

**Second activity report of the Office of Administration of Justice  
1 July 2009 – 30 June 2010**

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## I. Introduction

1. The second report of the Office of Administration of Justice (OAJ) outlines the activities of the Office for the first year of the new system of administration of justice, from 1 July 2009 to 30 June 2010.
2. The OAJ was established pursuant to General Assembly resolution 62/228; in accordance with General Assembly 63/253, the new system of administration of justice began functioning on 1 July 2009.
3. The OAJ 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. It provides substantive, technical and administrative support to the UNDT and UNAT through their Registries; assists staff members and their representatives in pursuing claims and appeals through OSLA and provides assistance through the Office of the Executive Director, as appropriate, to the Internal Justice Council (IJC).

## II. Activities of the Office of the Executive Director

4. The principal task of the Office of the Executive Director has been to set up the office, coordinate the selection of staff for the Registries of the Dispute and Appeals Tribunals and OSLA, and to provide assistance to the judges of the Tribunals in taking up their duties.
5. In June 2009, the Office of the Executive Director prepared and carried out an induction course for the newly appointed judges of the UNDT and UNAT upon their arrival to begin service in the new system. Subsequently, the Office published and distributed a handbook on the new system, titled, “A Guide to Resolving Disputes”, which has been distributed to all UN staff in the system.
6. In addition to this foundational work, the Office has conducted a global outreach campaign designed to inform staff about the new system of justice. During the reporting period, the Executive Director and other senior staff of OAJ have carried out outreach missions and held town-hall meetings at over 15 duty stations, including Arusha, Bangkok, Beirut, Geneva, Port-au-Prince, The Hague, Nairobi, Santiago, Vienna, Kuwait, Amman, Brindisi, Santo Domingo, Addis Ababa, Kinshasa and Khartoum. In addition, the OAJ participated in the XXXth and XXXIth sessions of the United Nations Staff-Management Coordination Committee) in Nairobi, in June 2009, and in Beirut, in June 2010, respectively.
7. During the first year, the Office managed to fill all positions in the UNDT and UNAT Registries and almost all in OSLA; facilitated and participated in the plenary meetings of the UNDT in November/December 2009 in Geneva and in June/July 2010 in New York; assisted with logistical and administrative arrangements for the preparation of the two UNAT sessions held in March/April in Geneva and in June/July 2010 in New York; continued its efforts to effectuate construction of courtrooms and, where appropriate, permanent offices in New York, Geneva and Nairobi; liaised with the Department of General Assembly and Conference Management to secure the necessary translation and interpretation services for the UNDT and UNAT; and, established a voluntary Trust Fund to support the mandate of OSLA. The Office also published a number of I-Seek articles, including on the occasion of the 100<sup>th</sup> day of the existence of the new system and to commemorate the completion of the first year of operation.
8. On 7 April 2010, Secretary-General’s bulletin ST/SGB/2010/3 was issued, promulgating the organization and terms of reference of the OAJ.
9. On 28 June 2010, the Office launched a new website which provides information about the internal justice system at the UN, including OSLA, the UNDT and UNAT. All judgements rendered by the Tribunals are available for download on the website, which also has an improved

search capability. In addition, the Office is in the process of developing a fully web-based case management system, which is expected to be available later this year.

10. Another of the mandates of the Office of the Executive Director has been to negotiate and conclude agreements with a number of entities in the UN Common system for their participation in the new system. To date, such agreements have been concluded by the Secretary-General of the United Nations with the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and the International Seabed Authority (ISA). Agreements with the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ) are close to finalization. An agreement with the United Nations Joint Staff Pension Fund (UNJSPF or “the Fund”) is also being negotiated.

11. Finally, the Office of the Executive Director is responsible for providing support to the IJC in its work. During the reporting period, the IJC held regular meetings and conducted a number of monitoring missions to see how the new system is functioning and in order to prepare a report with its views on the system to be presented to the General Assembly at the 65<sup>th</sup> session. The IJC also recently completed a draft “Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal” for transmission to the General Assembly for its consideration and adoption.

### **III. Activities of the United Nations Dispute Tribunal**

#### **A. Composition of the Dispute Tribunal**

##### **1. Judges of the Dispute Tribunal**

12. On 2 March 2009, the General Assembly elected three full-time judges and two half-time judges. Subsequently, the General Assembly also elected for a period of one year three ad litem judges to assist in handling the backlog of cases transferred from the Joint Appeals Boards (JABs) and Joint Disciplinary Committees (JDCs) and the former United Nations Administrative Tribunal. The Judges were elected as follows:

Judge Vinod Boolell (Mauritius), full-time judge based in Nairobi

Judge Memooda Ebrahim-Carstens (Botswana), full-time judge based in New York

Judge Thomas Laker (Germany), full-time judge based in Geneva

Judge Goolam Hoosen Kader Meeran (United Kingdom), half-time judge

Judge Coral Shaw (New Zealand), half-time judge

Judge Michael Adams (Australia), ad litem judge based in New York

Judge Jean-François Cousin (France), ad litem judge based in Geneva

Judge Nkemdilim Amelia Izuako (Nigeria), ad litem judge based in Nairobi

13. In accordance with article 4 of the Statute of the UNDT, following drawing of lots, Judge Ebrahim-Carstens (full-time judge) and Judge Meeran (half-time judge) serve for a term of three years, renewable for seven years. The other full-time judges and half-time judge are serving a non-renewable seven-year term of office.

14. On 29 March 2010, by its decision 64/418, the General Assembly decided to extend the tenure of the three ad litem judges for one additional year, beginning on 1 July 2010, to continue to handle the backlog from the old system. As the New York ad litem judge, Judge Michael Adams, was unable, for personal reasons, to accept a second term of office, the General Assembly appointed a replacement, Judge Marilyn Kaman from the United States, on 18 June.

## 2. Election of the President

15. In accordance with article 1 of the then provisional Rules of Procedure of the UNDT, on 24 June 2009, the judges elected Judge Vinod Boolell as President for a period of one year, from 1 July 2009 to 30 June 2010. During its plenary meeting in Nairobi, the UNDT elected Judge Thomas Laker as President for one year, from 1 July 2010 to 30 June 2011.

## 3. Plenary meetings

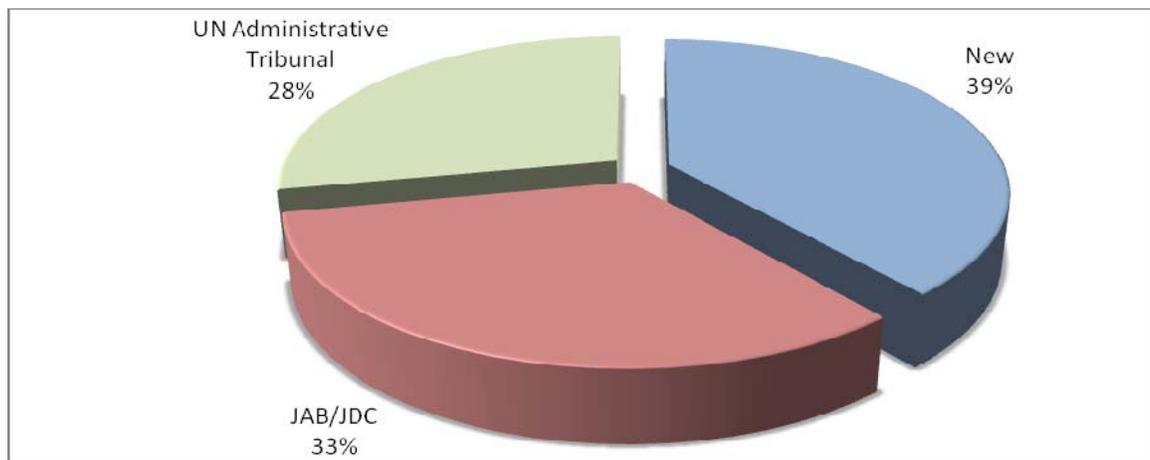
16. During the reporting period, the Judges of the Tribunal held three plenary meetings: from 20 to 24 June 2009 in New York; from 30 November to 2 December 2009 in Geneva; and, from 28 June to 2 July 2010 in Nairobi. During the first plenary meeting, the Judges discussed and adopted the Rules of Procedure of the UNDT, which were approved by the General Assembly on 16 December 2009 without a change, and elected the President of the Tribunal. During the second plenary meeting, the Judges discussed and agreed on a wide range of administrative and legal issues concerning their work practices. During the third plenary meeting, the Judges conducted a round-table discussion on the first year of the Tribunal's operation; discussed amendments to the Rules of Procedure; held a working session with the stakeholders of the internal justice system, chaired by the IJC Chair, Ms. Kate O'Regan; and, met with the Director, Mediation Division, Office of the Ombudsman, and the Regional Ombudsman for the UN in Nairobi. The UNDT also established a committee on Rules of Procedure as well as a practice directions committee.

## B. Judicial statistics

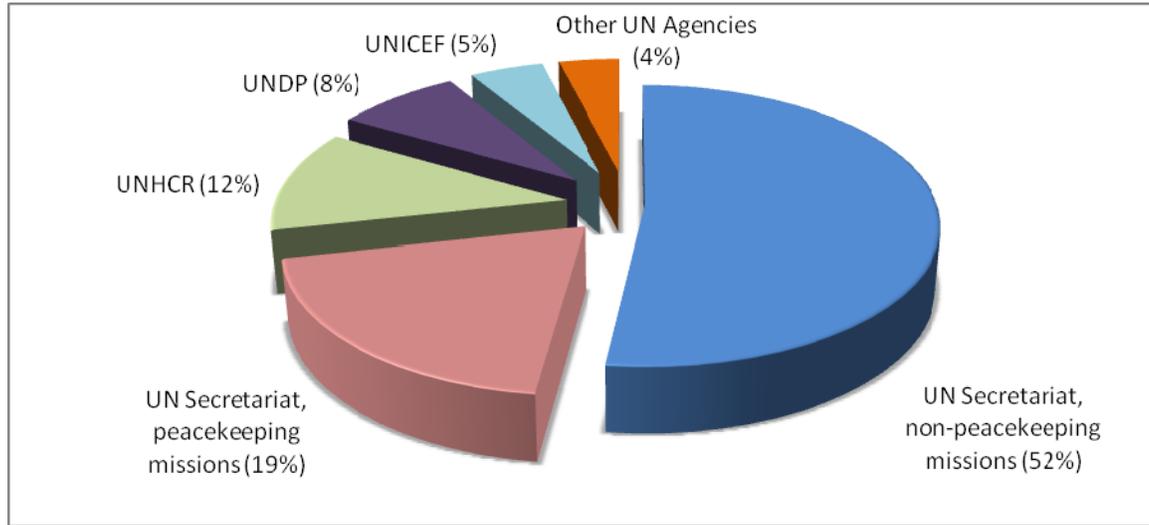
### 1. General activity of the Tribunal

17. During the reporting period, the UNDT received a total of 510 cases, including 169 cases from the former JABs and JDCs, 143 cases from the former UN Administrative Tribunal and 198 new cases. The Dispute Tribunal delivered 213 judgements. As at 30 June 2010, 290 cases were pending. The three Registries of the UNDT located in Geneva, Nairobi and New York provided substantive, administrative and technical support to the Tribunal.

**Chart 1 Distribution of registered cases by source (1 July 2009–30 June 2010)**



18. Of the 510 cases received during the reporting period, 265 cases originated from the UN Secretariat (excluding peacekeeping), including the regional commissions, offices away from headquarters, ICTR and ICTY, and various UN departments and offices; 100 cases originated from peacekeeping missions; and 145 from UN agencies, including UNHCR, UNDP, and UNICEF.

**Chart 2 Distribution of registered cases by clients (1 July 2009–30 June 2010)**

19. The judges agreed on the geographical distribution of cases among the three locations of the UNDT. Specifically, judges decided that if an applicant's office or duty station at the time of the contested decision was or is located in Europe or Western Asia (including the Arabic Peninsula, Armenia, Azerbaijan, Iran, Georgia, Iran, Russia, Turkey), the application should be filed with the Geneva Registry. Should the applicant's office or duty station be located in Africa at the time of the contested decision, the application was to be filed in Nairobi. For contested decisions made in locations not covered by the Geneva and Nairobi Registries, such as Central Asia (including Pakistan, Afghanistan, Turkmenistan, Uzbekistan, Kazakhstan), Eastern Asia, North America, the Caribbean, South America, and the Pacific, the application should be filed in New York. This geographical distribution has allowed a relatively even distribution of cases among the three Registries.

## 2. Cases transferred to the UNDT by the JABs and JDCs

20. On 1 July 2009, following the abolition of the JABs and JDCs in Geneva, Nairobi, New York and Vienna, the 169 cases pending before these entities were transferred to the UNDT. Of these cases, 61 were assigned to Geneva, 55 to Nairobi, and 53 to New York.

21. As at 30 June 2010, 132 of these cases had been disposed of. In New York, 12 JAB/JDC cases are still pending, 6 cases are pending in Geneva, and 19 in Nairobi.

## 3. Cases transferred to the UNDT by the former UN Administrative Tribunal

22. On 1 January 2010, 143 cases were transferred to the UNDT by the former UN Administrative Tribunal. Of these cases, 51 were assigned to Geneva, 52 to New York and 40 to Nairobi. As at 30 June 2010, 131 of these cases still pending: 39 in Geneva, 52 in New York and 40 in Nairobi.

## 4. New applications received between 1 July 2009 and 30 June 2010

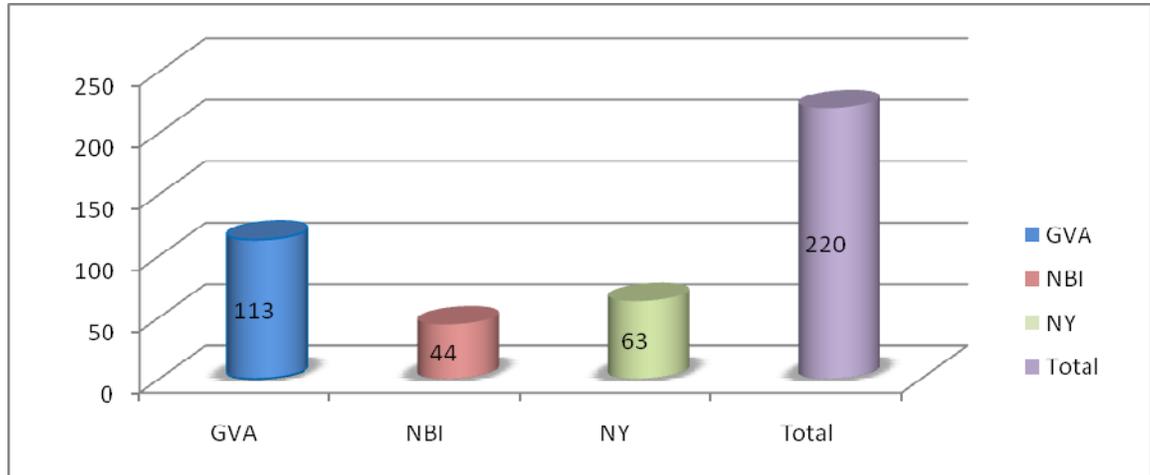
23. From 1 July 2009 to 30 June 2010, the UNDT received a total of 198 new applications. On average, 16 to 17 applications were filed each month with the UNDT. Of these new applications, 85 were received in Geneva, 38 in Nairobi and 75 in New York.

