side would be better prepared than the other on the basis of information that it already had on the opponent's case before the Dispute Tribunal (see A/71/62/Rev.1, para. 316).

118. The Internal Justice Council supports the recommendation of the Panel that, if the Management Evaluation Unit rejects a request for a review of an administrative decision, it be required to disclose any relevant document on which it relied to make that decision.

2. Access to documents during litigation

The concept of discovery

119. Disclosure or discovery of documents is a procedure used by courts under which each party is compelled to reveal to the opposite party all documents relevant to the matter being litigated. The procedure takes effect at an early stage of the proceedings because these documents will in most cases affect the conduct of the case by the parties and the judge. Relevant documents are usually defined as documents which support or undermine a disclosing party's case, or that of his or her opponent.

120. The rationale for disclosure is that it assists the judge to properly resolve the dispute between the parties because the judge is made aware of all documents relevant to the case. A subsidiary benefit of full disclosure is that it may facilitate settlement of the dispute since experience has shown that when there has been full disclosure, parties tend to settle, because they have seen the relative weaknesses of their respective cases.

121. The Redesign Panel envisaged that the Dispute Tribunal would, prior to the hearing, issue orders for the production of documents or the attendance of witnesses (see A/61/205, para. 91).

Rules of procedure of the Dispute Tribunal

122. Article 8.2 (g) of the rules of procedure of the Dispute Tribunal states that the applicant must annex to the application the documents that support his or her case, although the concept of a document is not defined. In contrast, and contrary to the principle of equal treatment before the law, article 10 does not require the respondent to include in the reply any documentation that supports its defence, although article 10.1 makes provision for annexes to the reply. The rules require an applicant to take extra steps to obtain disclosure, which the respondent obtains automatically.

123. The rules of procedure empower a party at the initial application or at any stage of the proceedings, to request the Tribunal to order production of documents or the giving of testimony relevant to the case (articles 17.1, 18.2, and 18.3).

Article 18.4 makes provision for protecting the confidentiality of evidence and article 18.5 enables the Tribunal to limit or exclude documentation or evidence.

124. At any time as part of case management, either on application of a party or at its own initiative, article 19 enables the Tribunal to issue any direction or order that appears to the judge "to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties" which includes production of documents or the giving of evidence.

Suggested reforms

125. The rules of procedure of the Tribunals do not include a definition of "documents". The Internal Justice Council considers that a definition would be useful, since in modern civil procedure many "documents" are not limited to paper documents but include various forms of electronic data, such as e-mail messages on a server, text messages etc., or information contained in a database maintained by the parties or a third party.

126. In addition, it seems to the Council that it would assist the disposition of a case if the rules could require the parties to provide in an application, appeal or response a list of documents in their possession that are relevant to the dispute. Each party would then know what is in the possession of the other party and could seek production and if a party considers that there are other relevant documents or information they could request the Tribunal for production.

127. The rules of procedure could also usefully define which documents are privileged and do not need to be disclosed, for instance, letters from legal advisers to their clients and documents containing efforts to settle the claim. The rules could also set out the consequences for refusing to disclose a document, such as the allowance or the striking out of a head of claim or defence.

E. Access to the system by employees who are not staff members

1. Recommendations of the Interim Independent Assessment Panel

128. The Panel noted that the Redesign Panel recommended that all individuals appointed to work for the Organization by way of personal services should have full access to the formal and informal justice system of the United Nations (see A/71/62/Rev.1, para. 230). However, the General Assembly, in paragraph 7 of resolution 63/253, by which it adopted the statutes of the Dispute Tribunal and of the Appeals Tribunal, decided that interns, type II gratis personnel and volunteers (other than United Nations Volunteers) would have the possibility of requesting an appropriate management evaluation but would not have access to the United Nations Dispute Tribunal or the United Nations Appeals Tribunal. The Tribunals have applied this limitation on their jurisdiction on a number of occasions.[20]

129. Nevertheless, the Council understands that all credible allegations from third parties, including non-staff personnel, of sexual harassment and abuse against any

[20] For example, (a) in the case of interns, UNDT/2010/145 (*Basenko*), affirmed in 2011-UNAT-139 (*Basenko*) and UNDT/2011/168 (*Di Giacomo*), affirmed in 2012-UNAT-249 (*Di Giacomo*); (b) in the cases of service personnel contracted under various forms of contract for services, UNDT/2010/142 (*Roberts*); UNDT/2011/055 (*Mialeshka*); and UNDT/2013/118 (*Akoa*).

staff member are investigated and appropriate action taken as a result of such investigation.

130. The Interim Independent Assessment Panel concluded that the reality on the ground was that no adequate alternate system of justice existed for non-staff members and staff in the field[21] and urged the United Nations to ensure that access to a fair, impartial and transparent process was established for all categories of personnel and considered that the matter required urgent attention (see A/71/62/Rev.1, para. 232).

131. In an in-depth analysis of the lack of remedies by non-staff personnel, Judge Ebrahim-Carstens noted that where rights and obligations attached, there must be an effective mechanism for resolution of disputes and for reparation of breached rights through appropriate remedies, that the Tribunal noted, in that regard, the Universal Declaration of Human Rights, which referred to "the right to an effective remedy" and stated that everyone was entitled in full equality to a fair and public hearing by an independent and impartial Tribunal, in the determination of his rights and obligations. (see arts. 8 and 10) and the International Covenant on Civil and Political Rights (1966), which refers to access to "an effective remedy" (art. 2.3(a)), encourages the development of "the possibilities of judicial remedy" (art. 2.3(b)), and provides that in the determination of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (art. 14.1)" (see UNDT-2011-168 (*Di Giacomo*), para. 46).

2. Background

132. The Joint Inspection Unit comprehensively examined the issue in a recent report on use of non-staff personnel and related contractual modalities in the United Nations system organizations (see A/70/685 and Add.1). It observed that the use of non-staff personnel by organizations could, for practical purposes, be divided into two major groups: the use of non-staff personnel for real consultancy-type work that was short-term and performed when the required expertise was not available within the organization; and the use of non-staff personnel to perform staff-type work, that is, under a de facto employment relationship and regularly located at the respective offices of the organizations" (see A/70/685, para. 23).

133. The Internal Justice Council emphasizes that the following observations are directed only at the second type of arrangement, that is, when the contracted persons are performing staff-type work under United Nations direction and control and who are in reality therefore employees of the Organization. For convenience such independent contractors are referred to as "non-staff personnel".

134. The issue of access to the internal justice system or to a simplified arbitration system has been considered for many years in the context of the annual reports of the Secretary-General on administration of justice (for ease of reference a brief listing of the major documents, summarized from a more complete account supplied by the Office of Administration of Justice to the Internal Justice Council, is set out

[21] The Internal Justice Council notes that all staff members, wherever serving, are covered by the staff regulations and rules and so are within the United Nations internal justice system, so the five words "and staff in the field" seem to have been included in the Interim Independent Assessment Panel text in error.

in annex II to the present report). The Council will not comment on those various proposals, except to say that even the simplified expedited models of arbitration presented are complex having regard to the conditions of appointment applicable in the contracts given to lower-level non-staff personnel. The Council is not suggesting that any modifications need to be made to the dispute settlement procedures available to consultants and true independent contractors.

3. Current arbitration mechanism for individual contractors

135. An example of a clause that is used by the United Nations is reproduced in the footnote.[22] The clauses used by the United Nations Children's Fund (UNICEF) and the United Nations Population Fund (UNFPA) are similar, except that the UNFPA clause does not require arbitration in New York. It is hard to conceive how typical non-staff personnel could understand the implications of such provisions and even harder to conceive how to initiate the procedure from a remote duty station far from specialist (and costly) legal advice. Even if a local attorney could be found — unlikely in field duty stations operating peacekeeping missions or humanitarian support — it is hard to see how an employee could afford the expense of bringing an arbitral proceeding in New York in the case of the United Nations and UNICEF provisions.

136. In the opinion of the Internal Justice Council the current arbitral remedies provided to persons under contract who are performing personal services equivalent to those of staff are too complex and difficult to use, especially for low-level non-staff personnel in the field.

4. Legal obligations to individual contractors

137. As stated, the Internal Justice Council is concerned with individuals who are in reality employees of the United Nations and subject to its control and direction for their work even though retained in a contract for provision of services. The Joint Inspection Unit report makes it clear that this type of arrangement is an expanding method of obtaining necessary employees at a cost which enables the Secretary-General to discharge the mandates placed upon him, particularly in peacekeeping and humanitarian operations (see A/70/685, sect. III.A). For non-staff personnel in remote duty stations discharging peacekeeping and humanitarian operations, for example, low-level employees performing manual work, such as truck drivers and cleaners, even the simplified arbitration procedures presented by the Secretary-General are far too complex and costly — completely disproportionate to their

[22] The United Nations General Conditions of Contract for the Services of Consultants and Individual Contractors (ST/AI/2013/4, annex I, clause 16) provides "**Arbitration**. Any dispute, controversy or claim between the parties arising out of the contract, or the breach, termination or invalidity thereof, unless settled amicably, as provided above, shall be referred by either of the parties to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. The decisions of the arbitral tribunal shall be based on general principles of international commercial law. For all evidentiary questions, the arbitral tribunal shall be guided by the Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration of the International Bar Association, 28 May 1983 edition. The arbitral tribunal shall have no authority to award punitive damages. In addition, the arbitral tribunal shall have no authority to award interest in excess of the London Inter-Bank Offered Rate then prevailing, and any such interest shall be simple interest only. The parties shall be bound by any arbitration award rendered as a result of such arbitration as the final adjudication of any such dispute, controversy or claim."

remuneration and net worth — and so the Council considers that the time is ripe for consideration of radically simplified and user-friendly procedures for resolution of this type of dispute.

