Sixty-Second session of the General Assembly
Sixth Committee

Friday, 26 October 2007
Afternoon
Trusteeship Council Chamber

Oral report of the Chairman Working Group on the Administration of Justice at the United Nations

I. Introduction

1. The Sixth Committee at its 1st meeting, on 8 October 2007, decided to establish a **Working Group on the Administration of Justice at the United Nations,** to fulfil the mandate entrusted to the Committee by **General Assembly resolution 61/261 of 4 April 2007**. At the same meeting, the Sixth Committee elected Mr. Ganeson Sivagurunathan (Malaysia) as Chairman of the Working Group. The Committee also decided to open the Working Group to all States members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.

2. The General Assembly in its resolution **61/261,** paragraph 35, had invited the Sixth Committee "to consider the legal aspects of the reports to be submitted by the Secretary-General without prejudice to the role of the Fifth Committee as the Main Committee entrusted with responsibilities for administrative and budgetary matters." In accordance with paragraph 36 of the resolution, the General Assembly also had decided to continue consideration of this item during the current session **"as a matter of priority with the objective of implementing the new system of administration of justice no later than January 2009."**

3. The Working Group had before it the Secretary-General's report on the Administration of Justice at the United Nations" (A/62/294).

II. Proceedings of the Working Group

4. The Working Group convened eleven meetings from 8 to 19 and on 25 October 2007. In its first meeting the representatives of the Office of Legal Affairs and the Department of Management introduced the report of the Secretary-General on **Administration of Justice at the United Nations** (A/62/294), and answered questions raised by delegations. Moreover, the Chairman of the **Advisory Committee on Administrative and Budgetary Questions** (ACABQ) attended the fifth meeting of the Working Group, on **9 October 2007**, and briefed delegations about the ongoing negotiations in ACABQ concerning the financial aspects of the proposed new system of administration of justice at the United Nations. Once again, representatives of the Office of Legal Affairs, Department of Management, Office of Human Resources Management and the Secretary of the United Nations Administrative Tribunal attended the sixth meeting of the Working Group, on **17 October 2007**, and provided explanations to the queries made by delegations. Undoubtedly, the briefings were useful and provided opportunities for delegations to better understand complex legal issues contained in the report, which is indeed comprehensive and dense.

5. Delegations, bearing in mind the time limit fixed by the General Assembly for the implementation of the new system of the administration of justice, engaged in the discussion of various legal aspects of the report.

6. As the Chair of the Working Group, I prepared a list of issues, which constituted the basis for the discussions in the Working Group. In the consideration of each issue delegations addressed relevant paragraphs of the report, as well as the elements of draft statutes as they appear in annexes III and

IV to the Secretary-General's report. Delegations also had the opportunity to make comments on each issue two or thee times in the course of the meetings of the Working Group. The following section of the present report constitutes an informal summary of the discussions in the Working Group, for reference purpose only, and not an official record of the proceedings.

III. Summary of discussions

A. General Issues

1. Scope ratione personae of the new system of administration of justice

7. As regards the scope (*ratione personae*) of the new system of administration of justice, some delegations supported the Secretary-General's proposal that all personnel who are working for the United Nations should have recourse to the new system of the Administration of Justice.

8. The view was also expressed that the new system should provide access to the officials who are appointed by the General Assembly, as well as to experts on mission.

9. Some delegations did not agree that the new system should cover individuals who are not staff of the United Nations and the Funds and Programmes, such as contractors, consultants, daily paid workers and experts on mission. Any claims of these personnel would be distinct from the basis of claims brought by UN employees, because the nature of their employment relationship was different. In addition, they were of the view that further information was necessary with regard to the type of grievances, applicable law and type of remedies currently available to such workers. These delegations further suggested that consideration should be given to alternative modes of dispute settlement such as small claims commissions and expedited procedures

for dispute settlement which might be more appropriate or more effective for these individuals. In this context, it was pointed out that paragraphs 52 of the UN Model Status of Forces Agreement (A/45/594) provided a mechanism for claims by locally recruited personnel. Some delegations asked for more information on this practice and whether it was viewed by all concerned as fair and effective.

2. Legal assistance for staff

10. Regarding Legal assistance for staff, some delegations expressed support for the Secretary-General's proposal. In their view, enhanced legal assistance provided by legally-qualified full time professionals would help to ensure that both staff and management operate on equal footing in the formal justice system. References were made to paragraph 23 of General Assembly resolution 61/261, stating that legal assistance should continue to be provided to the staff and that the professional office of staff legal assistance should be strengthened.

11. It was pointed out that assistance to staff could be provided in two forms, either through an internal legal assistance system, or by hiring lawyers from outside the United Nations. Some delegations were of the opinion that the proposed Office of Staff Counsel would be beneficial to the United Nations and the staff. By providing timely advice to staff in cases that are not ripe for litigation, unnecessary proceedings before the justice system could be prevented.