## 5. Cases disposed of between 1 July 2009 and 30 June 2010

24. The UNDT disposed of 220 cases in the reporting period. Chart 3 below shows that the Geneva Registry disposed of 113 cases while the Nairobi and New York Registries disposed of 44

and 63 cases respectively. On average, the three Registries disposed of approximately 18 cases per month.

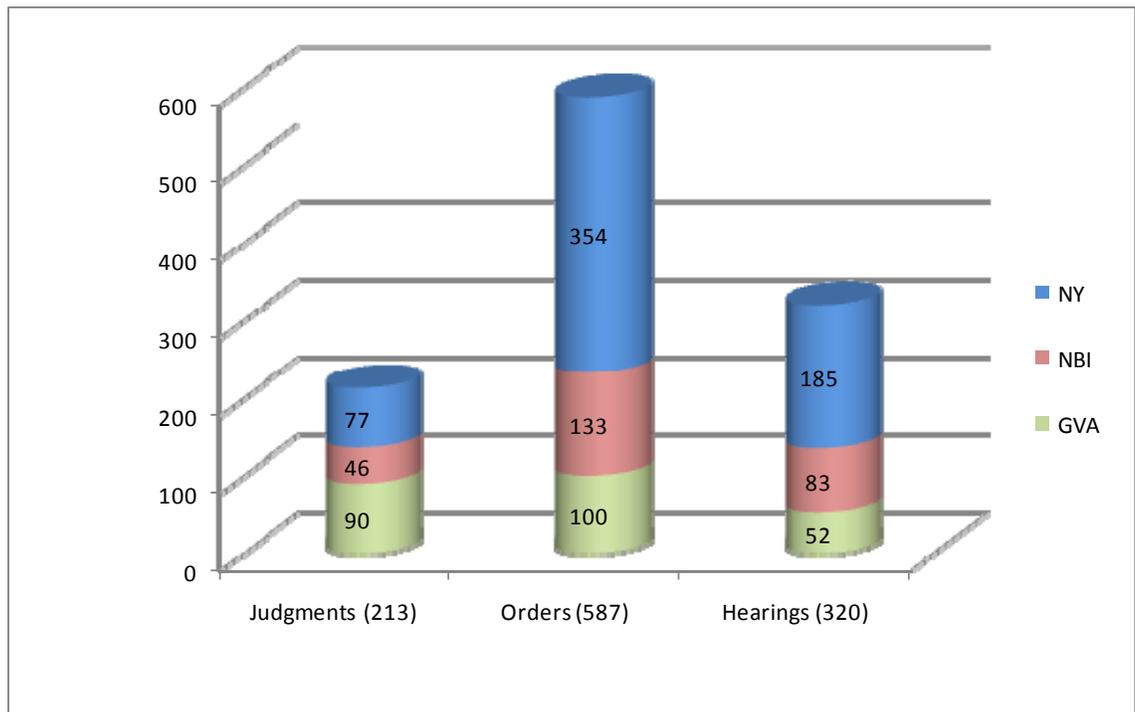
**Chart 3 Cases disposed of by the Dispute Tribunal (1 July 2009–30 June 2010)**



**6. Number of judgements, orders and hearings**

25. During the period 1 July 2009 to 30 June 2010, the UNDT issued 213 judgements on both the merits of cases and interlocutory matters. A total number of 587 orders were issued and 320 hearings were held by the UNDT. Chart 4 below details the numbers of judgements rendered, orders issued and hearings held by judges in Geneva, Nairobi and New York.

**Chart 4 Number of judgements, orders and hearings in Geneva, Nairobi and New York (1 July 2009–30 June 2010)**



## 7. Cases referred to the Mediation Division

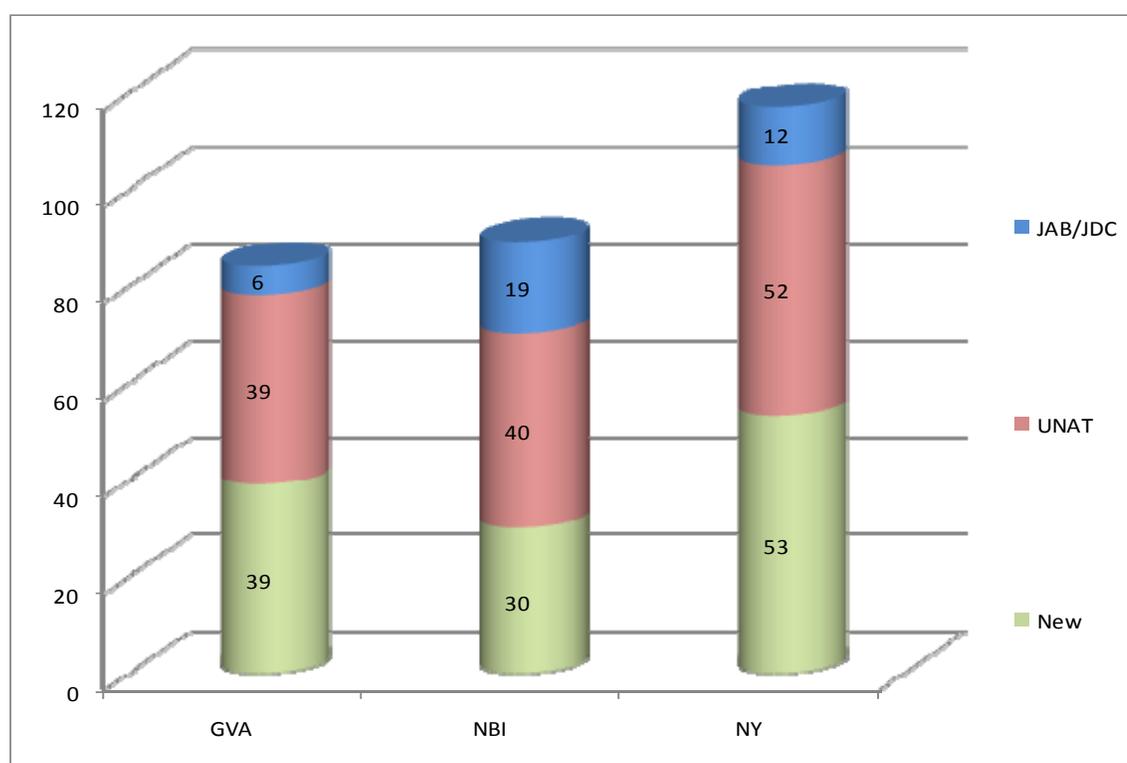
26. During the period covered by this report, the UNDT identified 10 cases suitable for mediation and referred them to the Mediation Division in the Office of the Ombudsman. Of these, four cases were successfully mediated.

## 8. Cases pending before the UNDT as at 30 June 2010

27. As at 30 June 2010, the Dispute Tribunal had 290 cases pending, 122 of them being new cases, 37 cases transferred by the former JABs and JDCs and 131 cases transferred by the former UN Administrative Tribunal.

28. Chart 5 below shows that, at 30 June 2010, 84 cases were pending in the Geneva Registry, 89 cases were pending in the Nairobi Registry and 117 cases were pending in the New York Registry.

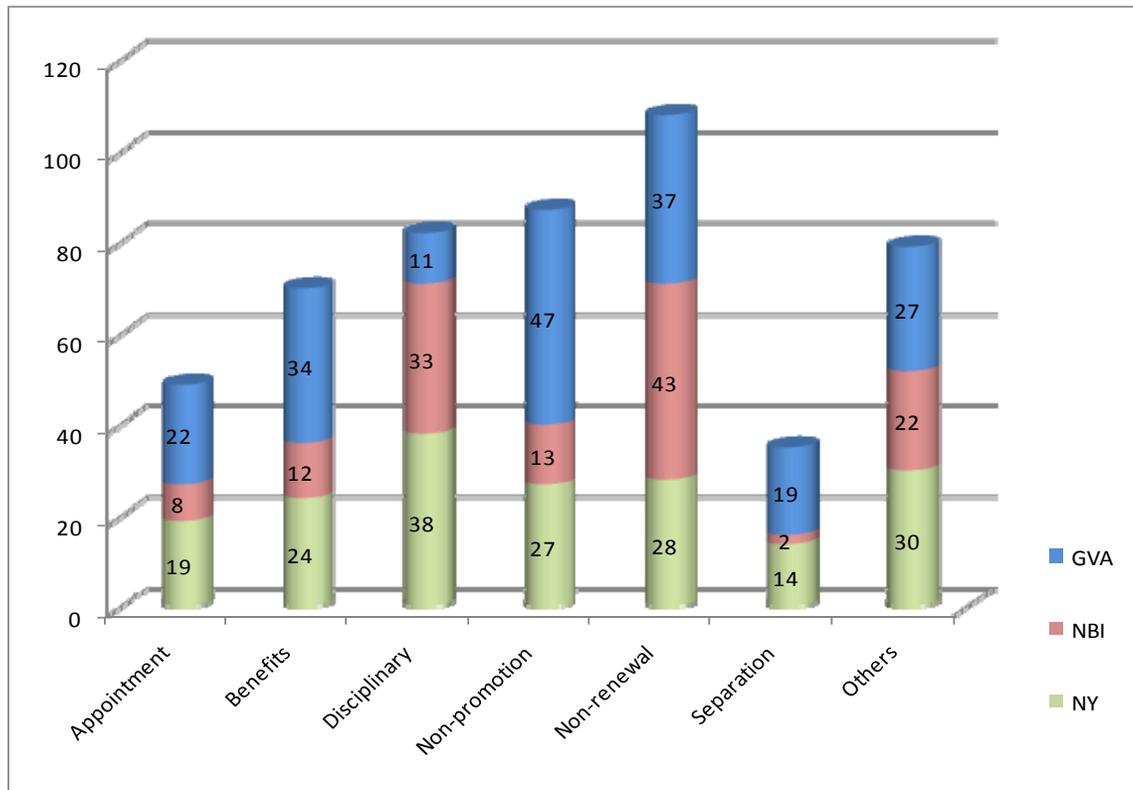
**Chart 5 Cases pending before the Dispute Tribunal as at 30 June 2010**



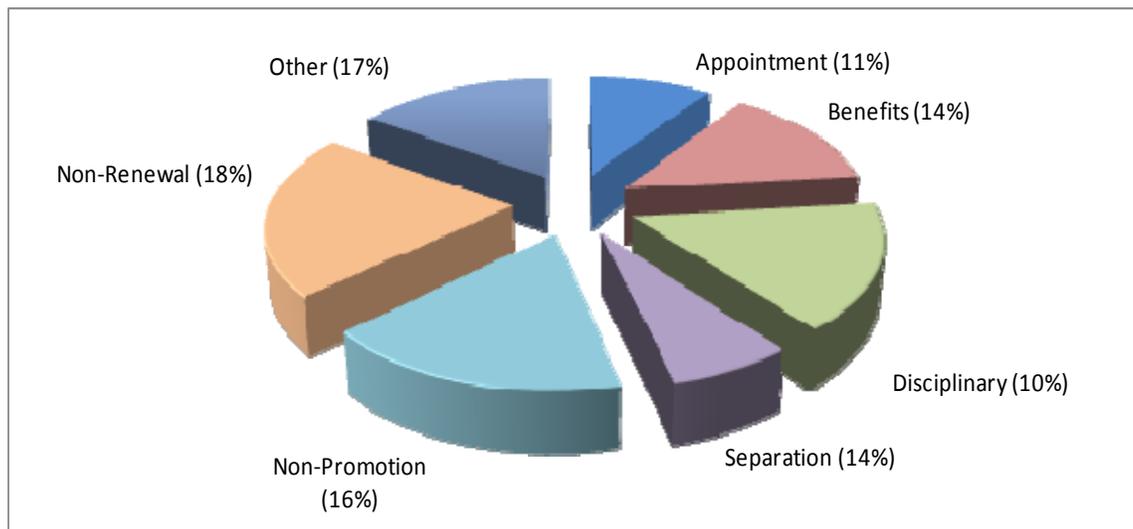
## 9. Cases by subject-matter

29. The nature of cases before the UNDT can be roughly distinguished into seven categories: (1) appointment-related matters (other than non-renewal and non-promotion), (2) benefit, entitlement and classification, (3) disciplinary matters, (4) non-promotion, (5) non-renewal of contract, (6) termination and separation from service, and (7) other. The greatest number of cases concern non-renewal of contract.