138. The first point to recognize is that the Organization has the legal power to engage persons by contract to provide personal services to it under conditions that it deems appropriate. There is no legal obligation on the United Nations to make into staff members of the Organization all individuals who provide personal services to it under contract. The legal obligation of the United Nations towards contractors is to make available "appropriate modes of settlement" of disputes of a private law character (see sect. 29(a) of the Convention on the Privileges and Immunities of the United Nations; hereinafter the General Convention).[23]

139. The danger of the current system of complex and costly arbitration procedures (described further below) is that it is hard to see how these could be accessed by comparatively lowly paid non-staff personnel in the field, particularly in peacekeeping and humanitarian operations, far from skilled and expensive lawyers able to launch such arbitration proceedings.

140. The Council notes the increasing emphasis being given to human rights law, and the fact that article 8 of the Universal Declaration of Human Rights — cited in paragraph 18 above — endows "everyone" with the right to an effective remedy before national tribunals. Where the right to a contractual remedy before national tribunals is foreclosed by the immunity of the Organization the "appropriate remedy" provided by the Organization must surely be appropriate to the circumstances. The Council has not had the time to research fully this evolving area of the law but was informed that a few national courts have asserted jurisdiction against international organizations based on the lack of an effective remedy being available to the plaintiff.[24] The Secretary-General could, of course, supply to the General Assembly a full account and analysis of all suits (many of which presumably may be unreported) faced by the United Nations Secretariat and the funds and programmes from non-staff personnel to date.

141. Of course, the Council realizes that the United Nations has until now been largely successful in deflecting claims. However, in presenting these options, what the Council is seeking to achieve is to more effectively protect in the long term the immunity of the Organization, since the time may come when national courts may insist on an "appropriate" remedy being supplied in employment disputes, that is, one that is workable and easily accessible in conditions where such non-staff personnel are used. This is why in the options that follow, the Council favours effective, yet simple and quick, procedures available in many national jurisdictions to settle labour disputes over United Nations Commission on International Trade Law arbitral models which

[23] Section 29 of the General Convention provides (in relevant part) as follows: "The United Nations shall make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party". This obligation is also recognized in article 10 of the Universal Declaration of Human Rights.

[24] The principle that the immunity of the Organization holds only if an appropriate remedy has been provided has been recognized by the Supreme Court of Argentina and characterized as a clear international law trend that has to be followed (see The Privileges and Immunities of International Organizations Before National Courts, edited by August Reinsch (Oxford University Press, 2013), pp. 20-22).

are more suitable for commercial disputes or for well-paid consultants or independent contractors, rather than relatively low-paid employees.

5. Options for an effective remedy system for non-staff personnel

142. At the outset the Internal Justice Council wishes to emphasize that the cost of any system of dispute resolution is, of course, a crucial consideration in assessing its viability. The Council was informed that extending the jurisdiction of the Tribunals to employees whose relationship with the Organization is governed by a contract other than a letter of appointment, which is a prerequisite for having the status of a staff member, would increase the number of United Nations personnel covered by management evaluations and by the Tribunals by about 40 per cent. Acceptance of the costs of such a change is hardly realistic, given the financial difficulties facing the Organization in effectively discharging its humanitarian, refugee and peacekeeping mandates where such non-staff personnel are often used.

143. Of course, access could be limited to the Dispute Tribunal but only in cases of the most serious allegations, such as sexual harassment, exploitation or abuse or a deliberate violation of the contractual terms of the employee causing provable injury. To ensure that only bona fide cases enter this channel, non-staff personnel could be required to seek leave to bring an application before the Tribunal from the President of the Dispute Tribunal. Alternatively, they might be required to establish at a preliminary ex parte stage a prima facie case to the Chief of the Management Evaluation Unit that the claim was of such seriousness as to warrant access to the Tribunals, for example, by providing facts from which it could be inferred that such treatment had occurred.

144. Such limited access would accord with the fact that at the present time credible allegations from third parties, including non-staff personnel, of sexual harassment and abuse against any staff member are investigated and appropriate action taken as a result of such investigation. On the other hand, the problem with this limited scheme of conflict resolution is that it does nothing to deal with the common types of disputes that occur in relation to conditions of service and contract renewals.

145. The Internal Justice Council suggests that a fairer and more just approach would be to institute on a trial basis in a field duty station a simple and quick dispute resolution system for non-staff personnel. The fact that simplified procedures could be worth trying is buttressed by anecdotal accounts to the Council during its session of how the Office of the Ombudsman has managed to informally resolve issues raised by non-staff personnel.

146. Such a system might consist, as hereinafter discussed, of a simple grievance form, with clear instructions for completion, provision for the reply of the relevant manager, and a designated arbitrator independent of the parties. There would be no need for legal representation.

147. The Council suggests that any trial of a simple dispute resolution mechanism should define exactly what groups of non-staff personnel are covered and, later, if a system, or a variant thereof, is made permanent, access to the simple remedy system should be conclusively established by a clause in the contracts of the non-staff personnel concerned in order to avoid all doubt as to who is entitled to access the simple dispute resolution system.

148. If this initiative is to be pursued a number of options, of varying complexity and cost, could be considered.

Option one

149. The Secretary-General might consider establishment of an expedited form of arbitration with the following features:

(a) The Arbitrator would be chosen by the Chair of the Arbitral Panel from a Panel of Arbitrators previously established, selected and kept current by the Secretary-General after consultations with the relevant field staff associations;

(b) The total fees payable to an Arbitrator for any case would be set periodically at a sum decided by the General Assembly. Those fees would be paid by the Organization;

(c) The Arbitrator would establish the length of time the arbitration could take — the duration between filing of the claim to the giving of the award;

(d) The procedures would be simple using standard grievance forms, with the Arbitrator deciding procedural issues, such as whether oral evidence is needed and, if so, whether it can be given by teleconference;

(e) The Arbitrator would only have power to award compensation for financial loss actually proved by the employee, and such compensation could in any event be no more than, say [18] months' remuneration;

(f) The decision of the Arbitrator would be final and binding on both parties, and there would be no appeal therefrom.

Option two

150. An even more simplified form of dispute resolution mechanism could be based on systems used in private enterprises such as factories, construction projects and even consumer complaints where a purchaser alleges product deficiencies but the value of the article in dispute simply does not warrant an elaborate arbitration procedure. Quick and simplified procedures are also employed in sports' arbitrations where, for example, a sports competition cannot be delayed for a lengthy arbitration to address participant eligibility. Industrial peace requires fast and cheap grievance procedures to avoid labour unrest. Job sites require speedy and simplified justice so as not to impede forward progress. There are numerous national precedents for establishing simple yet effective remedies for employment disputes that ensure projects are not tied up in labour disputes at the cost of getting the job done.[25]

151. In the view of the Internal Justice Council, a simplified process could feature a short standard form requiring basic information about the employee and his or her grievance or other employment issue. The local supervisor would fill out a response form and attach relevant documentation. Both forms would be transmitted electronically to an arbitration centre where a full-time arbitrator (who would be an individual experienced in United Nations employment law and practice but probably

[25] The Internal Justice Council was referred to the Australian Fair Work Commission (www.fwc.gov.au) and the Early Conciliation Scheme of the United Kingdom Advisory Conciliation and Arbitration Service. (www.acas.org.uk/index.aspx?articleid=1461) as examples of simplified approaches to settling workplace grievances.

without special legal training) would render a speedy decision without a hearing or any further formalities. If, in the opinion of the arbitrator, a particular case raised important issues deserving more elaborate treatment, the arbitrator would have the authority to refer the case to be dealt with in a more elaborate process. Otherwise the arbitrator's decision would be final and binding.

Option three

152. A further possibility is a very simplified "Management Evaluation Unit type" procedure, whereby non-staff personnel wishing to complain about an infringement of their rights can approach a neutral third party who has an obligation to try and resolve workplace disputes. By submitting to this process, the employee is accepting that it will be handled with minimal formality, but with the advantage of speed and the neutrality of the third party. Upon receipt of a complaint, the third party who has training in workplace disputes makes contact with the employer with a view to resolving the dispute. The neutral third party uses the telephone and e-mail to relay message between the two parties with a view to finding a middle ground. Neither party is expected to complete lengthy documents or pleadings setting out its case, nor are the two parties obligated to exchange documents but they agree to be bound by a decision of that neutral third party if they cannot reach agreement under the third party's auspices.

Any reform should be on a trial basis

153. The Office of the Ombudsman and Mediation Services has many individuals skilled in dispute resolution and their expertise and experience in the field could be harnessed by the Secretary-General in helping flesh out a simple and workable system for dispute resolution for non-staff personnel. In any event, the Internal Justice Council would recommend that whatever option is selected be adopted on a prospective trial basis, perhaps only in one peacekeeping operation to begin with, and subject to re-examination after a trial period.

F. Access to effective remedies

1. Specific performance

154. The Interim Independent Assessment Panel was of the opinion that the provisions in article 10.5 (a) of the statute, which required the Dispute Tribunal to set a sum to be paid as an alternative to specific performance are problematic (see A/71/62/Rev.1, paras. 349-350).

155. This concern was strongly supported in our discussions with representatives of the staff on this issue.

156. Nevertheless, although some international administrative tribunals, such as the ILO Administrative Tribunal, may order specific performance[26] and even though many stakeholders still advocate that the Tribunals have the power of specific

[26] Article VIII, paragraph 1, of the ILO Administrative Tribunal statute provides as follows: "In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible, or advisable, the Tribunal shall award the complainant compensation for the injury caused to him."

performance, the General Assembly has repeatedly decided — since the establishment of the former Administrative Tribunal — on policy grounds that specific performance was not acceptable in the areas of appointment, promotion or termination. The Internal Justice Council accordingly considers that the present provisions of the statute which enable the Tribunals to award more than two years' compensation in lieu of specific performance in egregious cases is acceptable.[27]

2. Judicially supervised extension of time to appeal to permit settlement

157. The Interim Independent Assessment Panel acknowledged that strict time limits for the Management Evaluation Unit to issue a decision may at times impede efforts to settle a dispute but the Panel was of the view that added flexibility might "encourage laxity in fulfilling the requirements of the system on time and delays could become institutionalized" (see A/71/62/Rev.1, para. 305).