12. Some other delegations expressed the view that the United Nations did not have an obligation to employ lawyers to provide staff with legal assistance and representation. They were also of the opinion that the United Nations should not exceed what other international organizations or national jurisdictions provide.

13. It was suggested that staff members seeking more individualized advice and assistance should continue to rely on the current voluntary system of legal

assistance, which should be improved. The new office of legal assistance should absorb the functions of the Panel of Staff Counsel, which should continue to provide training and coordination for volunteers. The Secretariat should develop better incentives for managers and staff to promote voluntary services. However, staff who wish to be represented by an attorney can hire a private attorney or seek assistance from UN associations. Reliance on independent outside representation would also avoid conflict of interests. The staff of the office of legal assistance could maintain registries for private lawyers and UN staff volunteers interested in servicing as a staff counsel. Staff associations could also provide staff with legal representation.

14. Divergent views were also expressed as to whether legal assistance should comprise only legal advice or should also include representation in litigations, legal research and preparation of briefs. Some delegations suggested that a distinction should be made between legal advice, which should be free of charge, and legal representation, for which staff members should contribute as appropriate. The view was also expressed that if in a dispute a defendant prevailed, the United Nations would have the burden of compensating the defendant for the expenses incurred.

15. Support was expressed for the preparation of a code of conduct to guarantee the impartiality and independence of professionals that would be working for the proposed Office of Legal Assistance under the new system.

B. Informal system of justice

16. Delegations generally supported the strengthening of the informal system of justice, which could result in reducing the accumulation of cases before the formal system. It was suggested that the relationship between the informal and formal systems needed to be clarified, by inclusion of a provision in the statute of

UNDT to regulate referral of cases by UNDT to mediation. As regards terminology, the view was expressed that the terms "extra-judicial" and "judicial" should be used instead of "informal" and "formal" system of justice. The use of the term "quasi-judicial" was also proposed.

3) *Qualifications, selection and terms of reference of the Ombudsman*

17. With regard to the Ombudsman, some delegations supported the appointment of the Ombudsman by the Secretary-General, and noted that the process of selection of the second Ombudsman by the Secretary-General had already begun.

18. The view was also expressed that the appointment of the Ombudsman by the Secretary-General who was a party to disputes might raise questions about the independence and impartiality of the Ombudsman. According to this view, in order to avoid real or perceived conflict of interests, the Ombudsman should be appointed by the General Assembly. Concerning the possible role of the General Assembly, some delegations favoured the endorsement of the Ombudsman by the General Assembly after selection by a panel of experts. Other delegations supported direct appointment of the Ombudsman by the General Assembly.

19. The view was also expressed that the Ombudsman should be a person who enjoys the trust of both staff and management. In accordance with this view, the appointment of the Ombudsman by the General Assembly would not necessarily increase the trust of the parties involved. The proposed procedure for the appointment of the Ombudsman by the Redesigned Panel was the best approach to gain the trust of both the employer and the employees.

20. Some delegations expressed the opinion that the Ombudsman should have legal background, in particular in the area of labour law, as well as vast

experience in mediation and negotiation procedures. Other delegations did not consider legal training as an essential condition; instead they stressed the importance of experience on mediation and negotiation.

4) Mediation

21. Delegations supported the creation of a Mediation Division in the Office of the Ombudsman. It was underlined by some delegations that decentralization of the system, including mediation, was an essential element of the proposed system. Other delegations, while supporting the strengthening of the informal system of administration of justice, expressed grave reservations concerning equal access of non-staff to the system.

22. Concerning the possibility of referral of cases by UNDT to mediation, different views were expressed. In the view of some delegations, mediation was entirely voluntary and any referral by UNDT would be contrary to such basic requirement. The UNDT, however, could encourage parties to settle their disputes by way of resorting to mediation. Other delegations favoured authorizing UNDT to refer disputes to mediation under certain conditions: willingness of the parties to a dispute, fixing a time limit for the resolution of disputes through mediation, and avoidance of referral if the dispute in question had previously been submitted to mediation.

23. Concerning qualifications of mediators, some delegations favoured the requirement of legal training in the area of labour law. Others were of the view that mediators need not necessarily be lawyers; instead, they should have training in alternative dispute resolution mechanisms, including mediation.

C. Formal system of justice

5. Judges

-Qualifications of judges

24. Many delegations agreed, in principle, with the Secretary-General's proposal regarding the qualifications of judges of the UNDT and UNAT, with the proviso that gender and regional balance be also respected in their nomination and selection.