**Chart 6 Nature of cases registered between 1 July 2009 and 30 June 2010**



**Chart 7 Cases registered between 1 July 2009 and 30 June 2010 by subject-matter (combined data for the three Registries)**

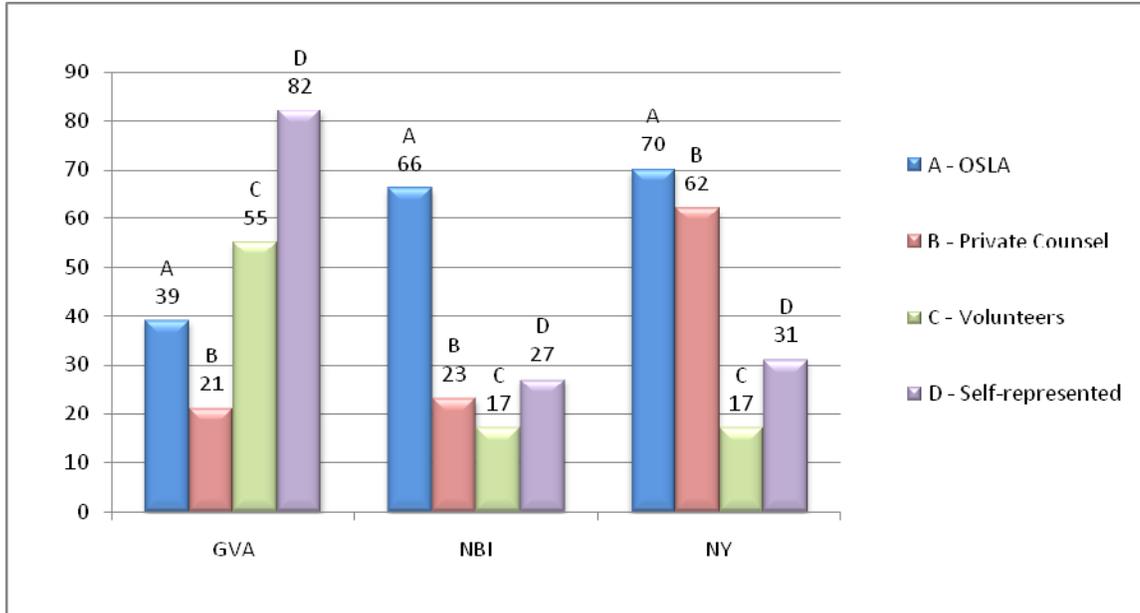


**10. Legal representation of applicants before the UNDT**

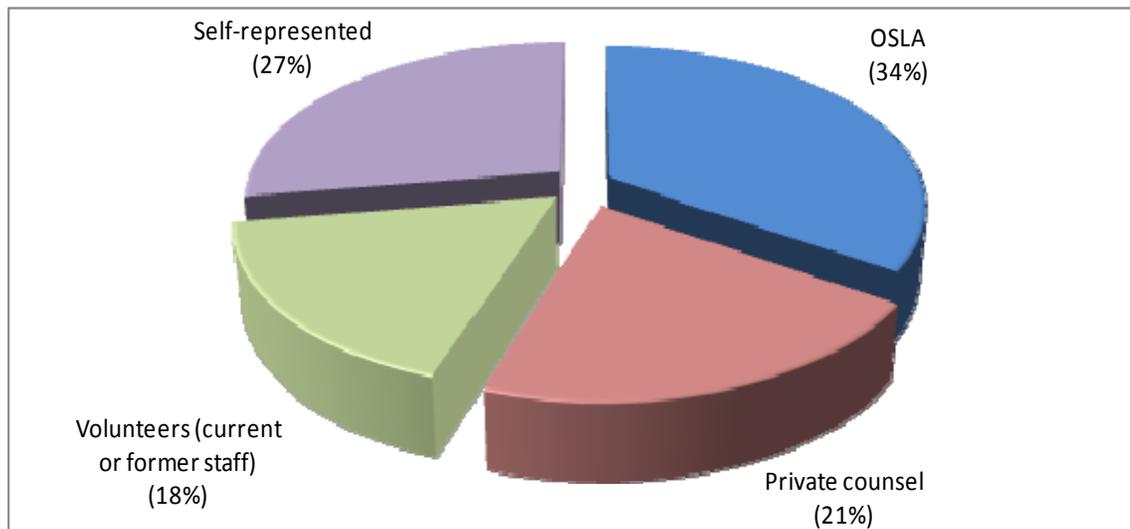
30. During the period covered by this report, OSLA provided legal assistance in 175 of cases before the Tribunal, 106 staff members were represented by private counsel, 89 staff members

were represented by volunteers who were either current or former staff members of the Organization and 140 staff members represented themselves (see charts 8 and 9).

**Chart 8 Legal representation of applicants, registered cases by Registry (1 July 2009–30 June 2010)**



**Chart 9 Legal representation of applicants (combined data for the three Registries)**

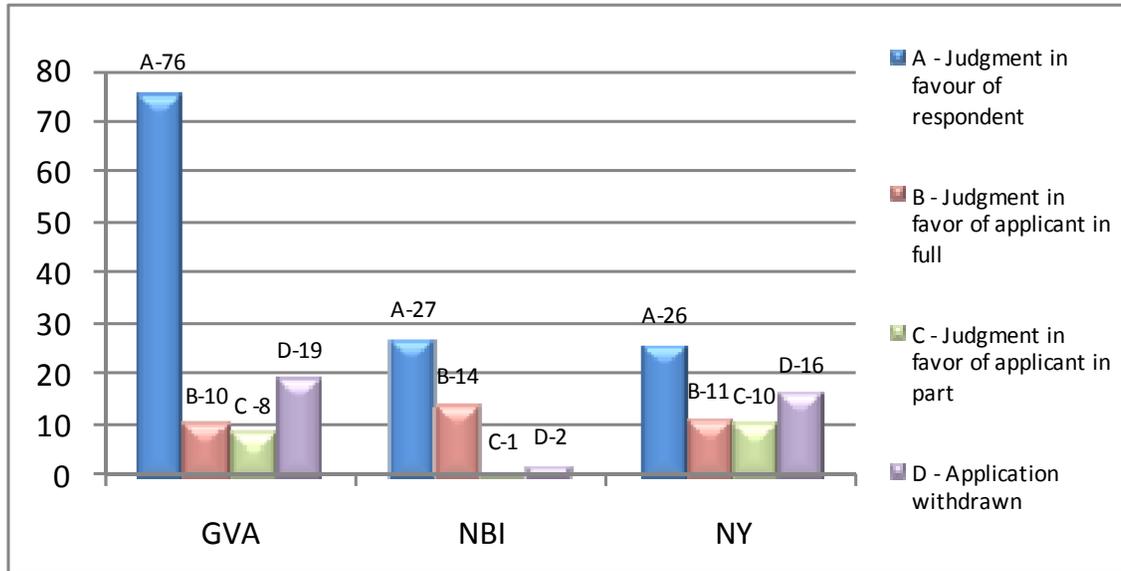


**11. Outcome of disposed cases**

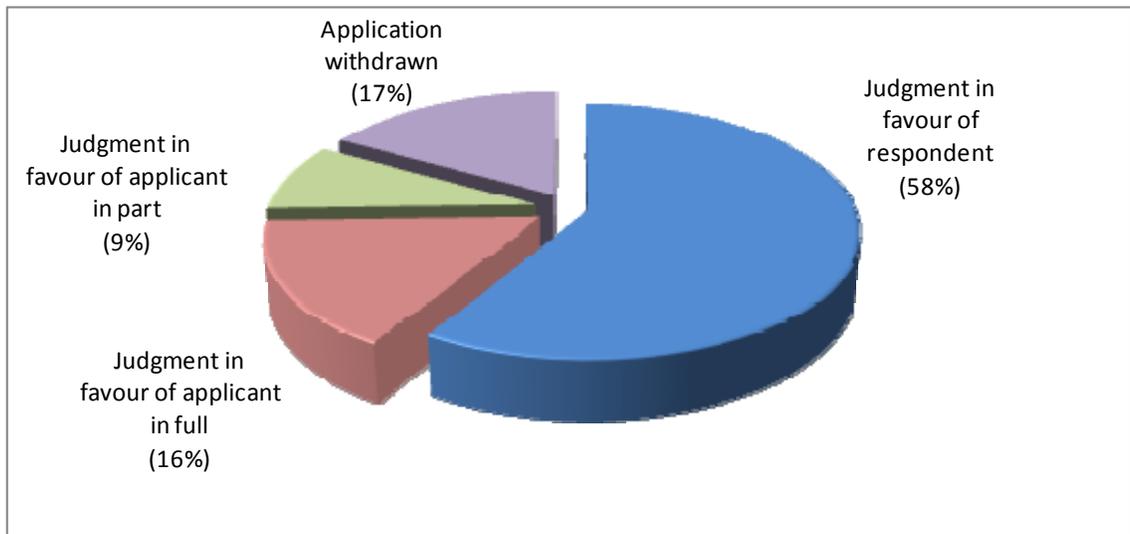
31. During the period covered by this report, 220 cases were disposed of. Of these cases, 129 judgements were in favour of the respondent (i.e., application rejected in full), 35 judgements were in favour of the applicant in full and 19 judgements were in favour of the applicant in part (i.e.,

some claims on liability or procedure granted). A total of 37 applications were withdrawn, including cases successfully mediated or settled.

**Chart 10 Outcome of closed cases, by Registry (1 July 2009–30 June 2010)**



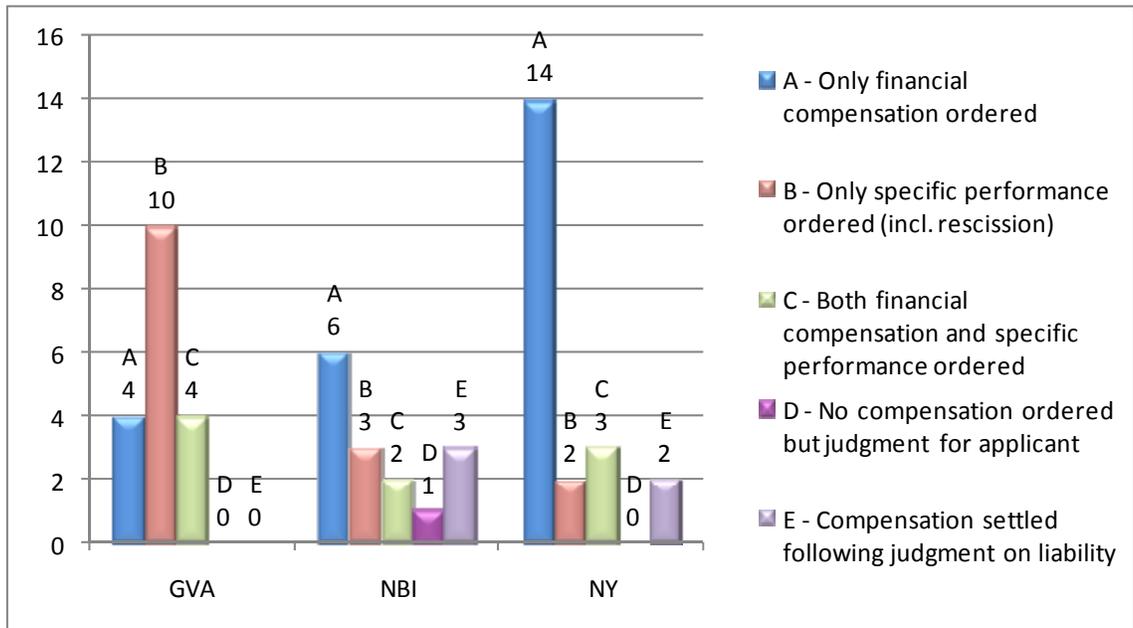
**Chart 11 Outcome of closed cases (combined data for the three Registries)**



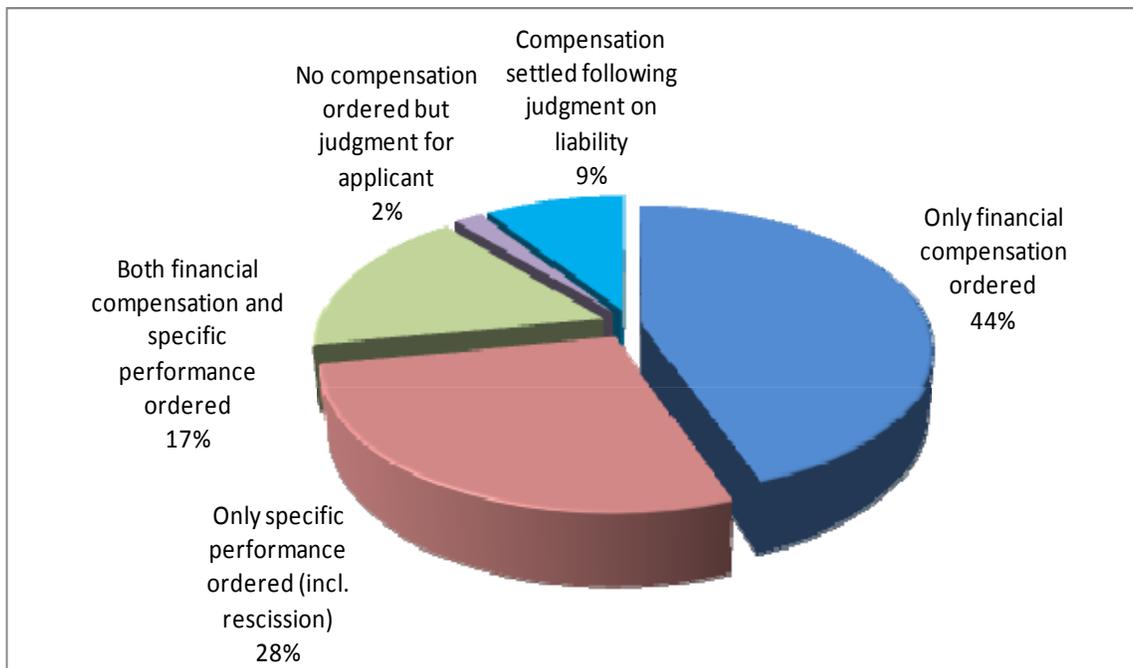
**12. Relief ordered and compensation awarded**

32. During the period covered by this report, 54 judgements were rendered in favour of the applicant either in full or in part. In 24 instances, only financial compensation was ordered. In 15 instances, only specific performance was ordered. In nine instances, both financial compensation and specific performance were ordered. In five cases, compensation was settled between the parties following a judgement on liability, and in one, no relief was ordered by the Tribunal.

**Chart 12 Relief ordered in closed cases, by Registry (1 July 2009–30 June 2010)**



**Chart 13 Relief ordered in closed cases (combined data for the three Registries)**



## **IV. Activities of the United Nations Appeals Tribunal**

### **A. Composition of the Appeals Tribunal**

#### **1. Judges of the Appeals Tribunal:**

33. On 2 March 2009, the General Assembly elected the following seven judges:

Judge Inés Weinberg de Roca (Argentina)

Judge Jean Courtial (France)

Judge Sophia Adinyira (Ghana)

Judge Mark P. Painter (United States of America)

Judge Kamaljit Singh Garewal (India)

Judge Rose Boyko (Canada)

Judge Luis María Simón (Uruguay)

34. In accordance with article 3.4 of the Statute of the UNAT, following drawing of lots, four of the judges are serving a seven-year term of office and three judges an initial three-year term. Judge Courtial, Judge Painter and Judge Garewal were elected for a term of three years. These three judges may be reappointed to the same UNAT for a further non-renewable term of seven years.