158. The Internal Justice Council considers that, given the high regard with which most stakeholders view the continual efforts of the Management Evaluation Unit to settle cases, often together with the Office of Staff Legal Assistance, and if an extension of time could be subject not only to the agreement of the parties but also to the agreement of a judge of the Dispute Tribunal, it is unlikely that this flexibility in selected cases could easily be used in bad faith by either party to delay judicial resolution of a dispute.

159. The Council recommends that that if both parties wish to pursue efforts to settle and apply to the Dispute Tribunal for an extension of the time limit to lodge an appeal, the Tribunal should have the authority to extend such time limits.

G. Referrals for accountability

1. Introduction

160. Article 10.8 of the Dispute Tribunal statute provides that the Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability. Article 9.5 of the Appeals Tribunal statute is in similar terms.

161. The Internal Justice Council considers that it is useful to recall that the General Assembly has taken a sustained interest in accountability and that the goals established by the General Assembly will assist consideration of the issue of referrals for accountability by the Tribunals. For example, in resolution 68/264, the General Assembly emphasized the importance of real and effective accountability at all levels, including criminal accountability (paras. 22 and 26) and requested the Secretary-General to take all measures to ensure that staff, in particular senior managers, are held accountable for their actions (para. 27).

[27] Article 10.5 (b) of the Dispute Tribunal statute provides "Compensation, for harm supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases, order the payment of a higher compensation supported by evidence, and shall provide the reasons for that decision." Article 9.1 (b) of the Appeals Tribunal statute is in similar terms.

162. It accordingly appears to the Council that referrals for accountability by the Tribunals are first and foremost a mechanism that recognizes the authority and obligation of the Secretary-General to hold staff accountable and the referral system is simply another tool to help the Secretary-General ensure that, in practice, staff members, including managers, are held accountable for their actions or inaction. The real issue is whether the system of referrals for accountability set out in the statutes of the Tribunals requires modification to implement the General Assembly goals of ensuring accountability of managers and staff members alike.

163. Given the repeated calls of the General Assembly to establish effective systems for accountability the Internal Justice Council supports the recommendation of the Interim Independent Assessment Panel that an in-depth assessment of the issue of accountability referrals could be facilitated through a meeting of stakeholders under the auspices of the Council (see A/71/62/Rev.1, para. 282).

2. Proposed agenda for meeting to consider referrals for accountability

Some data

164. From the inception of the new system of justice in 2009 to early 2016, there have been 21 referrals for accountability, 20 by the Dispute Tribunal and one by the Appeals Tribunal.[28] The Internal Justice Council notes that, of the 20 referrals by the Dispute Tribunal, 10 judgments were vacated by the Appeals Tribunal, of which 6 judgments explicitly vacated the referrals[29] and 4 judgments vacated the referral without dealing explicitly with it.[30]

165. It would seem to follow from this high rate of referrals for accountability being overturned by the Appeals Tribunal that consideration for reform of the system is timely. At a minimum, procedures must be established to protect the identities of those persons being referred since even if a judgment of the Dispute Tribunal is overturned or the Secretary-General decides that there is no basis for accountability, the original judgment of the Dispute Tribunal remains in the records and its contents can be retrieved, not only by use of the Office of Administration of Justice search engine for Tribunal judgments but also through the use of general Internet search engines.

Proposed agenda for stakeholder meeting

166. The Internal Justice Council expects that its successor Panel would be pleased to chair a meeting of stakeholders to consider the issue of referrals for

[28] UNDT/2010/030 (*Abboud*), UNDT/2011/058 (*Kozlov*/*Romadanov*), UNDT/2012/068 (*Pirnea*), UNDT/2012/089 (*Konate*), UNDT/2012/114 (*Applicant*), UNDT/2012/200 (*Finniss*), UNDT/2013/024 (*Igbinideon*), UNDT/2013/032 (*Tadonki*), UNDT/2013/062 (*Hersh*), UNDT/2013/084 (*Hunt-Matthes*), UNDT/2013/094 (Bali), UNDT/2013/101 (*Ngokeng*), 2013-UNAT-310 (*Nasrallah*), UNDT/2014/020 (*Munir*), UNDT/2014/034 (*Assale*), UNDT/2014/051 (*Nartey*), UNDT/2014/92 (*Birya*), UNDT/2014/102 (*Flaetgen*), UNDT/2015/020 (*Roberts*), UNDT/2015/048 (*Maiga*); and *Order* No. 243 (NBI/2015) and Corr.1 [Suspension of action] *Kelapile*).

[29] 2013 UNAT 311 (*Pirnea*), paras. 43-44; 2014-UNAT-410 (*Igbinedeon*), paras. 38-40; 2015-UNAT-522 (*Munir*), paras. 43-47; 2015-UNAT-534 (*Assale*), paras. 43-45; 2015-UNAT-544 (*Nartey*), paras. 65-69; and 2015-UNAT-562 (*Birya*), paras. 50-53.

[30] 2012-UNAT-228 (*Kozlov*/*Romadanov*), para. 27; 2014-UNAT-443 (*Hunt-Matthes*), para. 50; 2014-UNAT-450 (*Bali*), paras. 30 and 32; and 2014-UNAT-460 (*Ngokeng*), para. 40.

accountability. Such meeting would not include judges given their independent judicial status but their views, if any, on this issue in their comments attached to this report would be circulated by the Council to participating stakeholders.

167. In order to facilitate consideration by stakeholders and to enable the agenda to be revised to take account of any requests or comments of the General Assembly, the Council suggests that a draft agenda for such a meeting could include discussion of the following issues:

(a) Given the high rate of reversals of referrals for accountability (about 50 per cent), whether the mechanism is a useful one that ought to be retained;

(b) If the referral function is to be eliminated what sort of mechanism, if any, should be put in place to deal with serious issues perceived by a Tribunal during the consideration of a case that seems to warrant the attention of the Secretary-General;

(c) What changes are needed to make referrals for accountability an effective tool for the Secretary-General to ensure that staff members are accountable for their action or inaction;

(d) Whether the precise scope for accountability referrals should be elaborated on in the statutes of each Tribunal (e.g., referrals can only be made if misconduct is proved; referrals can also be made if a staff member commits a series of acts which, though they do not amount to misconduct, show inconsistent or erratic behaviour; referrals can also be made if the case shows that there is a systemic problem created by the applicable rules);

(e) Whether the statute of the Appeals Tribunal should be amended to require that any referral by the Dispute Tribunal in a judgment under appeal be specifically dealt with in the Appeals Tribunal judgment;

(f) What procedures, if any, should be put in place to ensure that an individual or office or entity to be referred has an effective right of due process before the finalization of such referral;

(g) What procedures, if any, should be put in place to protect the identity of any individuals referred to the Secretary-General for accountability;

(h) Whether referrals of staff for accountability should include cases of contempt of court, giving false evidence, not handling judicial processes which it is their duty to handle without discrimination or bias and not disclosing to the Tribunals facts that would enable the Tribunals to reach a fair and just decision in cases before them;

(i) Whether cases of inappropriate conduct by counsel should be dealt with solely under the Code of Conduct for Legal Representatives;

(j) The measures, if any, to be put in place to correct an online version of a Dispute Tribunal judgment if a referral contained therein is vacated by the Appeals Tribunal or if the Secretary-General decides that the case does not call for any action on the basis of accountability;

(k) Whether referrals for accountability should be made only in a judgment on the merits;

(l) The type of mechanism, if any, to be put in place, whereby the Tribunal, the staff member party and the General Assembly are informed of the results of a referral;

(m) To what level of proof (e.g., on a balance of probability established by clear and compelling evidence) must the facts which form the basis of a referral for accountability be established before a referral can be made;

(n) What is the probative value — if any — of facts found by the Dispute Tribunal as the basis of its referral for accountability in subsequent investigations by the Secretary-General;

(o) What the final recommendations of the Internal Justice Council to the General Assembly should be on these issues.

H. Investigations and retaliation

1. Investigations

168. The Interim Independent Assessment Panel saluted the fact that the topic of investigations was undergoing review by the Secretary-General (see A/71/61/Rev.1, paras. 396-397).

169. The Internal Justice Council was informed that the Staff-Management Committee had made significant progress on an instruction dealing with investigations and disciplinary matters, strengthening the standard of investigations and ensuring due process for those investigated, and had finalized its recommendation on the matter to the Secretary-General at its meeting in April. The Council is pleased by the progress made by the Committee and the improvements that it will make to the justice system.

2. Retaliation

170. The Interim Independent Assessment Panel noted that, while it was mandatory for all United Nations staff members to report any misconduct and other breaches of the Organization's rules and regulations and, in section 1.3 of his bulletin ST/SGB/2005/21, the Secretary-General condemned retaliation as a violation of the fundamental obligation of all staff members to uphold the highest standards of efficiency, competence and integrity and to discharge their functions and regulate their conduct with the best interests of the Organization in view, the Panel was of the view that the protection afforded to those who complied with those rules had serious inadequacies (see A/71/62/Rev.1, para. 244). In particular, the Panel noted that the decisions of the Ethics Office that prima facie retaliation had not occurred had direct legal consequences for the rights of the complainant staff member, yet the Appeals Tribunal had recently overturned the judgment of the Dispute Tribunal in the case of *Wasserstrom* (2014-UNAT-457), finding that the Ethics Office was limited to making recommendations to the Administration and those recommendations were not administrative decisions subject to judicial review (see A/71/61/Rev.1, para. 245).

171. The Interim Independent Assessment Panel concluded that the system offered no protection at all against retaliation for reasons other than reporting misconduct. There was no legal provision or prescribed procedure, for example, to protect a staff

member from retaliation for appearing as a witness in a case before the Dispute Tribunal to support a case against the Administration, or lodging an appeal as such. The Panel found that the inadequacies placed severe limitations on the protection system with regard to safeguards against retaliation and the protection of individual rights. The fear of retaliation among staff was real and could be counted as a factor that had serious implications for access to justice (see A/71/62/Rev.1, para. 246).

