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Case No.: UNDT/GVA/2011/074  
Order No.: 1 (PRES/2012)

## **Introduction**

1. This order deals with a request made by Mr. Walter Gehr (“Applicant”), pursuant to arts. 27 and 28 of the Rules of Procedure of the Dispute Tribunal, for the recusal of Judge Thomas Laker from consideration of the Applicant’s application for interpretation of a judgment previously rendered by his Honour.

2. The Applicant, a former staff member of the United Nations Office of Drugs and Crime (“UNODC”), makes the request on the alleged existence of a conflict of interest, in that Judge Laker has been, *inter alia*, assigned the application for interpretation with respect to an issue on

opinion expressed in *Gehr 1* concerning the terms of reference for the position of Senior Legal Adviser on the ground that Judge Laker exceeded his jurisdiction.

5. On 18 October 2011, Judge Laker rendered *Gehr* UNDT/2011/178 (“*Gehr 2*”) (Case No. UNDT/GVA/2011/024). In *Gehr 2*, the Applicant challenged, *inter alia*, the classification decision of the Administration of the United Nations Office in Vienna (“UNOV”) in relation to the post of Senior Legal Adviser, occupied by the Applicant. The classification decision was issued with retroactive effect from 1 April 2010. Judge Laker found, *inter alia*, that the classification decision in relation to the post of Senior Legal Adviser was unlawful and ordered its rescission.

6. No appeal has been filed against *Gehr 2*, but, on 5 November 2011, the Applicant filed an application for interpretation of *Gehr 2*, requesting clarification regarding its effects on the title, duties, and responsibilities of his post. This application was registered under Case No. UNDT/GVA/2011/074.

7. On 18 April 2012, Judge Laker held a case management hearing in relation to several of the Applicant’s cases.

8. By motion dated 20 April 2012, the Applicant requested the recusal of Judge Laker from the consideration of his application for interpretation of *Gehr 2*.

9. The motion was sent for French-to-English translation and the translation was received on 2 May 2012. On 2 May 2012, the motion and the translation were transmitted to Judge Laker for his comments in accordance with art. 28.2 of the Rules of Procedure. Judge Laker’s comments were provided on 4 May 2012.

### **Applicant’s motion**

10. The Applicant submits that Judge Laker has a conflict of interest with respect to the application for interpretation. The Applicant submits, in effect, that Judge Laker has been assigned an application for interpretation with regard to an issue on

which he has already ruled but which is the subject of an appeal. The Applicant also submits that Judge Laker's consideration of *Gehr 1* is a factor that may undermine, or might reasonably be seen as undermining, Judge Laker's ability to make a fully independent and impartial decision with respect to the application for interpretation. The Applicant submits that Judge Laker's consideration of the application for interpretation would appear inappropriate to a reasonable and impartial observer.

11. In his motion, the Applicant submits, *inter alia*, that at the case management hearing of 18 April 2012, Judge Laker "admitted ... that he had involved himself in Case No. UNDT/GVA/2011/074 'in error', believing that the judgment that was the subject of the [application] for interpretation [i.e., *Gehr 2*] had been contested before the United Nations Appeals Tribunal". The Applicant alleges that Judge Laker has also concluded that the interpretation of *Gehr 1*, and therefore the terms of reference for the Applicant's position, had become hypothetical since he is no longer employed by the United Nations. The Applicant submits that "rather than alleging an implausible 'error' that is to the advantage of one of the parties, the Respondent, it would have been far more honest for [Judge Laker] to recuse himself on the grounds of a conflict of interest well before the end of [the Applicant's] contract [on 31 December 2011]".