#### **2. Election of the President and Vice-Presidents**

35. In accordance with article 1 of the then provisional Rules of Procedure of the UNAT, at its plenary meeting on 24 June 2009, the Tribunal elected Judge Weinberg de Roca as President, and Judges Courtial and Adinyira as First and Second Vice-Presidents, respectively. On 30 June 2010, the UNAT elected Judge Courtial as President and Judge Adinyira and Judge Garewal as First and Second Vice-presidents, respectively, for the year from 1 July 2010 to 30 June 2011.

36. The judges of the UNAT held a plenary meeting from 20 to 24 June 2009. During this meeting, the Judges discussed and adopted their Rules of Procedure, which were approved by the General Assembly on 16 December 2009, without a change. The Appeals Tribunal also held plenary meetings at the beginning and at the end of its two sessions to deal with administrative and operational questions on 15 and 30 March, and on 21 and 30 June 2010, respectively.

### **B. Jurisdiction of the Appeals Tribunal**

37. Under article 2.1 of its Statute, the UNAT is competent to hear and pass judgement on an appeal filed against a judgement rendered by the UNDT.

38. Under article 2.9 of its Statute, the UNAT is also competent to hear and pass judgement on an appeal of a decision of the Standing Committee acting on behalf of the United Nations Joint Staff Pension Board (UNJSPB), alleging non-observance of the Regulations of the Fund. Previously, such appeals could be submitted directly to the United Nations Administrative Tribunal under article 14.2 of its Statute. Unlike the former system, however, such appeals are now subject to the payment of a flat fee per case.

39. In accordance with article 2.10 of the UNAT Statute, the competence of the Tribunal may be extended to specialized agencies or other international organizations or entities established by a treaty and participating in the common system of conditions of service, upon conclusion of a special agreement with the Secretary-General of the United Nations. The agency or entity agrees to pay a flat fee per case and must utilize a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. Essentially similar arrangements existed

between these agencies and entities and the United Nations, accepting the jurisdiction of the UN Administrative Tribunal under article 14 of its Statute, with the exception of the flat fee.

40. To date, four such entities have concluded special agreements with the UN Secretary-General accepting the competence of the UNAT: ICAO, IMO, ISA and UNRWA. It is anticipated that agreements will be concluded with ITLOS, the ICJ and the UNJSPF in the near future.

## **C. Judicial statistics**

41. During the reporting period, UNAT received a total of 110 appeals, including 10 against the UNJSPB, 14 against UNRWA, and 53 cases appealing judgements of the UNDT by staff members and 33 by the Administration.

42. The UNAT held its first session from 15 March to 1 April and its second session from 21 June to 2 July 2010. During its first session, the Tribunal rendered 33 judgements and, during its second session it is scheduled to render 31.

### **1. Outcome of disposed cases**

43. During the period covered by this report, 33 cases were disposed of. Eight judgements were rendered in appeals against the UNJSPB, seven of which were rejected and one was remanded to the Standing Committee, acting on behalf of the UNJSPB.

44. Ten judgements were rendered on appeals filed by UNRWA staff members against decisions by the UNRWA Commissioner-General. Seven appeals were rejected while three were entertained.

45. As for appeals against UNDT judgements, 15 judgements were rendered. Ten appeals were filed by staff members and five on behalf of the Secretary-General. In addition, one cross-appeal was filed on behalf of the Secretary-General which was considered by UNAT in the same judgement as the corresponding staff member appeal. Of the 10 appeals filed by staff members, six were rejected, two were entertained (one in full, one in part) and two were remanded to the UNDT. Of the six appeals filed by the Secretary-General, four appeals, including the cross-appeal, were entertained, and two were rejected.

### **2. Relief ordered and compensation awarded, modified or set aside**

#### **UNRWA cases**

46. In two cases, only compensation was ordered. In two cases, compensation was ordered in the alternative to specific performance and, in one of those cases, additional compensation was ordered.

#### **UNDT cases**

47. In one case, the UNDT's order for payment for compensation was annulled. In one case, UNAT increased the amount of compensation ordered by the UNDT. In one case, UNAT affirmed the UNDT's order for specific performance, but annulled its decision that compensation could be paid in the alternative.

## **V. Activities of the Office of Staff Legal Assistance**

### **A. Introduction**

48. The first full year of operation for OSLA was marked by the challenges of building and staffing a new Office, including satellite offices overseas, while learning the workings of an entirely new system of justice. Although significant progress has been made, the process of putting staffing and other resources in place continues. Particular achievements over the first year of OSLA's existence include: a consistent degree of response (nearly 100%), including provision of summary advice (206 instances), to clients in over 80 countries; closure or resolution of 510 out of 938 OSLA cases (54%); a considerable success rate on behalf of client before the UN Dispute Tribunal; a number of outreach missions; and, development of relationships with internal and external partners.

49. At the inception of OSLA on 1 July 2009, 346 cases were transferred to it from the former UN Panel of Counsel. During the reporting period, 592 additional cases were brought to OSLA, bringing the total number OSLA handled in its first year to 938 cases. Of those, OSLA was able to close or otherwise find solutions for 510 cases. OSLA's aggregate figure of active cases as at 30 June 2010 was 428 cases. The number of cases under OSLA's responsibility is expected to grow with the completion of staffing of OSLA field offices in addition to dissemination of knowledge and access to OSLA's services and thereby the system of administration of justice for staff members in the field.

## **B. Advice and legal representation before and during formal litigation**

50. The mandate of OSLA is to provide professional legal assistance pursuant to the General Assembly's resolution 62/228. OSLA's assistance consists of providing legal advice and representation to staff members contesting an administrative decision or appealing a disciplinary measure, primarily those with cases before the UNDT and UNAT. Upon receiving a request for assistance, OSLA counsel first assess the merits of a case, as well as matters of receivability, and, if the case is accepted, proceeds to provide legal advice to the staff member and take, *inter alia* any of the following actions on his or her behalf, as appropriate: draft legal submissions and other correspondence; discuss the case with third parties or opposing counsel, when authorized by the staff member, on case management issues or with a view to negotiating settlements, and; represent the staff member in hearings before the UNDT. OSLA may reject a case when it decides that it is not in the interest of the staff member, in the interest of justice or within the scope of OSLA's legal obligations to bring a case or complaint before a Tribunal or other body. In its Judgement **UNDT/2009/093**, the Tribunal interprets OSLA's obligations, pursuant to resolution 62/228, to include the following: "OSLA is ... entitled to advise applicants not to file an application before the Tribunal and may therefore legally refuse to appoint counsel for an Applicant on the grounds that his application has little chance of success". In its Judgement **UNDT/2010/025** the Tribunal further states that not to do so "would overload the Office and prejudice those applicants with a serious case."

51. The amount of time required to deal with a matter varies depending on the complexity of each case, the legal issues raised and the personal needs of the staff member. Some cases require a great deal of time and effort on the part of OSLA counsel. For example, a case before the UNDT could involve several submissions, multiple hearings, discussions with opposing counsel and numerous consultations with the concerned staff member. At times, managing a staff member's expectations can be challenging and time-consuming.

52. OSLA has also assisted staff members in resolving disputes in cases where there was no clear administrative decision which would allow for initiation of a case before formal bodies in accordance with relevant rules, but where there is a valid grievance. These cases involved consultations with the staff member and discussions and negotiations with third parties. In other cases, OSLA provided summary legal advice to staff members not involving written submissions or negotiations with a third party.

53. Reasons for closure or resolution of cases included the following:

- disciplinary or administrative measure taken, or exoneration of a staff member charged with misconduct;
- issuance of a management evaluation, judgement or other decision;
- negotiated settlement of a dispute;
- withdrawal by the staff member or by OSLA from the case;
- provision of summary legal or procedural advice by OSLA where follow-up is not anticipated;
- loss of contact with the staff member.

54. On a number of occasions, staff members withdrew their case after OSLA explained the unlikelihood of success before a Tribunal or other recourse body for reasons of receivability or lack of legal merit. At times, these withdrawals occurred after considerable time and effort had been devoted to the case by OSLA.

### **C. Challenges and observations after one year of operations**

55. As stated in Section A above, the establishment of the OSLA offices presented many challenges, especially in the early months when OSLA offices were established in Nairobi and Beirut (September 2009), and in Geneva (January 2010), each staffed by a single legal officer working without support staff. While some additional assistance has been obtained, especially in Geneva with a loan from UNHCR in February, the legal officer post in Addis Ababa, the fourth duty station, remains vacant, as does the post in Beirut, with the move of the Beirut legal officer to Geneva in June.

56. Over the course of the reporting period, OSLA benefited from the services of part-time legal officers, OSLA-affiliated volunteer counsel, a number of legal interns and external pro bono counsel. While this assistance is welcome and has been extremely helpful, it does not fill the human resources gap for the Office as a whole.

57. One way OSLA has attempted to gain additional funding is through the establishment of the “Trust Fund for Staff Legal Assistance”. The Fund was approved by the Controller in January 2010 and was created to enhance the ability of OSLA to provide legal advice and/or representation to UN staff members within the new internal system of justice. Continuing efforts are being made to obtain additional funding, especially to enhance service to staff in the field.

58. Failure to engage and maintain sufficient human resources for the Office may require OSLA to make difficult decisions such as managing the caseload on a “triage” basis, with only the most serious new cases being accepted for intake. This is something that, to date, OSLA has implemented only in a very limited way.

59. Developments before the Tribunals themselves with respect to procedural and normative issues has resulted in OSLA legal officers having to make submissions and representations in new areas of public international administrative law with a view to the development of further jurisprudence, particularly at the UNAT. It is anticipated that once further UNAT judgements are issued there will be greater legal clarity which would help OSLA in providing legal advice to clients.

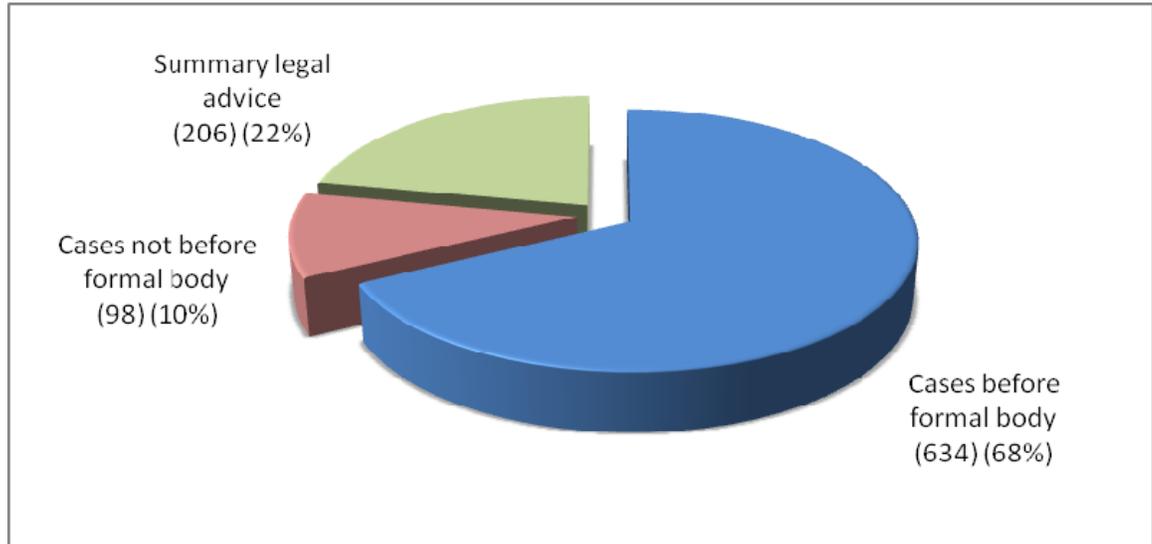
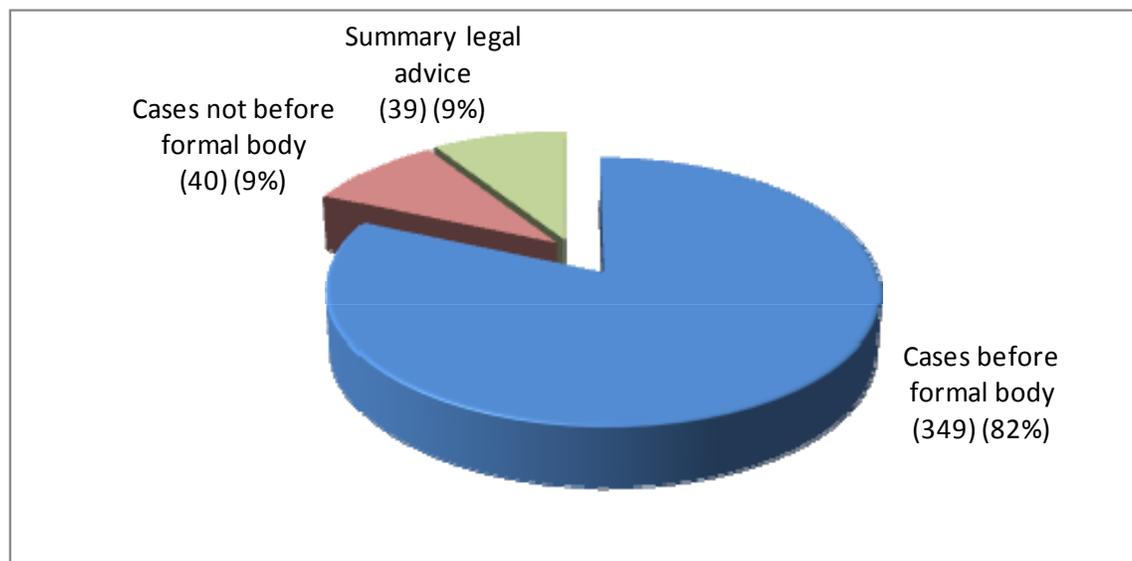
60. OSLA continues to endeavour to develop and strengthen its ties with UN staff union representatives and staff-at-large, to work in closer tandem with Ombudsman and Mediation Services and to strengthen its liaisons with counterparts in the legal offices of the Secretariat and UN agencies, funds and programmes.

61. Against this background, much has been achieved with limited resources during OSLA’s first year, as the following statistics will demonstrate.

### **D. Statistics**

#### **1. Number of cases received in 2009**

62. On 1 July 2009, 346 cases were transferred from the former Panel of Counsel (POC) to the newly created OSLA. From 1 July 2009 to 30 June 2010, 592 additional cases were brought by staff members (including former staff members or affected dependants of staff members) to OSLA. Of these 938 total cases, 510 were closed or resolved during the reporting period, bringing the number of cases pending before OSLA to 428 as at 30 June 2010.