172. The Internal Justice Council notes that staff rule 1.2 (g) explicitly prohibits retaliation and attempts at retaliation. However, the real problem is that for any single discretionary decision, such as failure to recommend for promotion or give a good performance rating, it is almost impossible to establish that the said discretionary decision was improperly motivated. Normally, it is only through a long list of decisions over time that this can be established, but under current rules, each administrative decision must be appealed within very strict time limits. It follows that central to any effective system of accountability is access to effective protection for those who report not only "public interest" offences, such as serious fraud and sexual harassment and abuse, but also those who disclose or complain about improper managerial or improper conduct by colleagues. If staff members are afraid to "say something", those who perform improperly will rarely be held to account. Protection for whistle blowers, and those who testify as witnesses cannot be limited or tightly circumscribed if the accountability goals established by the General Assembly are to be met.

173. The Internal Justice Council accordingly endorses the recommendation of the Interim Independent Assessment Panel that the Organization establish legal provisions and corresponding procedures to protect staff members from retaliation for appearing as witnesses or for lodging an appeal (see A/71/62/Rev.1, para. 413, recommendation 24).

IV. Tribunals

A. General observation

174. The views of both Tribunals are annexed to the present report, in line with the request in paragraph 42 of General Assembly resolution 70/112. Those views are submitted to the Assembly exactly as received.

B. Eligibility of serving ad litem judges and recruitment procedures should the General Assembly replace the three ad litem positions in the Dispute Tribunal by permanent positions

175. There are two technical matters relating to election of judges, should the General Assembly accept the recommendation of the Interim Independent Assessment Panel, which is supported by the Internal Justice Council, to replace the three ad litem positions in the Dispute Tribunal by three permanent positions (see A/71/62/Rev.1, para. 367). The first relates to eligibility of current ad litem judges and the second relates to recruitment procedures. These are discussed in turn below.

Eligibility of serving ad litem judges

176. The eligibility of current ad litem judges for the permanent positions was discussed in detail by the Internal Justice Council when making recommendations for vacancies that would arise in both Tribunals from 1 July 2016 (see A/70/190, paras. 33-35). The Council recommended that an ad litem judge would be eligible for consideration for full-time appointment if the total term of service as a judge would be less than 10 years, which is the limit on service in the statutes if a candidate is appointed to serve the remainder of a seven-year term of a judge who has ceased to hold office while his seven-year term of office has not yet expired (see art. 4.5 of the statute of the Dispute Tribunal and article 3.5 of the statute of the Appeals Tribunal).

Recruitment procedures

177. The issue is whether there should be a full recruitment exercise for candidates to be presented by the Internal Justice Council to the General Assembly for election to the three permanent positions or whether candidates should be selected from eligible ad litem judges and from the roster of qualified candidates from the prior recruitment exercise conducted in 2015 by this second Panel.

178. The term of the current Panel, which established the roster, ends on 12 November 2016. The problem arises because the third Panel of the Internal Justice Council that will conduct the recruitment exercise, was not involved in the selection process that led to the establishment of the roster.

179. A full recruitment exercise would take the better part of six months, given the lead time for advertising, submission of applications, review of applications and creation of a short list for written examinations and interviews, submission of the report of the Internal Justice Council to the General Assembly and consideration of that report and election by the General Assembly. This would require the Assembly to extend the appointments of the sitting ad litem judges by at least six months, to 1 July 2017.

180. Recruitment from the existing roster[31] would be much quicker and could perhaps be completed by the new Panel of the Internal Justice Council within a few months of any decision by the General Assembly to replace the ad litem positions by permanent positions. The General Assembly could then conduct an election at the resumed session in the spring of 2017. The current Panel of the Council considers that, if the Assembly accepts the recommendations of eligibility set out by the Council in the present report (see para. 176 above), the new Panel of the Council would have sufficient candidates on its roster to present two qualified candidates for each vacant permanent position.

181. Whichever recruitment procedure is adopted, there will be some delay, as the Council understands that the election must be dealt with under a different agenda item after the General Assembly takes a decision on whether to establish three new permanent positions in place of the ad litem positions. However, by the time the Assembly considers the present report, the new Panel of the Council — which will

[31] The roster consists of candidates who were recommended by the Internal Justice Council for appointment, but who were not appointed by the General Assembly, and others who though not recommended for appointment, were considered by the Council as capable of completely fulfilling the duties of a judge of the Dispute Tribunal.

be responsible for the recruitment exercise — will be in place and the Council recommends that the appropriate Committee consult the Chair of the new Panel before it makes its recommendations on this issue to the General Assembly.

V. Office of Administration of Justice

182. 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.[32]

183. The Council is grateful to the Office of Administration of Justice, and particularly to the Office of the Executive Director, for the valuable and extensive assistance provided to it prior and during its session.

(*Signed*) Ian **Binnie**

(*Signed*) Carmen **Artigas**

(*Signed*) Sinha **Basnayake**

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

(*Signed*) Victoria **Phillips**

[32] ST/SGB/2010/3 of 7 April 2010, sect. 2.1.

Annex I

Summary of recommendations made by the Internal Justice Council

1. The Internal Justice Council supports the recommendation of the Interim Independent Assessment Panel that the mandate of the Council explicitly clarify that the "representatives" of staff associations and management on the Council are not advocates of those who nominated them but are simply persons in whom staff associations and management have confidence to discharge the independent duties of the Council (see above, paras. 28-30).

2. The Council supports the recommendation of the Interim Independent Assessment Panel that judges submit their comments directly to the General Assembly on the understanding that interactions with any Committee of the Assembly not deal with individual cases to respect the principle of judicial independence (paras. 64-65).

3. The Council recommends that the qualifications of judges of the Dispute Tribunal in the statute be amended to reflect the changes made by the General Assembly to the statute of the Appeals Tribunal in resolution 69/203 (para. 68).

4. The assistance of Member States is sought to encourage qualified national judges to apply for vacancies on the two Tribunals, especially by encouraging national judiciaries to grant a seven-year leave of absence to serve on the Dispute Tribunal and at least three weeks leave of absence three times a year to serve on the Appeals Tribunal (see para. 72). Assistance is also needed to increase the pool of applicants for judicial positions requiring the ability to conduct proceedings in French (para. 74).

5. The Internal Justice Council recommends that the current remuneration model for judges of the Appeals Tribunal be revised to one that compensates judges for work done between formal sessions of the Tribunal (paras. 80-81).

6. The Council recommends that the judges consider data-gathering measures to enable all the judges to easily determine whether the case disposition goal established by the General Assembly in the Code of Conduct for Judges is met (para. 84).

7. The Council suggests that the Tribunals consider to change the annual term of their Presidents to run from 1 January to 31 December (instead of 1 July to 30 June, which is just before the usual deadlines for submission of the annual communications of the Tribunals to the General Assembly) by extending the current term of the Presidents to 18 months, that is, from 1 July 2017 to 31 December 2018 and then reverting to a yearly presidency (para. 87).

8. The Council supports the continuation of the two half-time judges of the Dispute Tribunal who play a vital role in assisting the permanent and ad litem judges cope with the caseload, which varies over time and between locations of the Dispute Tribunal (para. 88).

9. The Council supports practical training for new judges on the United Nations, its organization and rules, noting that a number of such training opportunities are already in place (para. 92).

10. The Council recommends that the General Assembly request the Secretary-General to examine, in a phased manner, selected groups of administrative issuances and to devise a plan in order to ensure their consolidation, internal consistency and compliance with higher norms and to put into effect a system to ensure that such consistency is maintained (paras. 109-116).

11. The Council supports the recommendation of the Interim Independent Assessment Panel that, if the Management Evaluation Unit decides to uphold a management decision after consideration of a request for review of an administrative decision by a staff member, it be required to disclose any relevant documents on which it has relied to make that decision (para. 118).

12. The Council suggests that the rules of procedure of the Tribunals define "documents", require each party to disclose with their application or response a list of relevant documents in their possession, define which documents are privileged and set out the consequences of failure to disclose or produce a relevant document (paras 125-127).

13. The Council proposes three options for a remedy system for non-staff personnel better suited to the need of field operations and lower paid personnel than the current model. It recommends that any system adopted be activated on a trial basis and be strictly prospective (paras. 149-153).

14. The Council recommends that, if both parties agree, a judge of the Dispute Tribunal should be empowered to extend the deadline for filing an appeal to enable the parties to continue efforts to settle a dispute (paras. 158-159).

15. The Council would be pleased to chair a meeting of stakeholders to consider the issue of referrals for accountability and suggests a draft agenda for such a meeting (paras. 166-167).

16. The Council supports the recommendation of the Interim Independent Assessment Panel to establish effective procedures to protect staff members from retaliation (paras 172-173).

17. The Council recommends that a serving ad litem judge be eligible to apply for a permanent position if the total term of service of that judge is less than 10 years at the end of the 7-year term to which he or she might be appointed, to be in line with the limit imposed on a judge who fills the remainder of the term of a judge who vacates before the expiry of his or her term of office (para. 176).

18. The Council recommends that the appropriate Committee consult with the Chair of the new Internal Justice Council Panel on whether there should be a full recruitment exercise or whether the current roster, assembled by this second Panel, is sufficient for the new Panel to recommend two candidates per position to the General Assembly, should it replace the three ad litem positions on the Dispute Tribunal with three permanent positions (para. 181).

Annex II

Brief descriptive listing of main documents concerning consideration by the General Assembly of access to effective remedies by non-staff personnel

Consideration of non-staff personnel in the context of the system of administration of justice has spanned the period from the Redesign Panel report to the present.

Paragraph 7 of resolution 63/253 provides that interns, type II gratis personnel and volunteers (other than United Nations Volunteers) shall have the possibility of requesting an appropriate management evaluation but shall not have access to the Tribunals.