25. Some delegations were of the view that judicial experience was a paramount consideration with regard to qualifications. Therefore, the notion of "equivalent experience" in the Secretary-General's proposal entailed a risk of lowering the bar for qualifications. The view was also expressed that the criteria regarding qualifications should be formulated in flexible terms, and, as for other international tribunals, previous judicial experience should not be an absolute requirement. It was also observed that the requirement of previous judicial experience was more important for UNDT judges. Furthermore, some delegations were of the view that a decision on the qualifications of judges would also depend on whether cases before the UNDT would be decided by a single judge or by a panel of three judges.

-Election and removal of judges

26. The Working Group agreed that judges of the UNDT and of the UNAT shall be elected by the General Assembly. In this regard, several delegations were of the view that judges' independence would be undermined if UNDT judges were appointed by the Secretary-General as proposed in the Secretary-General's report.

27. It was also agreed that the election of judges should be staggered so as to ensure a partial periodical renewal of the composition of each Tribunal.

28. As proposed by the Secretary-General in his report, delegations agreed that judges should be removable only by the General Assembly, and exclusively on grounds of proven misconduct or incapacity. However, some delegations raised questions on why only the Secretary-General could make a recommendation to that effect to the General-Assembly. It was proposed that the "grounds of proven misconduct or incapacity" should be carefully defined. A suggestion was made that decisions on removal be subject to the qualified majority prescribed by Rule 83 of the Rules of Procedure of the General Assembly.

-Nomination and selection of judges

29. The Working Group agreed that a mechanism shall be identrified for the compilation of lists of persons eligible for appointment to the judicial positions at the UNDT and the UNAT. Such a mechanism was considered essential in order to ensure that candidates meet the required qualifications for these positions. For this reason, several delegations supported the establishment of an Internal Justice Council for the selection of judges. Some delegations, however, raised doubts as to the composition of the Council proposed by the Secretary-General, which in their view gave too much representation to the administration. In this regard, it was suggested that the Chairperson of the Council be designated by agreement of the other members of the Council, and not appointed by the Secretary-General. A suggestion was also made that member States be represented in the Internal Justice Council. It was also suggested that the Internal Justice Council present to the General Assembly a list of qualified candidates which would contain two or three times the number of candidates to be elected.

30. As an alternative to the Internal Justice Council, it was proposed that nominations of candidates be made directly to the General Assembly by member States.

-Terms of office

31. As regards the terms of office, the Secretary-General proposed a 5-year term of office, renewable only once, for both for UNDT and UNAT judges. In this respect, several delegations were of the view that a possibility of reelection or reappointment would threaten the independence of judges. In the course of the debate, a clear preference emerged for a non-renewable term in order to avoid any real or perceived conflict of interest.

-Number of judges who shall decide a case in the first instance

32. The question of the number of judges who shall decide a case in the first instance was subject to extensive debate in the Working Group, and no agreement was reached on this issue.

33. In his report, the Secretary-General had proposed that a single judge would make decisions on procedural matters, while decisions on substantive issues would be made by a panel of three judges. Divergent views were expressed by delegations on this point. While some delegations favored first-instance decisions being made by a single judge, other delegations expressed a preference for a panel of three judges so as to ensure that diversity in nationalities, cultures and legal traditions be duly reflected in the decision-making process.

34. It was also observed that issues of substance and procedure could not always be clearly separated. Furthermore, the point was made that any determination on the question of the number of judges who would make

decisions in the first instance should take into consideration certain factors, such as the nature and level of legal assistance provided to UNDT judges, as well as the question whether the UNAT, in its capacity as appellate body, would have the power to review facts.

35. As a possible compromise solution, it was suggested that each case be subject to a preliminary examination by a panel of three judges, who could then agree whether the case should be referred to a single judge.

6. Jurisdiction and powers of the UNDT and the UNAT

- Jurisdiction *ratione personae*

36. Divergent views were expressed as to the jurisdiction *ratione personae* of the future UNDT and UNAT. Discussions on this point were similar to those which I already indicated at the beginning of my statement with regard to who would have access to the proposed administration of justice, and I will not repeat them here.

37. Concern was expressed in the Working Group about the Secretary-General's proposal that *locus standi* be conferred upon staff associations. It was agreed that this issue required further consideration.

- Jurisdiction *ratione materiae*

38. With regard to the jurisdiction *ratione materiae* of the UNDT, it was observed that the language currently used in the draft elements of statutes entailed certain ambiguities. A representative of the Office of Legal Affairs explained that there was no intention on the part of the Secretary-General to introduce any change in this respect.

39. The Working Group did not reach an agreement on the grounds for appeal before the UNAT. The main disputed issue was whether the Tribunal may consider only questions of law or whether it may also review facts. According to some delegations, the appellate instance should not be given the power to review facts. In the view of other delegations, while parties should not be allowed to bring the facts twice before the UNDT and UNAT, the UNAT should be allowed to review serious errors in the categorization of facts, or consider material facts that the parties, for justifiable reasons, were unaware of, and, therefore, unable to present to the UNDT. It was suggested that the UNAT should at least be empowered to overrule the UNDT's factual findings if they were clearly erroneous.