**Chart 14 Cases received in OSLA (1 July 2009–30 June 2010)****Chart 15 Cases pending as at 30 June 2010**

## 2. Advice and legal representation to staff appearing before recourse bodies

63. Table 1 below provides further details of the 938 OSLA cases for the period 1 July 2009 to 30 June 2010, including a breakdown of formal cases before each recourse bodies, those not before formal bodies or where summary advice was provided, and the number of closed or resolved cases for each recourse body or category.

64. In Table 1, “human resources (disciplinary cases)” indicate those cases where OSLA provided assistance to staff members in responding to allegations of misconduct. Where such a case is indicated as ongoing, the Administration had not yet taken a decision in the matter as of 30 June 2010. It remains an issue of concern that a number of staff members still await a decision on a pending misconduct charge after a period of, in some cases, nearly or over two years has elapsed

since their having responded to allegations. In cases before the UNDT and UNAT, as well as the former UN Administrative Tribunal, OSLA held consultations and provided legal advice to staff member clients, drafted submissions on their behalf, represented them in hearings (UNDT), held discussions with opposing counsel, and negotiated settlements. OSLA similarly provided advice and assistance in submissions and processes before other formal bodies listed in the table below.

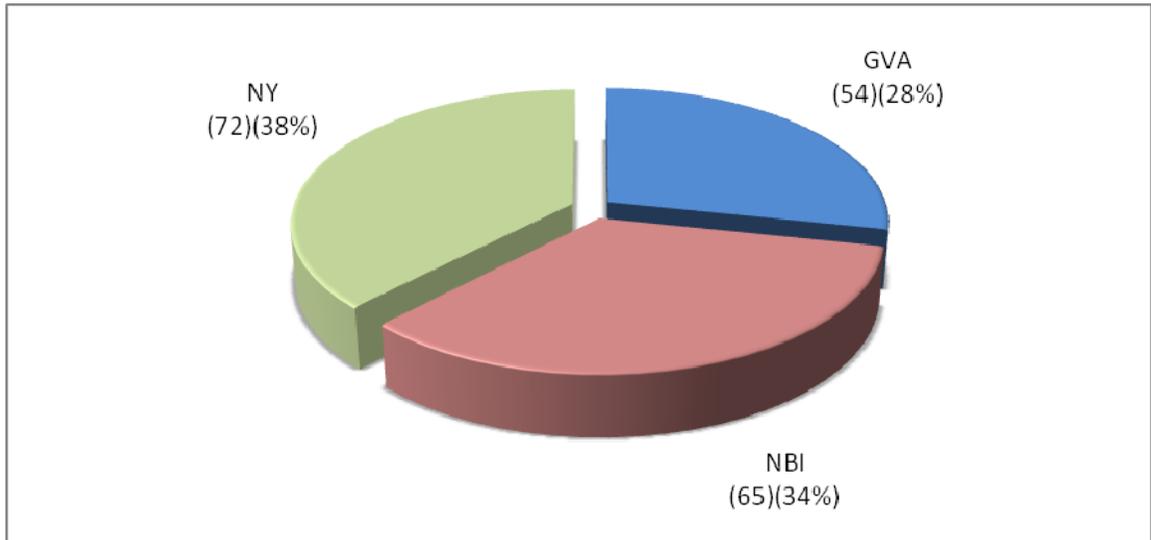
**Table 1 OSLA cases**

<b>Cases by recourse body:</b>	<b>New cases</b>	<b>Transferred from Administrative Tribunal</b>	<b>Closed/Resolved</b>
Human Resources (disciplinary cases)	209		60
UN Dispute Tribunal	191	+ 46	120
Management Evaluation	111		81
UN Administrative Tribunal	57	- 49	8
UN Appeals Tribunal	33	+ 3	7
Harassment investigation	16		2
Rebuttal Panel	10		5
ABCC	2		
UNICEF OIA	2		2
Medical Board	1		
UNJSPF	1		
Sexual Harassment Procedures	1		
<b>Cases before formal body</b>	<b>634</b>		<b>285</b>
<b>Cases not before formal body</b>	<b>98</b>		<b>58</b>
<b>Summary legal advice</b>	<b>206</b>		<b>167</b>

### 3. Representation before the Dispute Tribunal

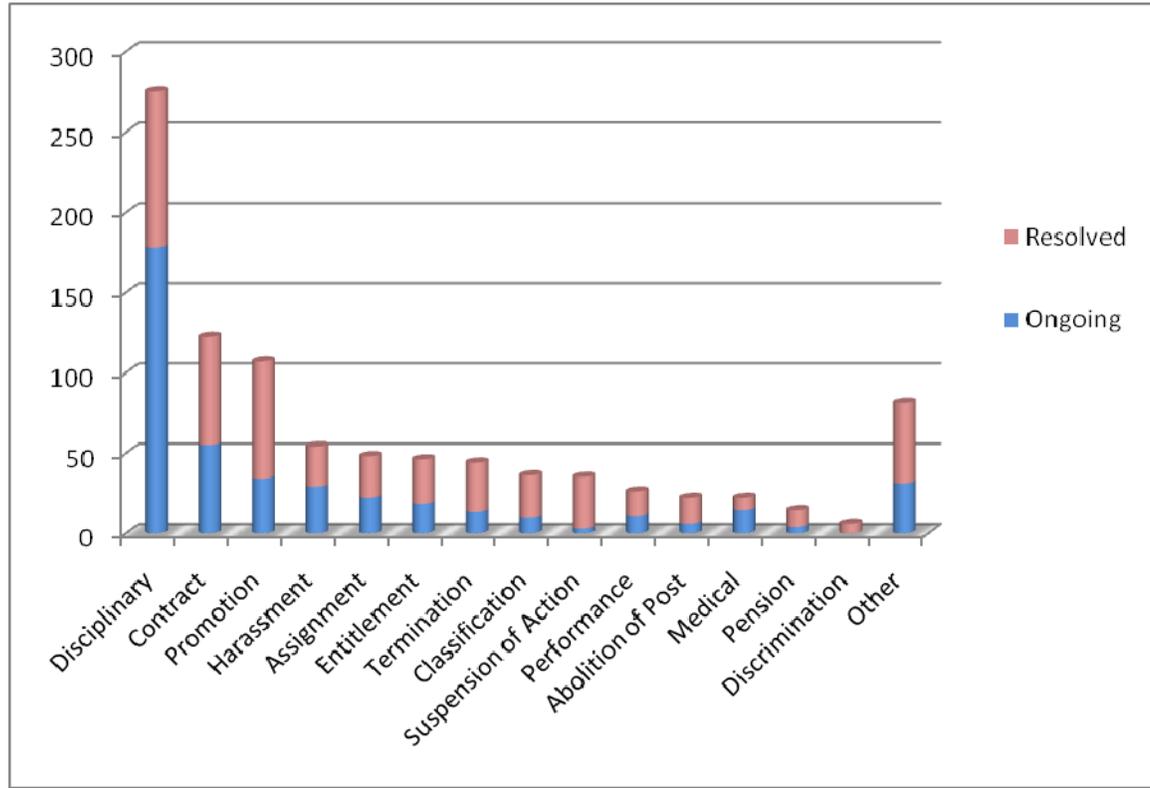
65. Chart 16 below shows a breakdown of OSLA's cases before the UNDT by UNDT venue. Those cases which have been closed or resolved through the issuance of a judgement, negotiated settlement, withdrawal by the staff member or by OSLA or loss of contact with the staff member are indicated.

**Chart 16 OSLA representation of cases before the UNDT (Geneva, Nairobi and New York)**



**4. Cases by subject-matter**

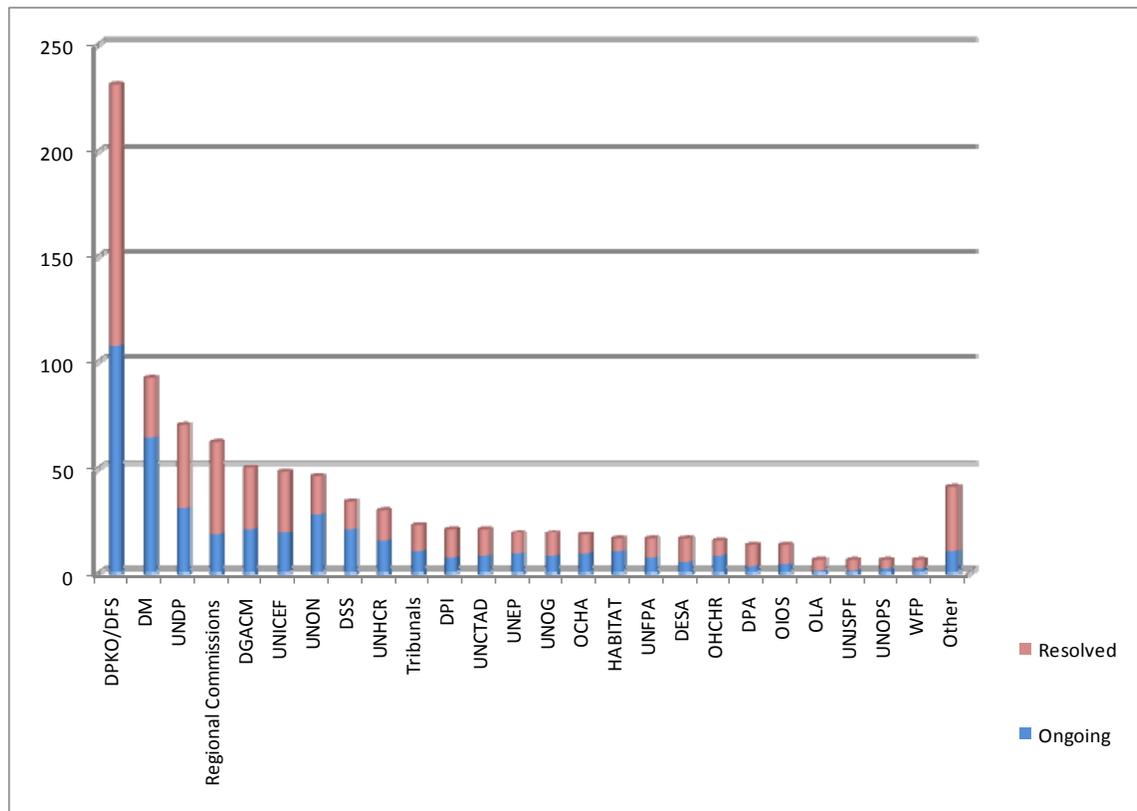
66. Chart 17 below provides an overview of OSLA cases by subject-matter. The bulk of the cases handled by OSLA for the reporting period concerned disciplinary matters, followed closely by cases involving non-renewal of contract, non-promotion and termination of contract. The reasons for resolution or closure of cases are described above. Ongoing/continuing cases remain pending a final decision or other resolution as of 31 December 2009.

**Chart 17 Cases by subject matter as at 30 June 2010**

##### 5. Cases by client (Department, Agency, Fund or Programme)

67. Chart 18 below provides an overview of OSLA cases by Secretariat departments or UN agency, fund or programme. The majority of cases arise from contested decisions taken by peacekeeping missions (DPKO/DFS) (231 cases). A large number of cases stem out of contested decisions made by the Department of Management (DM) (92 cases). The next largest caseloads by entity are UNDP (70), Regional Commissions (62), DGACM (50) and UNICEF (48). A total of 197 cases are from four Secretariat entities, namely DM, DGACM, DSS and DPI. This may be explained by the fact that NY-based staff can more readily contact OSLA as opposed to colleagues in field missions.

Chart 18 Cases by client (department, agency, fund or programme)



# APPENDIX I

## Proceedings of the UNDT

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### **Introduction**

1. As indicated above, during the period covered by this report, the UNDT rendered a number of judgments on issues which can be roughly divided into the following categories: non-promotion; non-renewal of contract; separation from service; appointment; disciplinary matters; benefits, entitlements and classifications; request for suspension of action; interim measures pending judgment on the merits of a case; other ancillary matters.

2. A summary of the legal pronouncements made by the UNDT in judgments rendered from July 2009 to June 2010 is provided below. The summaries are not authoritative and the judgments cited below are not comprehensive. For a complete set of the judgments issued during the period covered by this report by the UNDT, the website of the UNDT (<http://un.org/en/oaj/dispute/>) should be consulted. It should also be borne in mind that, at the time of the writing of the report, a number of UNDT judgments were being appealed before the UNAT by either the applicant or the respondent. Therefore, the findings made by the UNDT in a number of the judgments mentioned below should not be considered final and the website of the UNAT should be consulted for the final determination made in the cases being appealed.

### **1. Non-promotion**

3. The UNDT rendered a number of judgments on the issue of non-promotion. The Judges generally agreed that when the terms of the rules and the administrative instruction governing staff selection processes are unambiguous, the Administration should follow the terms of its own policies strictly or be liable to compensate staff for breaches of them.

4. In UNDT/2009/022, Kasyanov, the Tribunal found that the decision not to select the applicant was unlawful because the applicant was a 15-day mark candidate found suitable for the post and, under section 7.1 of ST/AI/2006/3 on staff selection system, the Administration was precluded from considering any 30-day mark candidates. The Tribunal elaborated that priority consideration given to 15-day mark candidates is mandatory because of the use of the word “shall” in the administrative instruction, which almost always indicates a mandatory and unqualified direction or command or requirement. The UNDT found that authoritative interpretations of administrative instructions can only be made by the Secretary-General through formal amendments or by the Tribunals and not by OHRM. This finding was followed in several subsequent judgments, including UNDT/2009/084, Wu.

5. In UNDT/2009/045, Solanki; UNDT/2009/040, Ardisson; and UNDT/2009/041, Ippolito, the Tribunal held that the Administration has a duty to set clear rules for promotion and, if it wishes to modify the promotion criteria, it has a duty to modify the rules prior to a selection process. Similarly, in UNDT/2009/038, Andrysek; UNDT/2009/039, Mebtouche; UNDT/2009/044, Mututa; and UNDT/2009/048, Tsoneva, the Tribunal held that the Administration must follow its

own procedures when promoting staff and that an irregularity that vitiates the non-promotion decision requires that that decision be rescinded or that compensation be awarded. In UNDT/2009/014, Parker, the Tribunal held that an applicant is able to contest a review body's decision of non-recommendation for promotion on incorrect facts. In UNDT/2009/074, Luvai, the Tribunal held that an applicant cannot challenge the recruitment process of a post to which he did not apply because the vacancy announcement did not indicate the number of posts to be filled. In UNDT/2009/095, Sefraoui, the Tribunal held that non-promotion cases should be determined by the preponderance of evidence rather than by imposing an *a priori* burden of proof on either party. If the evidence is evenly balanced, the impugned administrative decision should be regarded as unjustified since the Administration has the contractual obligation of making decisions for reasons that are accurate, sufficient and proper.