In paragraphs 8 and 9 of its resolution 64/233, the General Assembly requested the Secretary-General to describe remedies available to non-staff personnel and to present options for making simplified arbitration or other simplified remedies available to non-staff personnel. This was done in document A/65/373, paragraphs 165 to191, with annex IV describing the contracts and rules with respect to the various categories of non-staff personnel.

In paragraph 55 of resolution 65/251, the General Assembly requested the Secretary-General to provide further information with respect to remedies available to the different categories of non-staff personnel. This was done in document A/66/275, paragraph 190, and annex II, which was an account of proposed expedited arbitration procedures for consultants and individual contractors.

In paragraphs 38 to 40 of resolution 66/237, the Assembly asked the Secretary-General, inter alia, for a proposal for implementing expedited arbitration procedures for individual contractors and consultants; for a report on access to the system of administration of justice for different categories of non-staff personnel not covered under the proposed expedited arbitration procedures; and to include in his report information on measures to be made available with regard to the informal and formal aspects of the system in order to assist such non-staff personnel to address disputes that may arise. This was done in document A/67/265, paragraphs 182-186 and annexes IV, V and VI.

In paragraphs 50 to 52 of resolution 67/241, the General Assembly noted the importance of ensuring that all categories of personnel have access to recourse mechanisms and took note of the proposed expedited arbitration procedures and decided to remain seized of that matter, while asking the Secretary-General to continue to supply relevant information and to provide information also on existing measures to institutionalize good management practices that aim to avoid or mitigate disputes involving the different categories of non-staff personnel.

The Secretary-General has since that time presented such information in his annual reports on the administration of justice.

Annex III

Organization of the session

The Internal Justice Council held telephone conferences on 8 January, 12 February and 10 March 2016 to discuss its work programme and plan for its 2016 annual session. Much of the preparatory work and preparation of the report of the Council was undertaken by e-mail.

The Council arrived in Nairobi on 10 April 2016 and met at that duty station on 11 and 12 April 2016; it arrived in Geneva on 13 April and met at that duty station from 14 to 16 April. The Council met with stakeholders at those duty stations and by videoconference or telephone, in particular with: the President and judges of the Dispute Tribunal in Nairobi and a number of judges from the Dispute Tribunal in Geneva and New York; the President of the Appeals Tribunal; the Executive Director of the Office of Administration of Justice; the Principal Registrar and Registrars of the Dispute Tribunal and the Appeals Tribunal; the Director of Administration at the United Nations Office at Nairobi; the Officer-in-Charge and representatives from the Office of Staff Legal Assistance in Nairobi, Geneva and New York; representatives from the United Nations Office at Nairobi, the Staff Coordinating Councils of the United Nations Office at Geneva, the United Nations Office at Vienna, the Economic Commission for Latin America and the Caribbean, the International Criminal Tribunal for the former Yugoslavia, the Mechanism for International Criminal Tribunals and representatives from the field; counsel representing the United Nations Office at Nairobi; counsel representing the funds and programmes in Nairobi and in Geneva; the Director, Office of the Under-Secretary-General for Management; the Director-General of the United Nations Office at Geneva; the Director of Administration and the Officer-in-Charge of the Management Evaluation Unit; the Assistant Secretary-General for Human Resources Management; the Chief of the Human Resources Management Service in Geneva; representatives from her Office, including the Administrative Law Section; and the Director of the General Legal Division of the Office of Legal Affairs.

Annex IV

Memorandum from the United Nations Appeals Tribunal

Comments of the United Nations Appeals Tribunal

Overview

1. The United Nations Appeals Tribunal is the final arbiter of the administration of justice system for staff members of the United Nations, the United Nations Joint Staff Pension Board, the United Nations Relief and Works Agency for Palestine Refugees in the Near East, the International Civil Aviation Organization and several other international agencies and entities.

2. The Appeals Tribunal, which is itinerant in nature, adjudicates on appeals three times each year (Spring, Summer and Autumn) for two-week sessions at each interval. The Appeals Tribunal consists of a complement of seven judges of different nationalities and legal systems. The work of the Tribunal involves adjudication of appeals from the judgments rendered by the lower tribunals and the decisions taken by the heads of the international agencies and entities that have accepted the jurisdiction of the Appeals Tribunal, as well as review and disposal of interlocutory motions, which are filed by parties. At each session, the judges of the Appeals Tribunal are required to deliberate on the matters, write judgments and issue orders accordingly.

3. As demonstrated in figure I below, as at 31 May 2016, the Appeals Tribunal had received 942 appeals and disposed of 862 of them. In addition, 322 interlocutory motions were filed and disposed of during the same period. The statistics in figure II show a large volume of appeals received and a very high disposal rate of appeals since the inception of the Tribunal in 2009. It is important to note that, where applications are similar in nature, the Tribunal consolidates the cases and disposes of them in one judgment, even if they relate to different staff members.

Figure I
Number of cases and interlocutory motions received by the United Nations Appeals Tribunal for the period from 1 July 2009 to 31 May 2016

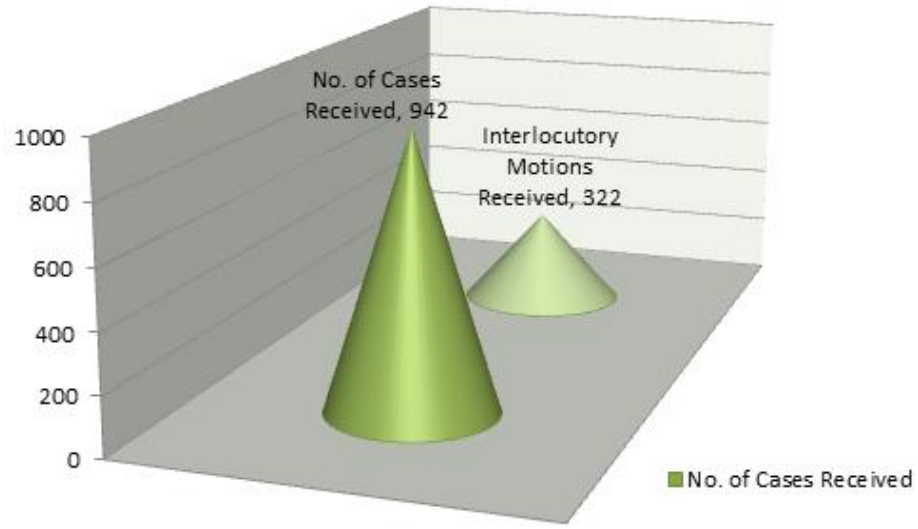
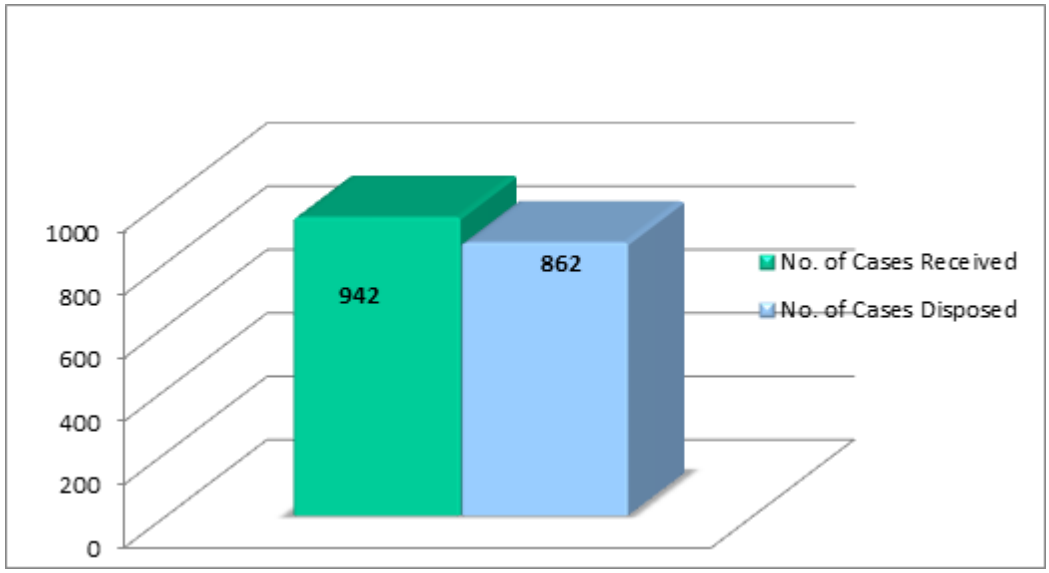


Figure II
Number of cases filed and disposed for the period from 1 July 2009 to 31 May 2016



Challenges

1. Staffing of the Registry

4. The Registry's staff performs various registry duties and the duties of legal officers. To this end, the staff is engaged in preparatory work before the actual sitting of the Tribunal, and they are also involved in the work of the Tribunal during and after each sitting. The Registry staff makes all the arrangements for each session of the Tribunal, including the drafting of briefing notes for judges. These briefing notes include reviewing and citing the relevant facts, the parties' contentions, legal issues, case law and administrative issuances related to the particular appeals. The staff attends the judges' panel deliberations, provide legal and administrative support in relation to oral hearings, and prepare and assist the plenary meetings. They are also required to edit, finalize and publish all judgments as well as to manage the daily affairs of the Appeals Tribunal under the guidance of the President.

5. In order to achieve and maintain an efficient and effective system of administration of justice in the United Nations, it is imperative that the human resource at the Tribunal's Registry be up to capacity. Currently, the Registry staff comprise of a Registrar, two legal officers and two assistants. This staff is insufficient to adequately perform the myriad tasks and functions of the Tribunal. It is important therefore that active consideration is given to increase the capacity of the Registry staff of the Tribunal. To this end, it is strongly urged and highly recommended that the Tribunal be provided with two additional members of staff, namely, a legal officer and an assistant. This would lend to the more efficient and productive functioning of the Tribunal and a more effective system of administration of justice.