40. In this regard, a proposal was made in the Working Group with a view to facilitating a compromise. According to that proposal, while the jurisdiction of the UNAT as an appellate body should be limited to questions of law, the UNAT should be granted the power to review facts to the extent that it considers that the ascertainment of facts by the UNDT was arbitrary or based on an obvious error.

41. Some delegations were of the view that any determination on this point would depend on the decision, yet to be reached, regarding the number of UNDT judges who would decide a case in the first instance.

- Powers of the Tribunals

42. As regards the remedy of specific performance, delegations were of the view that it required further consideration in determining the conditions under which specific performance may be ordered by the Tribunals as an alternative to compensation. Some delegations were concerned about any possibility of specific performance. Some delegations questioned the Secretary-General's

proposal that the power to order specific performance without compensation as an alternative remedy be granted exclusively to the UNAT.

43. Some delegations expressed concerns about lifting the current two years' salary limit for compensation, as suggested by the Secretary-General in his report. Some other delegations could agree to empower the Tribunals to order a higher amount of compensation only in exceptional cases, to be determined in their respective Statutes.

44. It was proposed that the two tribunals be granted the power to issue decisions regarding the interpretation of their judgments or decisions upon the request of one of the parties.

45. Some delegations were of the view that further information was necessary regarding the Secretary-General's proposal that UNDT and UNAT be entitled to refer appropriate cases to the Secretary-General and heads of funds and programs for "possible action to enforce accountability".

46. Some delegations supported the Secretary-General's proposal that the UNDT be authorized to suspend action on implementation of a contested administrative decision upon request of the staff member concerned. However, the view was expressed that the Statute should make clear that the parties are not entitled by right to suspend a decision of the tribunal pending appeal.

47. I have already summarized the views regarding the power of UNDT to refer the parties to mediation in a pending case, and will not repeat them here.

7. Registries of the UNDT and UNAT

48. Some delegations expressed preference for the establishment of a single registry for both tribunals, in the interest of cost effectiveness. In their opinion, the functions of the registry should be limited to case management and should not include legal research or the preparation of summaries of facts for judges.

49. Some other delegations preferred separate registries for UNDT and UNAT, on the grounds that UNDT would be decentralized and would function in other locations, whereas UNAT would function in New York only.

50. The view was expressed that the functions suggested by the Redesign Panel (A/61/205, para 131) for registries are different from the functions proposed by the Secretary-General in his recent report (A/62/294, para 130). Concerning the question whether the two tribunals should have a single registry or separate registries, the view was expressed that it would mainly depend on the type of functions assigned to a registry or registries. A single registry for both tribunals could be foreseen in a situation where it would be required to deal solely with case management. Separate registries would be necessary if they were required to deal with case management and also assist the Tribunals with legal research, etc.

8) Adoption of the rules of procedure by judges of the UNDT and UNAT

51. Support was expressed to the proposal by the Secretary-General that the rules of procedure of the tribunals be drafted by their judges, in accordance with the statutes of the proposed tribunals.

52. Some delegations favoured a role to be given to the General Assembly regarding the adoption of the rules of procedure of the tribunals.

53. Other delegations stated that it was premature, at the current stage of our work, to discuss matters relating to the internal administration of the proposed tribunals.

9) Transitional measures

54. It was noted that at 1 January 2009, when the new system of administration of justice at the United Nations would begin to function, it is estimated that there would be around 100 cases pending before the United Nations Administrative tribunal. These cases could either continue to be considered by the current UNAT, in parallel with the new system, or be transferred to UNDT.

55. Some delegations expressed preference for transferring these cases to UNDT, in the interest of cost effectiveness, uniformity of proceedings and taking into consideration the point that the staff members have lost their trust in the existing system.

56. Some other delegations favoured preserving the old system in parallel with the new system, on the grounds that the transfer of pending cases to the new system in the beginning of its operation would overburden the new system and would cause unnecessary delays in handling new cases. The point was also made that other organizations are also using the current system and their views needed to be solicited before taking a decision in this regard.

57. The view was also expressed that litigants of pending cases should be encouraged to use informal system for resolution of their disputes.

58. Other delegations felt that it was premature to discuss transitional measures at this stage of our work, since ACABQ was considering the matter and had not yet come up with a concrete recommendation in this regard.

****

59. Finally, I wish to inform the Sixth Committee that negotiations on draft points of agreement will continue during informal consultations to be announced. If agreed, the points of agreement would be attached to a draft resolution or decision to be presented to the Sixth Committee for adoption.

60. Mr. Chairman, this concludes my oral report to the Sixth Committee. Once again, I wish to thank all delegations for their cooperation, flexibility and continuous support.