6. In UNDT/2010/059, Antaki, the Tribunal held that a narrative in which the Programme Case Officer had stated that that applicant was not a qualified candidate for a post was a fair reflection of the true consensus of an interview panel, and that no numerical score given by a member of an interview panel can ever be more than indicative. However, the Tribunal awarded the applicant a nominal compensation for deficiencies in the manner in which the scores attributed to candidates was made.

7. In UNDT/2010/068, Krioutchkov, the Tribunal found that differentiating one of several requirements in the specific job description of a vacancy announcement from the generic job profile may well be proper – this is a question of the degree and nature of the departure. The Tribunal stated that it is not for the Judge to decide whether the relevant decision-makers were correct when they determined that an applicant did not have the required skills for the post. The Tribunal further held that the contestable obligation of the Administration is that a fair consideration of the candidacy is undertaken in good faith and in accordance with the applicable instruments, and the decision-makers have to evaluate all relevant attributes, both those which are stipulated as essential and those specified as desirable, when assessing a candidate's qualifications to determine suitability.

8. In UNDT/2010/081, Khan, the Tribunal held that a head of office acted within his discretionary authority in selecting a particular candidate and that he was not bound to accept the recommendation of one selection panel over another; he was only bound to give careful consideration to the recommendations and to explain why one candidate was preferred.

9. In UNDT/2010/095, Rolland, the Tribunal stated that the assessment of candidates in a promotion exercise involves a high degree of judgment and experience which will not be replicated by a Judge and that, accordingly, unless there was some obvious anomaly or evidence that irrelevant material was taken into account, relevant material ignored, or of a mistake of fact or law, the Tribunal would not be able to conclude that the process was significantly flawed. The Judge reminded the parties that it is necessary that accurate and fair records be maintained of the appointment exercise so that a critical examination is possible. A failure to notify the applicant of the outcome of the process as required by section 9.5 of ST/AI/2006/3 was found, however, but as it caused the applicant no proven loss, only nominal compensation was awarded.

10. In UNDT/2010/066, Safwat, the Tribunal stated that the evaluation of candidates falls within the discretion of the Secretary-General and that the Tribunal will not substitute its views for that of the Secretary-General. However, as consistently upheld by the former United Nations Administrative Tribunal, the discretion of the Secretary-General is not without boundaries and will be reviewed when there are allegations of abuse of discretion.

11. In UNDT/2010/006, Parmar, the Tribunal held that staff regulation 4.4, which provides that “the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations”, does not confer any absolute (as distinct from qualified) preference in favour of staff already in service in filling vacancies, and does not create an obligation on the part of the Administration to extend or renew the contracts of staff members on fixed-term appointments.

12. In UNDT/2010/116, Messenger, the Tribunal held that staff rule 109.1(c), which provides rules for preference in selection and retention for permanent staff, cannot be relevant to an evaluation of the comparative attributes of candidates. Therefore, it cannot make the staff member

who is entitled to invoke it a better candidate and may only be used to provide an advantage to the staff member in question when they are a candidate of equal merit.

## **2. Non-renewal of contract**

13. The Tribunal rendered a number of judgments on the issue of non-renewal of fixed-term appointment, which were generally in accord with the jurisprudence of the former United Nations Administrative Tribunal which was abolished on 31 December 2009. Specifically, in UNDT/2009/003, Hepworth, the Tribunal held that according to staff regulation 4.5(c) and staff rule 9.4, a fixed-term appointment (FTA) does not carry any expectancy of renewal or conversion to any other type of appointment and expires automatically and without prior notice on the expiration date specified in the letter of appointment, unless there are countervailing circumstances. The Tribunal elaborated in UNDT/2009/093, Syed, that a legitimate expectancy of renewal may be created by the Administration's actions. The Tribunal also found that if the respondent provides reasons for the non-renewal of a fixed-term appointment – for instance poor performance – these reasons must be supported by the facts (UNDT/2009/071, Corcoran). In Syed and UNDT/2009/019, Balestrieri, the Tribunal found that a decision not to renew an appointment cannot be motivated by extraneous factors. In UNDT/2009/085, Boutruche, the Tribunal held that if a legal provision, such as a prohibition to hire a sibling, is clear and does not leave room for interpretation, the Administration is obliged to adhere to it. In UNDT/2009/088, Nogueira, the Tribunal found that the decision not to renew the applicant's contract based on poor performance was not well-founded since the provisions of the administrative instruction on the Performance Appraisal System (PAS) were not respected. In UNDT/2009/096, Utkina, the Tribunal held that the application was not time-barred because the time for the applicant to appeal the decision started running when the applicant was made aware by the Administration that there was no reasonable chance or possibility of renewal.

14. In UNDT/2010/039, Beaudry, the Tribunal affirmed that the fundamental attribute of a fixed-term contract is that neither party is obligated to continue in the employment relationship once the term has expired, but the administrative decision not to renew must still be lawful. The Tribunal also found that the reasons for any decision must be recorded at the time it is made in order to avoid *ex post facto* rationalization. In UNDT/2010/060, Sina, the Tribunal reiterated that a staff member has no legitimate expectation of renewal of his contract. The Tribunal specified in UNDT/2010/091, Islam, that if a decision-maker has several valid reasons not to renew a staff member's contract, each being sufficient to justify the decision and complying with all necessary requirements, the decision-maker can choose to rely on any of those reasons in making the decision. Not identifying all reasons in such circumstances would not necessarily result in the unlawfulness of the decision. To prove the unlawfulness, the evidence would need to demonstrate that the unstated reasons were mistaken or irrelevant and significantly influenced the decision. The Tribunal reiterated in UNDT/2010/107, Riquelme, that if a decision of non-renewal is reasonably based on the material available and is not affected by any significant irrelevant matter or the omission of a significantly relevant consideration or the making of any significant error of fact or law, it cannot be held to be made in breach of the contractual obligations of the Organization even if the Tribunal would have made a different decision. In UNDT/2010/108, Larkin, the Tribunal held that, whilst the Administration is not bound to provide a justification for not extending a fixed-term appointment, where it chooses to do so, the reason alleged must be supported by facts. In that case, the Administration claimed that the applicant's non-renewal was due to poor performance but could not provide any evidence thereof; the record further showed that the applicant had not been given any warnings or guidance regarding his performance. Consequently, the Tribunal found that the applicant's non-renewal breached his terms of appointment and ordered the rescission of the decision or the award of four months' net base salary as an alternative to the rescission.

## **3. Disciplinary**

15. In various judgments, the Tribunal specified the rights of staff in disciplinary-related matters. Specifically, in UNDT/2009/006, Manokhin, and UNDT/2009/009, Kouka, the Tribunal held that an internal UN investigation must provide full and fair opportunity for staff to defend themselves and the evidence must be sufficient to sustain disciplinary findings. The Tribunal held that it will use principles of natural justice and internationally recognized standards for reviewing administrative actions in relation to disciplinary matters in an employment context. In Balestrieri,

the Tribunal held that a witness in an investigation does not have the right to be informed of the outcome of the investigation. In UNDT/2009/072, Ishak, the Tribunal held that the applicant has a right and a duty to report to his management any misconduct that comes to his notice but if the alleged misconduct does not in any way affect his rights, the applicant has nothing to gain by contesting the management's follow-up to his report. In UNDT/2009/066, Parker, the Tribunal held that if the Organization conforms to its procedures prescribed by relevant rules upon receiving complaints for harassment and diligently addresses allegations through the procedures established, it acts reasonably when not undertaking an additional fact-finding investigation. In UNDT/2009/091, Coulibaly, the Tribunal found that the decision to summarily dismiss the applicant was lawful as the applicant was recruited/promoted on the basis of his qualifications, the certificate for which was forged, and falsely asserted in his P-11. Similarly, in UNDT/2010/046, Tra-bi, and UNDT/2010/041, Liyanarachchige, the Tribunal found that "the decision to summarily dismiss the applicant was proportionate to the nature of the charges".

16. In UNDT/2010/069, the Tribunal stated that it is the Administration's prerogative to decide whether to place a note in a staff member's personnel file but its content has to be accurate, and that staff members' right to comment on adverse material in their file survives the termination of their contract. The Tribunal also held that staff members have no right to require the Secretary-General to institute disciplinary proceedings, whether to clear their name or for any other reason. However, when such proceedings have commenced, any decision as a result of these proceedings must be proper.

17. In UNDT/2010/058, Molari, the Tribunal held that in disciplinary matters, the Administration is not required to prove its case beyond reasonable doubt but only to produce evidence that raises a reasonable inference that misconduct has occurred. Once a *prima facie* case of misconduct is established, the burden shifts to the staff member to provide countervailing evidence or a satisfactory explanation to justify the conduct in question. Furthermore, while recognizing that former staff regulation 10.2 gave the Secretary-General broad latitude with respect to the appropriate disciplinary measure, the Tribunal nevertheless had to examine whether the sanction imposed was proportionate to the offence. In this case, the applicant, a Procurement Specialist employed by UNOPS at the L-5 level, had been separated from service as a disciplinary measure for falsely certifying store receipts as being eligible for VAT reimbursement. The Tribunal found that, given the nature of the offence, compounded by the grade and responsibilities of the applicant and her refusal to fully cooperate with the local authorities and UNOPS, separation from service was entirely appropriate. By contrast, in UNDT/2010/056, Masri, the Tribunal held that when serious allegations of misconduct are made against staff, the degree of proof required is proportionally higher, i.e., higher than the ordinary one of a balance of probabilities. Since disciplinary action would often depend mostly on an investigation report, OIOS investigators must exercise their functions and power with a high sense of accountability and responsibility. In UNDT/2010/024, Diakite, UNDT/2010/096, Woldeeslassie, and UNDT/2010/073, Elbadawi, the Tribunal specified that the burden of proof to show that a sanction was not warranted and that the Administration did not properly exercise its discretion is on the applicant.

#### **4. Benefits, entitlements, salaries, classifications**

18. In UNDT/2009/075, Castelli, the Tribunal held that because the Administration continued to pay the applicant's salary during an imposed break-in-service during which he worked, it cannot refuse to pay the relocation grant entitlement which is due after one year of continuous service.

19. In UNDT/2010/015, Warren, the Tribunal held that because of the lack of any reference to a technical definition of "full economy class" in the relevant legal instrument (UNDP/ADM/2003/29) concerning the calculation of a lump sum entitlement for home leave travel, the only viable approach was to give the term as ample a meaning as it could reasonably bear and identify those flight fares which it logically and reasonably denoted.

20. In UNDT/2010/082, Parmar, the Tribunal found that the Administration did not err in calculating the applicant's sick leave entitlements and held that calculation of sick leave days is based on any period of twelve consecutive months, not on calendar years.

21. In UNDT/2010/059, Chen, the Tribunal found that the Administration did not properly conduct the reclassification exercise of the applicant's post. The Tribunal held that staff members are entitled to expect certain normative implied rights, including the right to equal pay for equal

work of equal value, and that this right is not necessarily linked to equality between genders but refers also to equality for each employee performing a defined job. The Tribunal also held that the reliance on budgetary restraints in the face of strong evidence that the classification was justified was inappropriate. The Administration was ordered to pay compensation of the difference in salary between the current level of the applicant's post and the level at which the post should have been classified and compensation for non-material damage due to frustration and humiliation compounded by delays at six months' net base salary. Similarly, in UNDT/2010/064, Fuentes, the Tribunal held that ST/AI/1998/9 sets out special procedures for contesting a post classification or reclassification and, in particular, provides for the referral of the appeal to a Classification Appeals Committee. When an appeal is referred to this Committee, that Committee has an obligation to issue a report with recommendations. There can be no implicit decision of refusal to reclassify a post until this Committee has issued its recommendation. In this case, as a result of the breach of her right to have the Committee issue a recommendation, the applicant lost an important chance to obtain the reclassification of her post, as well as a chance to be promoted to this post after its reclassification.

## 5. Appointment

22. In UNDT/2009/025, James, the Tribunal held that recruitment from general service level to professional level requires competitive examination but found that the Administration could not unilaterally impose limitations on staff members' existing contracts because it is a universal obligation of both employee and employer to act in good faith towards each other. In UNDT/2009/028, Crichlow, the Tribunal found that, when a staff member alleges that actions have been taken against her (such as a reassignment to a post to be abolished) which have disadvantaged her in her employment, it is for the Administration to explain and justify those actions by providing balanced and objectively verifiable reasons. In UNDT/2009/030, Hastings, the Tribunal held that a decision-maker exercising powers conferred by rules and regulations is obliged to turn his or her mind to the factors which are relevant to the decision to be made. In UNDT/2009/054, Nwuke, the Tribunal found no unlawfulness in the decision not to appoint the applicant. The Tribunal held that the applicant had himself to blame as he declined to submit to an interview as requested; he cannot invoke his own omissions to pray for an equitable remedy. In UNDT/2009/013, Parker, the Tribunal held that the applicant was prevented from preparing himself for a medical examination, in particular, by gathering the medical personal documents or by securing the assistance of his personal doctor, from discussing his aptitude with the doctor and from challenging the medical opinion made and that, therefore, the decision not to appoint him was illegal.

23. In UNDT/2010/080, Bertucci, in respect of appointment at the Assistant Secretary-General and higher levels, the Tribunal held that, although the discretion of the Secretary-General is necessarily wide when considering senior appointments, it must be lawful. The Secretary-General cannot advertise a position and then fail to comply with due process by seeking to maintain his freedom to appoint candidates of his choosing. In this matter, an external candidate was selected despite the applications of apparently qualified internal candidates, despite a statement that they would be "considered first". The fact that the respondent did not seek to establish that the external appointee was even interviewed by a selection panel justified the inference that he was not.

24. In UNDT/2010/086, Abbassi, the Tribunal held that if a 15-day candidate is considered after the 15-day mark, he or she is still entitled to priority consideration separately from 30- and 60-day candidates. The order of interviews of candidates is not strictly relevant as long as 15-day candidates are *considered* first, but practical compliance with section 7.1 of ST/AI/2006/3 requires the determination of suitability to be made before the other candidates are interviewed; otherwise, it would be difficult to persuade the Tribunal that section 7.1 was complied with. The Tribunal held that the requirement of priority in section 7.1 of ST/AI/2006/3 applies only to truly suitable candidates. The Tribunal also held that the weight to be afforded to the applicant's PAS and the determination of whether the applicant's supervisor should be asked for information are matters for the interview panel's judgment and will not be a vitiating error unless manifest unreasonableness is demonstrated. The Tribunal further held that unsuccessful applicants should be notified shortly after the decision on their non-selection is finalized. The delay, if any, should not be excessive or unreasonable.