2. Interlocutory motions

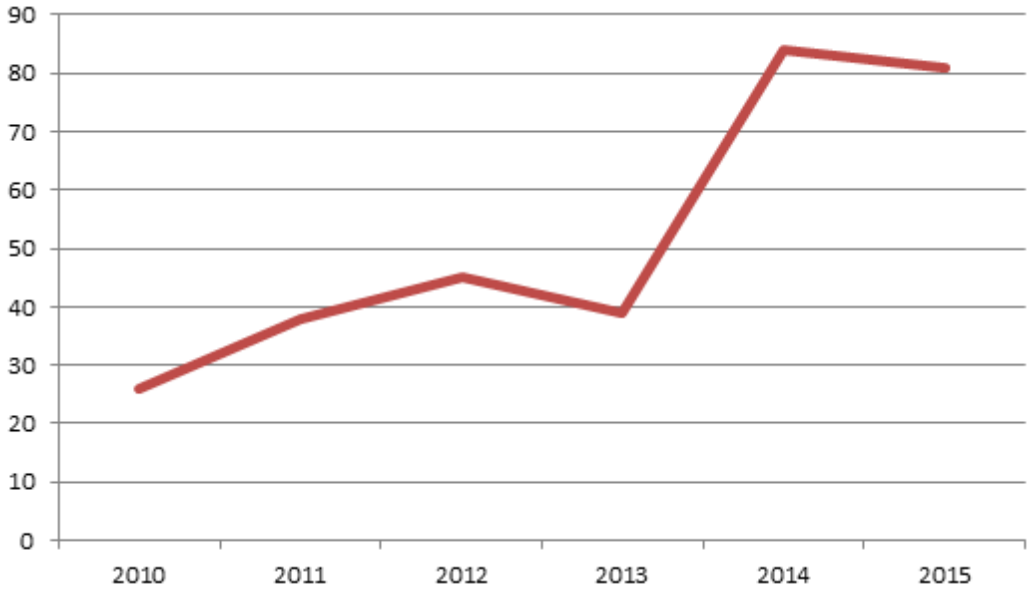
6. The Appeals Tribunal receives and pronounces on all motions which are lodged by parties. Although many of these motions are filed when the Appeals Tribunal is not in session, they often require time-sensitive judicial attention and must be ruled upon promptly.

7. As a result, the judges of the Appeals Tribunal created an ad hoc "duty judge" system in July 2010 to address interlocutory motions and other judicial matters that arise outside of the annual sessions. Under this system, the judges took turns on a monthly basis performing judicial functions in between sessions, as designated by the President. The "duty judge" system was set up entirely on the judges' own initiative, and they gave freely of their own time to dispose of the parties' motions in a timely manner.

8. This "duty judge" system has played a critical role in assuring that the appellate cases proceed through different procedural phases in a timely manner and in safeguarding against potential due process violations. However, from the inception of the system to present date, the amount of work required to be done by the judges between sessions has increased significantly.

9. The number of motions has continued to rise over the years. The Appeals Tribunal Registry received 84 motions in the year 2014 and 81 in the year 2015.

Figure III
Interlocutory motions received by the United Nations Appeals Tribunal during the period 2010-2015



10. This sharp increase in motions, as evidenced by figure III above, made such inordinate demands on the time of the judges outside the time needed to review and decide on the appeals placed on the docket that the system could not be sustained — especially in the absence of any remuneration. Hence, the "duty judge" system ceased to be operational in 2014.

11. Currently the motions are dealt with by the President of the Tribunal, who cannot decide on all the motions due to the sheer volume. As a result, the President pronounces on the motions which are deemed urgent and postpones all other motions until the next session of the Appeals Tribunal. The obvious consequence of this change will be a backlog of cases over time, since it is simply not feasible to decide on all outstanding motions and all docketed appeals during a two-week session three times a year.

12. Article 2(1) of the Appeals Tribunal Rules of Procedure (Rules) provides, in part, that "[t]he President shall direct the work of the Appeals Tribunal and of the Registry. …" Similarly, article 8(5) of the rules provides that "[t]he President may direct the Registrar to inform an appellant that his or her appeal is not receivable because it is not an appeal against either a decision of the Dispute Tribunal or of the Standing Committee acting on behalf of the United Nations Joint Staff Pension Board, as the case may be".

13. It is difficult for the President to direct the work of the Registry when there is no presence in New York between the sessions. The current arrangements require the Registry's staff to contact the President regularly for guidance on issues related to appeals, motions and other judicial matters.

Matters for the General Assembly to consider

14. Accordingly, the Appeals Tribunal respectfully requests that the General Assembly address and determine the following:

(a) Whether the "pay per judgment" system for judicial compensation should be replaced by either a flat daily rate or stipend, either of which would remunerate judges for the work they perform deciding and ruling on motions between sessions and for addressing regulatory and administrative matters;

(b) Whether the President should be financially compensated for deciding and ruling on interlocutory motions;

(c) Whether there is a need for the President to be in New York periodically (outside of the sessions) to manage the judicial issues which arise in the registry daily;

(d) What is the best solution to deal with the management of interlocutory motions which are filed when the Tribunal is not in session.

15. In the short term, it is respectfully proposed that arrangements be made to restore the "duty judge" system with compensation to the judges for time spent on reviewing and ruling on interlocutory motions and other judicial matters.

Annex V

Memorandum from the United Nations Dispute Tribunal

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

Introduction

1. Further to their previous memorandum to the General Assembly in 2015 on systemic issues of the United Nations administration of justice system (A/70/188, annex III), the judges of the United Nations Dispute Tribunal (hereinafter "the judges") hereby respectfully share with the Assembly their views on them seven years into the operation of the Tribunal.

2. From 16 to 20 May 2016, the judges of the United Nations Dispute Tribunal held their tenth plenary meeting in Nairobi. In anticipation of the first major transition of the United Nations judiciary in July 2016 — marked by the departure of three Dispute Tribunal judges in office since 2009 and the arrival of three new judges — the plenary focused on addressing pending potential amendments to the Tribunal's rules of procedure and/or its practice directions, current issues and challenges — such as case load redistribution and case management — as well as on evidence and hearings. The Dispute Tribunal judges also exchanged views on the report of the Interim Independent Assessment Panel (A/71/62) and the yet-to-be-finalized code of conduct for practitioners.

Institutional stability

Number of full-time judges in each duty station

3. The judges reiterate that after seven years of functional experience, the need for two full time judges at each duty station remains incontrovertible. Statistical data on its work 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 2015 was 438 (27 more cases than in 2014). The judges reiterate that while they have continued to take all appropriate measures to expedite the handling of cases, including early proactive case management, fast tracking of non-receivable and manifestly inadmissible cases, and judicial intervention with a view to settlement, the number of cases filed each year remains high and cannot be disposed of without the attention of two full-time judges at each duty station. In this regard, the judges welcomed the General Assembly's decision to extend the three ad litem judge positions through 2016. More importantly, the judges are respectfully of the view that as per paragraph 9 of its resolution 70/112, the General Assembly is now in a position to decide on the conversion of ad litem positions to full-time positions and to give due eligibility consideration to judges who have already been elected to the ad litem positions with the Dispute Tribunal. The half-time judges, who are themselves eligible for full time appointment, are being deployed to the Registries with the greatest number of cases and should be retained, thus maintaining the status quo to ensure the greatest efficiency of the Dispute Tribunal as has been the case since its inception.

4. It is also the considered view of the judges of the Tribunal that, should the General Assembly not decide on the conversion of the ad litem positions into permanent positions during its seventy-first session, the Assembly should give positive consideration to the continuation of the ad litem judge system by extending the contracts of ad litem judges and their supporting staff at least until 31 December 2017.

The imperative of autonomous decision-making by the Tribunal and independence

Interim independent assessment of the formal system of administration of justice

5. The Dispute Tribunal is pleased that the Interim Independent Assessment Panel completed its review of the system of administration of justice and its report on it in October 2015. The judges look forward to its discussion by the General Assembly at its seventy-first session and remain available to make further representations or to provide clarifications.

6. The judges remain, nevertheless, concerned about several issues affecting the autonomy and independence of the Dispute Tribunal, the fairness of its proceedings, and its overall efficiency in disposing of an ever growing caseload. The judges respectfully request the General Assembly to consider issues discussed below and postulates arising therefrom.

Independence of the Dispute Tribunal

7. The judges recall that in paragraphs 36 and 37 of its resolution 69/203, the General Assembly reaffirmed that the Dispute and Appeals Tribunals shall not have any powers beyond those conferred under their respective statutes, and that recourse by the Tribunals to general principles of law and the Charter of the United Nations is to take place within the context of and consistent with their statutes and the relevant General Assembly resolutions, regulations, rules and administrative issuances.

8. The judges understand and agree that the statutes do not confer upon them a mandate akin to a constitutional court, which would include the power to strike normative acts which are not compliant with the higher ranking laws. They nevertheless note again that the Charter of the United Nations is at the top of the hierarchy of the structure of the internal justice system. The Preamble of the Charter reaffirms faith in fundamental human rights and undertakes to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. The judges reiterate that the core function of an independent judiciary is to apply and interpret legal provisions previously approved by the legislator, in the context of the internal justice system, in accordance with international law and the rule of law, as expressly provided by the General Assembly in its resolution 63/253. As noted by the Secretary-General in 2007, United Nations staff are entitled to a system of justice that fully complies with applicable international human rights standards.[a]

[a] "The United Nations, as an organization involved in setting norms and standards and advocating for the rule of law, has a special duty to offer its staff timely, effective and fair justice. It must therefore, 'practice what it preaches' with respect to the treatment and management of its own personnel. The Secretary-General believes that staff are entitled to a system of justice that fully complies with applicable international human rights standards", A/61/758. para. 5 (b).

9. It is important to reiterate that the independence of the judiciary requires 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. As stated above, judges recently reviewed their procedures regarding case management, evidence and hearings, and found that the case management system is working well to increase the efficiency in the processing of cases and that, in many instances, it has resulted in disputes being referred to mediation.

Administrative and financial independence

10. The judges also 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 intent of the General Assembly when setting up the new system of administration of justice.