### **Judge Laker's comments**

12. In his written comments provided pursuant to art. 28.2 of the Rules of Procedure, Judge Laker explains that the purpose of the case management hearing of 18 April 2012 was to discuss seven cases filed by the Applicant. The case concerning the application for interpretation of *Gehr 2* was not included in the list of cases to be discussed at that hearing because Judge Laker had erroneously believed at the time that *Gehr 2* was under appeal. Judge Laker considered that, if *Gehr 2* was under appeal, it would have been inappropriate for him to discuss the application for interpretation relating to that judgment. However, having realized that no appeal had

been filed against *Gehr 2*, Judge Laker decided, at or around the time of the case management hearing of 18 April 2012, to

16. Article 27 of the Rules of Procedure defines a “conflict of interest” as follows:

1. The term “conflict of interest” means any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her.

2. A conflict of interest arises where a case assigned to a judge involves any of the following:

(a) A person with whom the judge has a personal, familiar or professional relationship;

(b) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness;

(c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge’s participation in the adjudication of the matter would be inappropriate.

17. On 9 December 2011, the General Assembly adopted the Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal (see resolution 66/106). Section 2 of the Code of Conduct states:

**2. Impartiality**

(a) Judges must act without fear, favour, or prejudice in all matters that they adjudicate;

(b) Judges must ensure that their conduct at all times maintains the confidence of all in the impartiality of the Tribunals;

(c) Judges must recuse themselves from a case if:

(i) They have a conflict of interest;

(ii) It may reasonably appear to a properly informed person that they have a conflict of interest;

(iii) They have personal knowledge of disputed evidentiary facts concerning the proceedings;

(d) Judges must not recuse themselves on insubstantial grounds. Judges must provide reasons when they decide an application for recusal;

(e) Judges must disclose to the parties in good time any matter that could reasonably be perceived to give rise to an application for recusal in a particular matter;

18. Rules on recusal and impartiality form a significant part of the rules on judicial conduct, as failure to comply with them may undermine the public's trust in any system of justice. As was stated by Lord Hewart CJ in a well-known case regarding impartiality and recusal of judges, *R v. Sussex Justices, ex parte McCarthy* (1924) 1 KB 256, (1923) All ER 233, "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

19. The precise test for determining whether a Judge should be recused from consideration of a case has been expressed in different ways in different jurisdictions, sometimes in terms of a reasonable suspicion or apprehension of a conflict of interest or bias, sometimes in terms of a reasonable risk of a conflict of interest or bias.

20.





sustained in an application for interpretation of a matter which has already been adjudicated.

Application of the rules on recusal

26. In the event that a motion for recusal is sustainable in an application for interpretation, I find that none of the conditions of art. 27 of the Rules of Procedure have been satisfied. In terms of art. 27.2 of the Rules of Procedure, a conflict of interest may arise under three scenarios:

- (a) A person with whom the judge has a personal, familiar or professional relationship;
- (b) A matter in which the judge has previously served in another capacity, including as an adviser, counsel, expert or witness;
- (c) Any other circumstances that would make it appear to a reasonable and impartial observer that

application for interpretation. However, it is not necessary to decide this point in view of the other findings in the present Order.

29. It appears that the present motion for recusal was prompted, at least in part, by the Applicant's interpretation of what was stated by Judge Laker at the case management hearing of 18 April 2012. Indeed, had either party appealed *Gehr 2*, it would have been inappropriate for the Dispute Tribunal to consider an application for interpretation of *Gehr 2*, as the Appeals Tribunal would be regarded as being seized of the case (*di Giacomo* UNDT/2011/200). Judge Laker explained in his response to the present motion that, having clarified at the time of the case management hearing that *Gehr 2* was, in fact, not appealed by either party, he decided to include it in the case management discussion. Considering that *Gehr 2* is not under appeal, as was clarified by Judge Laker, it was well within his discretion to raise the application for interpretation of *Gehr 2* at the case management hearing. In any event, it is always open to the Applicant to withdraw the application for interpretation if he considers that the issue with respect to which he seeks interpretation is on appeal as part of *Gehr 1*.

### **Conclusion**

30. For the reasons stated above, the present motion for recusal stands to be rejected.

31. The present Order is without prejudice to any consideration or findings on issues of receivability and substance in any other matters concerning the Applicant and pending before the Tribunal.