25. In UNDT/2010/042, Gomez, the main issue was whether the applicant was required to take a break in service between her two temporary appointments. Finding for the applicant, the Tribunal held that there was no documented policy in the Organization requiring mandatory breaks in service and that the respondent failed to demonstrate a consistent application of the practice of enforced separation between temporary contracts. The Tribunal ordered that the applicant be placed in the position as if there had been no break in service.

26. In UNDT/2010/009, Allen, the Tribunal held that the Organization enjoys broad discretion to reassign its employees to different functions, provided that the new position is in line with the grade, qualifications and professional experience. The prior consultations with staff representatives legally required in this particular case were not held and, in addition, the Organization showed a lack of good faith by informing the applicant of his reassignment by an all-staff e-mail. A redeployment or reassignment is not an “appointment” within the meaning of article 10.5(a) of the UNDT statute, i.e. the Tribunal is not required to set an amount of compensation that the respondent may elect to pay as an alternative to the rescission.

## **6. Separation from service**

27. In its Judgment UNDT/2009/034, Shashaa, the Tribunal noted that staff members with permanent appointments are afforded additional protections, particularly when nearing retirement age. In UNDT/2009/083, Bye, the Tribunal held that it is doubtful that former staff rule 109.1(c) imposes on the Administration a duty to make good faith efforts to find alternative employment to a staff member on a fixed-term appointment and whose post is abolished. The Tribunal also held that the party alleging harassment, prejudice, bias, discrimination bears the burden of proof. In its Judgment UNDT/2009/078, Koh, the Tribunal found that the respondent was in breach of the contract of employment by not respecting the terms of a separation agreement and therefore was liable to compensate the applicant.

28. In UNDT/2010/044, D’Hooge, the Tribunal held that the only mode by which separation from service can be effected is pursuant to staff regulation 9.1 or pursuant to disciplinary procedures. These are part of the instrumental conditions of the contract. Every misrepresentation capable of justifying cancellation or rescission of the contract under the general law would necessarily fall within the grounds for termination specified in staff regulation 9.1. The Judge found that authority to terminate the applicant’s contract for facts anterior resided solely in the Secretary-General and no other official. The Tribunal held that the requirements of good faith and fair dealing apply to preliminary fact-finding investigations. Any resulting decision on allegation of misconduct must be based upon an adequate inquiry. This necessarily involves seeking information from the staff member both as to the charges and, ultimately, the findings or recommendations affecting him or her. The Tribunal further found that the Assistant Secretary-General for OHRM does not have authority to place a staff member on special leave pending the outcome of a preliminary investigation on whether facts anterior justify a separation from service in accordance with staff regulation 9.1.

## **7. Suspension of action pending management evaluation**

29. The Tribunal rendered a considerable number of decisions on requests for suspension of action pending management evaluation. Such decisions were treated as judgments in 2009. In 2010, decisions on requests for suspension of action were issued as orders. Such orders are only included below when they make new legal pronouncements.

### **Receivability of request for suspension of action**

30. In UNDT/2009/001, Tsoneva, the Tribunal held that pursuant to article 2.2 of the Dispute Tribunal’s Statute, only an administrative decision may be the subject of a request for suspension of action before the Tribunal. Similarly, in UNDT/2009/035, Caldarone, the Tribunal held that a request for suspension of action is only receivable if, in accordance with staff rule 11.2(a) the applicant has submitted, as a first step, a request for management evaluation. This ruling was upheld and elaborated on in a number of subsequent judgments, including UNDT/2009/051, Costa. In UNDT/2009/092, Calvani, the Tribunal rejected the respondent’s argument that the Tribunal did not have the authority to suspend the contested decision because it had already been implemented, since the decision to place a staff member on administrative leave without pay during a certain period of time has continuous legal effects during the suspension period and can only be deemed to

have been implemented in its entirety at the end of the administrative leave. Thus, it found that the application for suspension of action was receivable.

### **Cumulative nature of the conditions to grant a request for suspension of action**

31. In UNDT/2009/033, Onana, the Tribunal found that where a decision has been shown to be *prima facie* unlawful, and although the rules require that the Tribunal consider two further elements before granting the applicant with the interim relief that he seeks, the illegality is so fundamental a factor that it ought to be sufficient for the impugned decision to be suspended. By contrast, the Tribunal held in all other judgments and orders on requests for suspension of action that the conditions for granting a suspension of action are cumulative and that it is enough to demonstrate that one condition is not met to reject the request.

### ***Prima facie* unlawfulness**

32. In UNDT/2009/003, Hepworth, the Tribunal elaborated on the meaning of the Latin expression “*prima facie*” and found that *prima facie* does not require more than serious and reasonable doubts about the lawfulness of the contested decision. In UNDT/2009/004, Fradin de Bellabre, the Tribunal found that to establish *prima facie* unlawfulness there has to be evidence that it is at least probable that the decision was unlawful. In UNDT/2009/008, Osman, the Tribunal found that the decision not to renew the applicant’s contract was unlawful inasmuch as his performance evaluations were conducted following an irregular procedure. Similarly, in UNDT/2009/16, Tadonki, the Tribunal held that any decision not to renew the fixed-term appointment of the applicant and to resort instead to extensions of the contract when faced with applications for suspension of action is *prima facie* unlawful. In UNDT/2009/063, Kasmani, the Judge held that since none of the facts adduced by the applicant were challenged by the respondent, it was entitled to accept the applicant’s case as stated, namely that he had been victimised for a personal conflict between his first and second reporting supervisors and that therefore the decision he wished suspension of was *prima facie* unlawful.

33. In UNDT/2009/064, Buckley, the Tribunal defined the expression “appears *prima facie* to be unlawful” as meaning that there is an arguable case that the contested decision is unlawful. To establish a reasonably arguable unlawfulness, an applicant must show, in respect of contract extension, that there was a legitimate expectation of renewal that gives legal rights and not merely a reasonable expectation of renewal of contract. In Calvani, the Tribunal found that it resulted from the respondent’s ill will to adduce evidence regarding proof of the identity of the author of the contested decision to place the applicant on administrative leave that the contested decision could be deemed *prima facie* illegal. In UNDT/2009/096, Utkina, the Tribunal followed the test elaborated in Buckley and held that in order to show that the contested decision appears *prima facie* to be unlawful, it is not necessary to demonstrate that it was motivated solely by improper motives as long as the applicant can demonstrate that the decision was influenced by improper considerations and was contrary to the Administration’s obligations to ensure that its decisions are proper and made in good faith. Similarly, in UNDT/2009/097, Lewis, the Tribunal held that since there was some evidence to support the applicant’s allegation that her non-renewal was due to shortcomings in performance and that this assessment was made on the basis of information obtained from her supervisor who was motivated by ill will, the low test of reasonable arguability was satisfied and accordingly, the prerequisite of *prima facie* unlawfulness was met.

### **Irreparable harm**

34. In Fradin de Bellabre, Lewis, and Utkina, the Tribunal held that, since generally any breach of due process is capable of being compensated financially or by specific performance, applicants can get compensation for any economic losses, harm to professional reputation and career prospects. By contrast, in UNDT/2009/008, Osman, the Tribunal found that the implementation of the decision not to renew the applicant’s appointment would cause to the applicant irreparable damage as, even if staff members do not have a right to have their contract renewed, the applicant, after over 16 years of service at the United Nations, would find himself unemployed and, thus, without income. Similarly, in UNDT/2009/16, Tadonki, UNDT/2009/033, Onana, and UNDT/2009/063, Kasmani, the judges held that monetary compensation should not be used in cases where there appears to be a blatant irregularity, which caused distress. Similarly, in Calvani, the Tribunal held that the decision to deprive the applicant of his salaries in a sudden and unexpected manner, if not suspended, would cause irreparable damage because in this case the

damage was not merely financial and could not be repaired by possible restoration of withheld salaries or award of damages.

### **Urgency**

35. In UNDT/2009/007, Rees; Osman; and Lewis, the Tribunal found that the urgency requirement was met. In the latter two cases, the Tribunal found that the urgency requirement was met because their appointments were to expire. In Calvani, the Tribunal rejected the request for suspension of action on the decision to place the applicant on administrative leave on the grounds that there was no particular urgency for an applicant placed on administrative leave pending investigation to be reinstated in his functions and that, on the contrary, allowing the applicant to continue exercising his functions while the investigation is ongoing could hinder the investigation.

### **Duration of the suspension of action**

36. In UNDT/2009/058, Tadonki, the Judge granted the request for suspension of action until determination of the merits of the case, finding that the length of the suspension is to be decided by the Tribunal depending on the circumstances of the case and this discretion cannot be subject to the control of the Administration, including the management evaluation unit.<sup>a</sup> By contrast, in UNDT/2009/071, Corcoran, the Tribunal held that suspension pending management evaluation and suspension during the proceedings are two types of interim measures with different functions, restrictions and scope, which have to be clearly distinguished. Article 13 of the Rules of Procedure has to be applied exclusively during the pendency of the management evaluation, whereas article 14 is appropriate only during judicial review in terms of article 2 and 8 of the Dispute Tribunal's statute; in short; it is either article 13 or article 14, never both. Orders based on article 13 become ineffective with the end of management evaluation.

## **8. Interim measures pending judgment on the merits of the case**

37. In UNDT/2009/076, Miyazaki, the Tribunal granted the applicant's request for interim relief pursuant to article 10.2 of the Statute of the Dispute Tribunal and article 14.1 of the Rules of Procedure, pending determination of her appeal against the decision not to allow her a formal rebuttal process in relation to a short-term staff performance report which made adverse findings regarding her performance on the grounds that the applicant demonstrated an arguable case of unlawfulness, notwithstanding that the case may be open to some doubt. In UNDT/2009/054, Nwuke, the Tribunal stated that an appointment decision cannot be the subject of an interim relief in view of the exception contained in Article 14 of the Rules.

38. In Order No. 29 (GVA/2010), Calvani, and Order No. 49 (GVA/2010), Pacheco, the Tribunal held that, for an interim measure to be ordered pursuant to article 10.2 of the Tribunal's Statute and article 14.1 of the rules of procedure, it is an indispensable prerequisite that judicial proceedings have already been started pursuant to article 2.1 of the Statute, in other words, that an appeal against an administrative decision be already pending before the Tribunal. In the Pacheco Order, the Tribunal further held that to order an interim measure, including suspension of action, it is necessary that the three conditions provided for under article 10.2 of the Tribunal's statute be fulfilled, i.e. *prima facie* unlawfulness, irreparable harm and urgency. If only one of the conditions is not fulfilled, the Tribunal must reject the application without its being necessary to examine whether the other two conditions are fulfilled.

## **9. Other ancillary matters**

### **Time limits**

39. In various Judgments (e.g. UNDT/2009/060, Lutta; UNDT/2009/067, Gabriel; UNDT/2009/079, Abubakr; UNDT/2009/080, Jennings; UNDT/2009/36, Morsy; UNDT/2010/019, Samardzic et al.; UNDT/2010/025, Kita; UNDT/2010/031, Bidny; UNDT/2010/083, Barsed; UNDT/2010/102, Abu-Hawaila), the Tribunal interpreted article 8 of the Dispute Tribunal's Statute and articles 19 and 35 of the Rules of Procedure that deal, inter alia, with time limits to file submissions, in different manners.

40. In Morsy, the Tribunal held that the respondent's objection based on the grounds that the applicant had failed to show exceptional circumstances or overriding issues of interest of justice

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<sup>a</sup> This decision was subsequently quashed by the Appeals Tribunal.

which would justify a waiver of the statutory time limits was not correct on the grounds that article 8 of the Statute which referred to “exceptional case” for the granting of extension of time limit should not be interpreted too narrowly. The Judges specified that “exceptional” is normally defined as something out of the ordinary, quite unusual, special or uncommon; therefore, the Tribunal was not required to interpret “exceptional case” referred to in article 8 of the Statute as requiring the circumstances to be beyond the applicant’s control as was required by the former UN Administrative Tribunal.

41. By contrast, in *Samardzic et al., Kita, Bidny, Barsed and Abu-Hawaila*, the Tribunal stated that it saw no reason to depart from the definition of exceptional circumstances adopted by the former United Nations Administrative Tribunal, i.e. circumstances that are beyond the control of the applicant. In *Abu-Hawaila*, the Tribunal noted that this definition had also been upheld by the UN Appeals Tribunal in 2010-UNAT-029, *El-Khatib*.

42. In *Samardzic et al.*, the Tribunal further held that time limits for contesting administrative decisions are imposed by the legislator in order to ensure the stability of a legal situation resulting from an administrative decision. This concern for stability explains why, in administrative law, time limits for contesting such decisions are, on the one hand, usually fairly short (an extended time limit would have the effect of “looming as a black cloud” over the definitive nature of these situations) and, on the other hand, applied with rigour. Whereas the situation may be different in employment and contract law, administrative law regulates the relationship between administrative authorities and their constituents. Time limits are connected to individual action, i.e. submitting an application for legal remedy within a fixed time frame. Of course, all relevant factors have to be considered. However, relevant factors for an applicant’s failure to act within the prescribed time limits are confined to his individual capacities. Factors like the prospects of success on the merits and the importance of the case are extraneous to the requirement to submit an application within the prescribed time limits and should not be taken into account at this level. Thus, the “exceptional cases” mentioned in article 8.3 of the Tribunal’s Statute refer to the applicant’s personal situation and not to the characteristics of the application. Since it is in the applicant’s interest to obtain a suspension, waiver or extension of time limits, the burden of proof is on the applicant. An applicant’s alleged ignorance of the time limits does not constitute an “exceptional circumstance”.

43. However, in *UNDT/2010/054, Avina*, where it was held that an application was not receivable after being filed over two years after the date of the contested decision, the Judge held that a request for an extension or waiver of time limits must show circumstances which are out of the ordinary, quite unusual, special, or uncommon but which need not be unique, unprecedented or beyond the applicant’s control. An applicant must be able to show that he or she has not been negligent or forfeited the right to be heard by inaction or a lack of vigilance.