11. There can be a conflict of interest in the arrangement where the Administration is determining the budget allocated for the Dispute Tribunal and its disbursement. Consistent with the doctrine of the separation of powers, the Dispute Tribunal needs to have full administrative and financial independence from the Office of Administration of Justice, which is headed by an Executive Director. Functional independence, a cornerstone of judicial independence, must be guaranteed by ensuring that the Tribunal is not perceived as being in collusion with representatives of the executive or legislature or with one of the parties. The Office of the Executive Director, whose functions include support to the Tribunals and overseeing the Office of Staff Legal Assistance, also coordinates and chairs the task force on the annual report of the Secretary-General on the administration of justice. The judges are conscious that the issue of financial independence is always a difficult one for a court. Judges should, however, have a say in how funds are allocated in respect of plenaries, training, conferences, library and research requirements, travel and any other matter related to the Tribunal's proper and efficient discharge of its functions. It would be desirable for there to be a joint board established between the General Assembly and the judges to establish and define guidelines in respect of such financial independence.

12. The judges again take note of paragraph 27 of resolution 69/203, in which the General Assembly requested the Secretary-General to report on the practice of proactive case management by the judges of the United Nations Dispute Tribunal in the promotion and successful settlement of disputes within the formal system of administration of justice, and take note of paragraph 29 of resolution 70/112, in which the Assembly expressed concern about the increase in the number of cases and encouraged further efforts to handle them in an effective and efficient manner, including through proactive case management. The judges reiterate their belief that it is entirely inappropriate for a respondent appearing before the Tribunal to report on the judicial practices of the judges; only the judges can appropriately respond to matters within their sole domain and knowledge.

Reporting line

13. In paragraph 42 of resolution 70/112, the General Assembly stressed that the Internal Justice Council could help to ensure independence, professionalism and accountability in the system of administration of justice, and requested the Secretary-General to entrust the Council with including the views of both the Dispute Tribunal and the Appeals Tribunal in its reports.

14. The judges continue to be concerned that the Secretary-General, the respondent before the Tribunal, is asked by the General Assembly to report upon the activities of the Dispute Tribunal. This, with respect, is in significant contradiction of the doctrine of the separation of powers and must, or should, cause some embarrassment to the respondent. A party before a tribunal should not be that which reports upon any of the actions or activities of such tribunal. There is a very clear risk of a conflict of interest and a challenge to independence. Such reports can be biased and cause the party to whom the reports are made to act in a manner more favourable to the reporting party, whereas an unbiased report would be objective and balanced. A report from one of the parties can lead to injustice and to a system diverted from being independent and fair. The Secretary-General, as a party to the proceedings before the Tribunal, as are applicants, cannot properly comment on judicial matters.

15. The need to ensure the impartiality and independence of the judiciary, as well as of the position of the judges in the hierarchy of the United Nations, requires that the Tribunal have direct access to the General Assembly, instead of processing all views and requests of the judiciary, in particular those relating to their judicial practices and handling of cases, through a report prepared and submitted by the office of the Secretary-General and/or through one prepared by the Internal Justice Council.

16. The judges restate that, given the role of the Internal Justice Council as a body charged by the General Assembly with responsibility for general oversight and reporting on the efficiency and effectiveness of the entire system of internal justice, it is inappropriate for only one of the component parts of the system to report to the General Assembly through the Council. The judges further re-emphasize that a direct 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 by judges

17. After seven years of existence of the new system of administration of justice, the judges continue to have no recourse to any mechanism regarding decisions affecting their conditions of service and contractual rights taken by an Administration that is itself under the jurisdiction of the tribunals. In 2015 two judges had an issue with the Administration and, in 2016, the newly elected Dispute Tribunal judges have been placed in a position of professional embarrassment, in which the Administration demanded of them that they sign “letters of appointment” containing clauses incompatible with the judicial positions of the Dispute Tribunal and the conditions of service determined by the General Assembly.

18. Considering that negotiations by judges with the Administration are indelibly viewed as political and as undermining the appearance of judicial independence, the

judges reiterate that they view the lack of a dispute resolution mechanism applicable to them as inimical to the independence of the judiciary and damaging for the Organization. To preserve the principle enshrined under clause 11 of the Basic Principles on the Independence of the Judiciary (endorsed by the General Assembly in 1985), the judges request that the General Assembly consider the establishment of a mechanism to enable judges to voice their concerns and have them addressed.

Efficiency of the system of administration of justice

Proactive case management

19. The judges are pleased to report that proactive case management has generated significant gains for the new system of administration of justice, although even seven years after of the introduction of the new system, pleadings are still found to be lacking in essential averments, in precise legal basis and supporting authorities, and supported by copious and unnecessary documents. Proactive case management has allowed the judges to direct parties on how to seek, give and receive admissions and disputes of fact, documents and other evidence, and to prepare their cases for disposal either on the papers or by trial. Case management has also given an opportunity for the self-represented applicants, who in 2015 represented a little over 50 per cent of all applicants, an opportunity to familiarize themselves with the direct working of the Dispute Tribunal, and to also consider the issue of mediation in a meaningful manner following discussions directly with a judge who will give clear guidance on the applicable legal principles and the nature of the evidence required to support their contentions.

20. Proactive case management by the judges of the Dispute Tribunal has also resulted in a number of cases being withdrawn, obviating the need for a determination by reasoned judgment.[b] Resources have been saved through vigorous case management, even if settlements did not take place in all instances, as cases are better prepared for trial. Furthermore, through proactive case management, a change in workplace culture has taken place in facilitating one of the overall purposes of the system of administration of justice, namely to preserve a harmonious work environment for staff and managers alike.

21. The judges finally note that there has been an increase in the number of hearings, with such being the norm, and with matters generally being considered on the papers only with the joint consent or request of the parties, or in circumstances where, for example, the irreceivability of an application is beyond question.

Transparency of the system of administration of justice

Courtroom and access to the public

22. The judges take note with appreciation of paragraph 26 of resolution 70/112, in which the General Assembly reaffirmed the need for the Dispute Tribunal and the Appeals Tribunal to have at their disposal functional courtrooms, and welcomes the Assembly's inclusion of the requirement for appropriate information technology.

[b] In 2015, 62 per cent of the cases withdrawn before the Dispute Tribunal resulted from proactive case management.

The judges are pleased to confirm that the Dispute Tribunal has adequate courtrooms in all of its three locations, and that work to provide each of them with appropriate information technology or improve existing technology is constantly under way.

Complaints mechanism

23. The judges note the approval by the General Assembly of a mechanism for addressing possible misconduct of judges (para. 40 of its resolution 70/112).

Adequate resourcing

24. The seven-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 continue to be underestimated. The limited resources are yet not adequate to provide proper administrative and technical support, and continue to put at risk the proper functioning of the system of administration of justice and its independence, as outlined below.

25. The judges respectfully note that the expressed policy objective of decentralization is not being achieved, in that the ability to hold hearings in duty stations other than New York, Nairobi and Geneva is being curtailed by the lack of direct budgeted funding. Justice needs to be seen to be done in as close proximity as possible to the place where the problems arise.

Travel and training funds

26. A striking area of neglect has been the Registries of the Tribunal, which have experienced even greater difficulties than the judges because very limited travel funds were allocated in the past seven years for annual meetings of the staff of the Registries of the three duty stations. During this period, it has again generally proved challenging, and at times impossible, to properly work on ensuring the consistency and standardization of practices among the Registries, a matter directly related to efficiency and access to justice. However, a meeting of the Registries' staff was held in Geneva in December 2015. It has resulted in greater communication between the Registries' staff and the development of greater standardization. This is merely a start; the holding of such a meeting should be institutionalized and proper funding should be allocated for it. A professionalized and adequately resourced system of administration of justice also requires ongoing training and the improvement of skills for all staff within the new system of justice. Continuing judicial education demands that staff in the Registries participate in training and information-sharing conferences with other international or regional Tribunal's Registries. An adequate allocation of funds for these purposes needs to be made too.

Transcripts of hearings

27. The judges again reiterate that professional and reliable records of proceedings are essential for the transparency of a professional and credible system of administration of justice. While the importance of proper transcript of hearings has been recognized, the judges continue to note the minimal level of funds allocated

for this purpose, which does not allow the systematic transcriptions of 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 reiterate the need for allocation of sufficient funds for the systematic production of professional transcriptions of hearings in all duty stations of the Dispute Tribunal.

Information and communications technology resources

28. In paragraph 4 of resolution 70/112, 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 case management system of the Dispute Tribunal allows staff members who file cases before it to have access to them at all relevant times and from any computer. Some individuals who have separated from the Organization and self-represented litigants still experience difficulties in accessing or using the case management system. In this respect, the judges are given to understand that there is work in progress to deploy a new platform towards the end of 2017.

29. The judges recall that the General Assembly, in paragraph 34 of resolution 69/203, stressed the importance of the dissemination of the jurisprudence of the Tribunals, including through improvement to the search engine. The judges understand that the available web-based search engine for accessing and researching judgments and orders of the Dispute Tribunal has undergone several enhancements, and that its forthcoming latest upgrade will bring it up to appropriate legal research standards.

30. The judges request that sufficient funding continue to be allocated to assist the Office of Administration of Justice in upgrading its Court Case Management System and online search engine to facilitate dissemination of the jurisprudence of the new professionalized internal justice system.

Fairness of proceedings

Right to effective remedy — award of compensation and orders for rescission

31. The judges note that article 10.5 (a) of the statute of the Dispute Tribunal provides that when the Dispute Tribunal orders rescission of a contested administrative decision or specific performance, it must also determine an amount of compensation that the Administration may pay as an alternative where a decision concerns appointment, promotion or termination.

32. The judges are concerned that where there has been a finding of wrongful dismissal, the respondent appears to effectively always elects to pay the compensation set, notwithstanding that no wrong may have been committed by the former staff member. The article makes no provision for these considerations to be taken into account when making the election. This may lead to significant injustice to entirely innocent staff if the decision not to accept the rescission is not properly and fully considered.

Representation for applicants

33. The Dispute Tribunal is appreciative of the efforts made to increase the provision of legal assistance to staff wishing to file a case before it. The judges reiterate that the experience during the seven years of its existence continues to show that the significant number of unrepresented applicants hinders the ability of the Tribunal to adequately focus on managing its case load. Such applicants often do not understand the legal process and tend to file numerous irrelevant documents and submissions, swamping the Registries with unnecessary or inappropriate queries and requests, generally slowing down the system and causing delays in proceedings as well as consequent increases in costs for the Tribunal.

34. 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, and 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 it is a key matter that should be monitored regularly.

35. The judges join the General Assembly in recognizing the extremely positive contribution of the Office of Staff Legal Assistance to the system of administration of justice (para. 24 of resolution 70/112).

36. The judges note with concern the significant time lapse for the filling of the vacancy of the position of the Head of said office. Importantly, the judges bring to the General Assembly's attention that the location of the Legal Officers of the Office of Staff Legal Assistance could be reviewed to ensure full decentralised representation.

37. The judges further note, with appreciation, the assistance that they receive from both counsel for the respondent and from the Office of Staff Legal Assistance, and observe that in a number of cases the Respondent has clearly acted as a model litigant, properly making disclosures to both the applicants and to the Tribunal.

Status of the judges

38. The judges note paragraph 38 of resolution 70/112, in which the General Assembly approved the harmonization of the privileges and immunities of the judges of the Dispute and Appeals Tribunals by considering them officials other than Secretariat officials under the Convention on the Privileges and Immunities of the United Nations.

39. The judges reiterate that by virtue of the doctrine of separation of powers and the independence of the judiciary, they are not staff members, international civil servants or officials of the Organization. The judiciary is a separate independent entity, free from interference by the executive and legislative branches, and it must enjoy financial, administrative and disciplinary independence. Since the core task of the judges 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, it is important that they be at the right level of seniority and status in relation to their level of decision-making.

40. It cannot be stressed enough that the impact of the rulings of the judges, which have far reaching consequences for both staff and the Administration, have also resulted in the clarification, reconsideration and promulgation of new administrative instructions, guidelines and practices, thus inculcating and promoting harmonious and good workplace relations within the United Nations at large.

41. The current D-2, step IV, status of Dispute Tribunal judges is not only anomalous with that of the other international judges directly in the United Nations system, who are at the Under Secretary-General level, but it is also unmeritoriously unequal with relevant positions within the Administration. The United Nations Ombudsman, who is part of the informal system of internal justice, is at the Assistant Secretary-General level. It is to be noted that mediated cases are referred to the Office of the Ombudsman as part of the informal resolution process, and that it is anomalous that the judges do not have at least the same status as the person to whom they refer cases for informal settlement. This is further emphasized by the fact that the judges have the power to enforce agreements reached in mediation.

42. Above all, however, judges of the United Nations should not have their status and their benefits linked to any status of staff of the United Nations. They should have a separate and distinct judicial status which reflects their total independence from the Administration, whose actions they are invariably judging upon. As matters currently stand, the Administration has been unilaterally interpreting General Assembly resolution establishing the remuneration of Dispute Tribunal judges at the D-2 level, which has resulted in the incongruous application of entitlements on a selective basis at the respondent's whim, mainly in the form of extending financial limitations and burdens attached to staff status, such as staff assessment, but at the same time refusing benefits applicable to staff, such as, for example, within-step increments. Recently, the Administration has even moved to decrease the remuneration of Dispute Tribunal judges in the coming years, contrary to established international principles in respect of the judiciary. Furthermore, the judges of the Dispute Tribunal are in no way treated in a comparable manner to the judges in most Member States.

43. In pointing out the inappropriateness of such unilateral interpretation of the General Assembly resolution by the Administration, it must be stressed that, unlike staff, Dispute Tribunal judges have no career path after Dispute Tribunal service; to the contrary, promotion or continuity of service are expressly excluded by the Dispute Tribunal statute. Moreover, having noted the inconsistency of the status, it is necessary to consider the appropriateness of linking that status to a staff member level within the employment regime because it may well lead to the necessity of the judges to recuse themselves in respect of cases involving the consideration of matters concerning issues of status, benefits and emoluments, as may also apply to them by reference to their "D-2" status, or any other staff level status. This is particularly critical in the current context, where the Organization is implementing a new compensation package for internationally recruited staff members, which may give rise to legal challenges before the Dispute Tribunal.

44. In order to preserve and enforce the independence of the United Nations judiciary, consideration should be given to the explicit removal of the judges from the regime applicable to United Nations staff. Judges are not staff and they are not international civil servants. Judges should stand alone and be considered as being entirely separate from the international civil service community. Their benefits

should be determined and set independently by the General Assembly to prevent them from being affected by administrative issuances originating from the respondent and subject to interpretation by his staff — an arrangement incompatible with judicial independence, even more poignant considering that judges have no recourse to a tribunal. The judges respectfully note that, as there are so few Dispute Tribunal judges, ensuring their proper status and independence would not impose an overwhelming burden on the Organization.

Additional matters of efficiency

Legislative amendments

45. The judges respectfully note that the General Assembly, in accepting proposals to amend the Dispute Tribunal's statute, appears to rely on proposals made without seeking the views of the Dispute Tribunal's judges. It is submitted that a rationality of the legislative process in matters affecting the Dispute Tribunal's procedures, including decisions on whether policies of fairness and efficiency are to be achieved through legislative intervention or could be instead achieved by jurisprudence, will be better served if the Dispute Tribunal's judges are allowed to provide knowledge-based input regarding each proposed amendment.

46. An example of unnecessary legislative intervention, the result of which is confusing and possibly cost-generating, is paragraph 38 of resolution 69/203, in which the General Assembly amended article 10, paragraph 5, of the statute of the Dispute Tribunal to require that compensation be awarded only in cases where "harm is supported by evidence". The judges take this opportunity to share with the General Assembly that, in principle, all awards of compensation are made upon a finding that the harm was suffered. However, it is for the Tribunal to decide on what basis it would be legitimate to enter such a finding, including based on facts derived from notoriety and common sense, which do not require separate evidentiary proof, in the technical sense. The requirement that there be "evidence" may have an adverse practical effect in that instead of allowing for a judicial finding, based on common sense, of whether the harm occurred, the proceedings may become invariably burdened by hearing additional witnesses, while costs of medical examinations, medical certificates and sick leave taken in relation to a claimed moral harm will burden the Organization. Considering that the judges have intimate knowledge of how procedures work and what are the possible implications of any changes in the controlling provisions, it is most desirable for the rationality of the legislative intervention that the judges' input be sought in relation to any relevant procedural legislative initiative.

Commencement of amendments

47. In addition, the judges respectfully note that the General Assembly does not have formal provisions for the publication and identification of the commencement date for amendments in respect of the Dispute and Appeals Tribunals' statutes. While it can be said that such amendments take effect from the moment they are passed, without publication of the amendment in an accessible manner, problems exist for all those affected by an amendment. The judges respectfully request that there be clarification in this area to ensure certainty and access for all parties.

Standard of drafting of administrative issuances

48. The judges are concerned that the standard of drafting of administrative issuances is often below that which should be expected. Such leads to a loss of efficiency in the Administration, generates disputes, and increases the length, complexity and costs of the administration of justice. The Dispute Tribunal has found matters before it where implementing procedures of administrative issuances have been entirely missing, no transition procedures between issuances have been provided, there are conflicts between issuances and there has been no systemic consideration of administrative issuances.

Standard of initial investigations and fact-finding in disciplinary matters

49. The judges have noted that the standard of initial investigations/fact-finding in disciplinary matters is often very poor and not in line with best practices. Investigations disclose that they are costly to run. It is unfair to staff members not to have their complaints properly investigated and equally unfair to those facing such investigations. The costs to the administration could be anticipated to be great. It is understood by the judges that those undertaking the investigations are generally trained for only three days and must undertake investigations in addition to their normal duties, thus delaying the completion of investigations.

Delays by the Management Evaluation Unit

50. It is apparent that there are often delays beyond the stipulated time for the completion of management evaluation. This does not assist the system. In addition, the judges express their disquiet when they are confronted with matters where no Management Evaluation Unit reply has been provided to an applicant.

Whistle-blower protection

51. A number of cases over the last seven years, but particularly in 2015, show that the whistle-blower protection provisions do not appear to be functioning properly, occasioning urgent applications for suspension of action and cases on the substantive merits. The judges of the Dispute Tribunal respectfully ask the General Assembly to review such provisions to ensure their adequacy in respect of the policy behind them and their practical and efficient application.

Lack of decentralization in respect of disciplinary and some other matters

52. It was the wish of the General Assembly that the system of justice be decentralized. Unfortunately, it is apparent that the work of the Dispute Tribunal has been hindered with some cases, particularly disciplinary cases, being centralized in New York Headquarters. Due to time differences between location of staff and New York, some matters can be adversely affected by it being, for example, 8 p.m. in Bangkok and 9 a.m. in New York. Or, conversely, 9 a.m. in Bangkok and 8 p.m. in New York. It is functionally impossible for cases to be fairly heard in such circumstances. The judges respectfully request that there be an examination of the issues arising from having certain matters centralized in New York Headquarters.

Examination of the rules of procedure

53. After seven years of application and operation of the Dispute Tribunal's rules of procedure, the judges consider that it is appropriate to undertake an examination of the efficiency of the rules to ensure that there is the greatest functional efficiency and harmonization of processes between the Registries supporting the judges. This will also assist with access to justice. In addition, the judges will consider the impact of de minimis, frivolous and vexatious cases.

Single code of conduct for all legal representatives

54. The judges join the General Assembly in regretting the delay in the finalization of a single code of conduct for all legal representatives (para. 36 of resolution 70/112). The judges are awaiting its adoption.

Administrative and legal staff assistance

55. The judges wish to acknowledge with appreciation the assistance of the Office of Administration of Justice, and the assistance and support of the legal and administrative staff of the Registries of the Dispute Tribunal.

15 July 2016