44. In respect of an extension of time to file a reply, in *Jennings*, the Tribunal distinguished when to act pursuant to article 35 or article 19 of the Rules of Procedure. The Tribunal held that article 35 deals specifically with the time limits provided for in the Rules of Procedure, and should therefore be applied by the Tribunal when dealing with the time limit for the filing of a reply. Article 19 deals generally with case management and is more appropriate for orders relating to time limits that are not set forth in the Rules of Procedure. In exercising its discretion in granting extension of time under articles 35 and 19, the Tribunal will have regard to what is fair to the parties and will weigh all relevant factors, including potential prejudice to both parties, the adequacy of the reasons advanced, the timeliness of the request, and the effect the extension of time will have on the proceedings. In *Lutta*, the Tribunal held that a literal reading of the Statute and the Rules of Procedure does not allow the respondent to request an extension of the time limit to submit a Reply after it had expired and that the only remedy is for the respondent to seek permission of the Tribunal to take part in the proceedings in accordance with article 10.1.

45. In two cases, the Tribunal found that the requests for extensions of time were tantamount to abuse of process. Specifically, in *UNDT/2009/056, Hijaz*, the Tribunal found that the applicant did not prove that the claimed illness may have affected his capacity to take the required preparatory action in his case. The Tribunal concluded that the application was unserious, lacking in diligent prosecution and merit and constituted an abuse of process. Similarly, in *UNDT/2009/081, Macharia*, the Tribunal treated the applicant’s request for extension of time as an abuse of process. It found that the applicant indulged in frivolous and unending applications for extensions of time.

46. In Abu-Hawaila, counsel for the applicant failed to file the application within the statutory time limits and argued that the applicant should not have to bear the consequences of his counsel's procedural error. The Tribunal rejected the application as time-barred noting that failure of counsel for the applicant to file it within the statutory time limits was not an exceptional circumstance warranting the waiver of the time limits. The Tribunal held that it cannot and should not, except in rare situations, excuse an applicant for the failure of his or her counsel to successfully defend his or her case. In judicial proceedings, no distinction should normally be made between a party and its representative. Representation means that a party and its duly authorized counsel are regarded as a single entity. Except in cases where counsel would abuse his or her authority, all actions taken by counsel are to be attributed to the party he or she represents.

#### **Inconsistency between article 8.1 (d) (i) of the UNDT statute and staff rule 11.4(a)**

47. In Abu-Hawaila, the Tribunal noted that, in accordance with article 8.1 of its Statute, in order to be receivable, an application must be filed either within 90 days of the applicant's receipt of the Administration's response to his or her request for a management evaluation or within 90 days of the expiry of the relevant response period for the management evaluation if no response to the request was provided, whereas staff rule 11.4(a) requires that the application be filed *by the earlier* of these two dates. The Tribunal held that there is no question that the Tribunal's Statute is legislation of higher level than the Staff Rules and that in case of contradiction or inconsistency, the former must prevail over the latter. Accordingly, and regardless of staff rule 11.4(a), the Tribunal considered that the time limit to file an application would start to run anew if the Administration were to respond to a request for a management evaluation *after* the expiry of the relevant response period for the management evaluation.

#### **Informal resolution and tolling of time limits**

48. In Abu-Hawaila, the Tribunal rejected the applicant's contention that the time limits for filing the application were tolled by settlement negotiations entered into with the Administration on the basis that Tribunal's Statute and Staff Rules clearly set out that informal resolution may result in the extension of the deadlines for filing an application with the UNDT *only* if such informal resolution is conducted by the Office of the Ombudsman. The Tribunal held that encouraging informal dispute resolution, as the General Assembly did and as the Tribunal often does, is not tantamount to saying that the legal consequences attached to any type of informal resolution should be the same no matter how it is conducted and who conducts it. If it were so, it would often be difficult, if not impossible, for the Tribunal to ascertain whether or not an applicant has complied with time limits.

#### **Right to legal assistance**

49. In Syed, the Tribunal held that General Assembly resolution 62/228 on administration of justice must be interpreted as creating a right for staff members to request legal counsel from OSLA, which has an obligation to provide proper advice, including on the merits of the case. OSLA is therefore entitled to advise applicants not to file an application before the Tribunal and may therefore legally refuse to appoint counsel for an applicant on the grounds that his application has little chance of success.

50. In Kita, the Tribunal elaborated on the ruling in Syed and stated that interpreting General Assembly resolution 62/228 as imposing an obligation on OSLA to provide legal assistance to all staff members requesting it, including those with obviously frivolous cases, would overload the Office and prejudice those applicants with a serious case. The Tribunal found that, since the Tribunal's Statute neither imposes financial costs on filing applications, nor requires that applications be filed by an attorney or that an attorney be obtained as a prerequisite for initiating legal proceedings, lack of counsel is not, normally, an exceptional circumstance justifying failure to observe the time limits set forth in the Tribunal's Statute to file an application.

#### **Receivability *ratione personae***

51. Noting the judgments of the United Nations Appeals Tribunal 2010-UNAT-009, James, and El-Khatib, the Tribunal held in its judgment UNDT/2010/098, Gabaldon, that in view of the special relationship between the United Nations and its civil servants, the legal principles that may be applicable to a contract between private parties are not relevant to assess if a valid contract of employment has been concluded between the Organization and a civil servant. It further results from that special relationship that

a person cannot obtain the status of a staff member of the United Nations before his letter of appointment is signed by a duly authorized official of the Organization. The Tribunal found that the record shows that the limitation of the Tribunal's jurisdiction to persons having acquired the status of staff member, as reflected in the Tribunal's Statute, was not unintentional, but was the clear wish of the General Assembly. Indeed, the General Assembly, which had considered proposals to open the Tribunal to non-staff personnel, such as for example Interns and Type II gratis personnel, opted to reject such proposals and to limit the scope of the Tribunal's statute as reflected in article 3, paragraph 1. Hence, this limitation does not constitute an "unintended lacuna", and there is no room for a larger interpretation of the actual wording of the Statute.

52. In UNDT/2010/021, De Porres, a former staff member appealed the decision not to select her for a post to which she had applied after she had been separated from service. The Tribunal noted that article 3.1 (b) of the Tribunal's Statute had to be read in conjunction with article 2.1 (a), thus limiting the access of former staff members to the Tribunal to applications against decisions alleged to be in non-compliance with the terms of an applicant's former appointment. The Tribunal considered that since the decision did not affect the terms of a previous appointment of the applicant, the application was not receivable *ratione personae*.

53. In UNDT/2010/100, Iskandar, a World Food Programme (WFP) staff member on loan under a reimbursable loan agreement to a United Nation peacekeeping mission (UNAMID) contested an UNAMID's decision on appointment. The Tribunal held that it is not competent to Judge the manner in which external candidates are considered for posts within the UN Secretariat. The Tribunal is only open to individuals who file appeals alleging the non-observance of their contracts of employment. In this case, the applicant cannot allege the non-compliance of his contract of employment because such a contract only exists with WFP, an organization that does not recognize the Tribunal's jurisdiction over its international staff members.

#### **Abandonment of proceedings**

54. In various judgments (e.g. UNDT/2009/061, Bimo & Bimo; UNDT/2009/062, Hastopalli & Stiplasek; UNDT/2010/029, Moussa; UNDT/2010/047, Saab-Mekkour), the Tribunal held that it is a general principle of procedural law that the right to institute legal proceedings is based on a legitimate interest in initiating and maintaining legal action. Access to the court is denied to those who are obviously no longer interested in the proceedings they once instituted. This principle was applied to applicants who did not respond to the Tribunal's requests and who therefore were deemed to have abandoned the legal proceedings they had instituted.

55. In UNDT/2010/074, Monagas, the application was dismissed after the applicant failed to respond to an order to show cause that he had not abandoned the proceedings.

#### **Application for revision of judgment**

56. In UNDT/2009/087, Mezoui No. 2, the Tribunal held that it follows from a combined reading of articles 11.3 and 12.1 of the Dispute Tribunal's Statute and article 7.1(c) of the Appeals Tribunal's Statute that when, prior to the expiration of the time provided for appeal, the parties discover a decisive fact which meets the criteria of article 12 of the Statute of the Dispute Tribunal, their only recourse to contest a judgment of which they have been notified is the appeals process.

#### **Referral of conduct to the Secretary-General**

57. In UNDT/2010/030 Abboud, the Tribunal held that, while staff members are ultimately accountable to the Secretary-General in respect of their conduct, it is given a specific responsibility under article 10 of its Statute to refer cases to the Secretary-General to consider taking action to enforce accountability. The Tribunal observed that giving evidence before it is personal, not official, conduct and doing so dishonestly is serious misconduct. The Under-Secretary-General's conduct in dealing with the complaint of the applicant and in giving evidence to the Tribunal was referred to the Secretary-General for consideration under art 10.8 of the Statute. The Secretary-General was requested to inform the Tribunal of the outcome of the referral as a courtesy.

## **Conduct of counsel**

58. In UNDT/2010/062, Rosca, the Tribunal held that personal attacks on witnesses or parties that cannot be justified by the evidence are contrary to the obligation of counsel to exercise their independent judgment; they are an abuse of the office of counsel and bring both counsel and the administration of justice into disrepute.

## **Compensation**

59. In Crichlow, the Tribunal found that in respect of compensation for emotional suffering and distress, non-statutory principles for calculation of compensatory damages for emotional suffering and stress include non-punitive damages awarded to compensate proportionally for negative effects of a proven breach. This was further elaborated on in UNDT/2009/084, Wu, in which the Tribunal held that financial compensation (under article 10.5(b) of the Statute) must be proportionate to the injury suffered, bearing in mind the maximum amount set in the Statute. Even if an applicant did not suffer any financial damage, the immaterial injury caused to him/her by an illegal administrative decision may warrant compensation for the negative effects of the proven breach. To determine the amount of compensation, the particular circumstances of a given case have to be taken into account, including the impact the established breaches have on the victim.

60. In UNDT/2010/011, Castelli, the Tribunal held that interest is payable on a debt owed by the UN as part of the award of compensation under art. 10.5 of the Statute in order to place the staff member in the same position as s/he would have been if the debt had been paid when it was due. The applicable rate was set at 8 per cent per annum from the date upon which the debt was due to be paid, namely thirty days after accrual. In UNDT/2010/026, Kasyanov, the Tribunal reiterated that compensation under art. 10.5 of the Statute covers the duty to place a staff member, as nearly as money can do so, in the same position as he would have had if there were no breach, in respect of any direct or foreseeable loss, whether economic or otherwise. The practical difficulty of measuring the amount of compensation to be awarded does not mean there has been no compensable loss or make such compensation punitive. The Tribunal held that, with respect to damages, the burden of proof rests with the applicant, and the respondent bears the burden of establishing the mitigating circumstances that would limit the award of compensation.

61. In UNDT/2010/071, Hastings, the Tribunal elaborated that, although not expressly stated in the Statute, it may reasonably be inferred from its context that compensation under 10.5(b) is to compensate an applicant for losses other than the more easily quantifiable material losses available under article 10.5(a), i.e., adverse but non-material consequences of a legal wrong. The Tribunal determined that the applicant's loss of chance be compensated based on the balance of probabilities regarding each step of the selection process and expressed in percentages.

62. In UNDT/2010/040, Koh, the Tribunal found the Administration liable for depriving the applicant of an opportunity to apply for positions for which he was suitable and, it was agreed, for which he would have been short-listed as a staff member on an abolished post. The Judge held that the principle issue in assessing compensation was the valuation of loss of a chance to be a candidate and that the positive value of a chance of benefit and the loss involved in being subjected to a significant possibility of future detriment must be taken into account in the assessment of compensation for breach of contract. Other relevant factors were held to be the applicant's chance of success at interview, the likely duration of the position, termination indemnities already paid and income earned during the relevant period. The Judge also held that, unless a case was exceptional, the compensation should be limited to two years' net base salary but that this limit does not inform the way in which compensation is to be calculated. In UNDT/2010/113, Fayek, the Tribunal specified that, in assessing compensation, certain assumptions can be made, but they must be reasonable. Normal contingencies and uncertainties which may and frequently do intervene in the average working life, including early retirement, career change, death or disability, and lawful termination should be taken into account. Each case must be seen on the basis of its own facts and surrounding circumstances and the mitigating and aggravating circumstances.

63. In UNDT/2010/117, Bertucci, there was substantial difference between the sums which the applicant would have received but for the respondent's breach and the cap contained in art 10.5(b) of the Statute (of two years' net base salary). The Judge held that this substantial difference amounted to an exceptional circumstance in this case, justifying an award more closely

approximating just compensation than compliance with the cap would permit. He stated that this not necessarily meant that the whole sum should be awarded, but assessed a sum on the basis that any lesser amount would represent a significant departure from the amount of compensation actually required to be paid to place the applicant in the same position as he would have been in had the respondent not breached his contract as to impose an exceptional injustice.

#### **Conduct of and during investigations**

64. In UNDT/2010/001, Abboud, regarding a complaint concerning the conduct of an interview panel member, the Judge held that staff members have a contractual right to have their request for an investigation fairly and competently considered and that the initial inquiry as to whether there is reason to believe unsatisfactory conduct occurred must be sufficient to enable the decision to be rationally made. The Judge observed that the personal opinion of the decision-maker that unsatisfactory conduct did or did not occur is irrelevant: the question is one of objective judgment and the decision-maker must consider all relevant and disregard all irrelevant matters, free from bias and without any error of significant fact. The Judge held the initial inquiry was inadequate and affected by bias and the applicant was awarded USD20,000 for breach of contractual right.

65. In UNDT/2010/094, Bertucci, the Tribunal decided that the test required by ST/AI/2004/3 to withhold entitlements is not actual guilt of the staff member, but merely “reason to believe” that they may have been grossly negligent, causing loss. This is an undemanding test, amongst other things satisfied even if there is evidence of innocence, unless that evidence is so cogent and evidently reliable as to render it unreasonable to entertain the suspicion in question. The Judge also held that an applicant’s opportunity to respond at the preliminary charge/investigation stage before an investigation report is finalised should not arbitrarily be limited simply because the practice is not to disclose the material. The only proper reason for non-disclosure – confidentiality aside – is that it is not necessary in order for an adequate response to be made, but if parts of conversations with witnesses are ultimately relied on in an investigation report, this will be unlikely to justify non-disclosure.

#### **Withdrawal of an application**

66. In UNDT/2009/023, Sheykhiyani, the Tribunal held that an applicant could not withdraw a withdrawal of an application. It ruled by way of summary judgment (since there was no dispute as to the material facts and judgment was restricted to a matter of law) that, according to general principles of procedural law, any statement of intention toward the court has to be clear and without any preconditions, and cannot be withdrawn because, normally, procedural law does not tolerate turning back the clock, as reasons of security and reliability tie the parties to their statements unless they were in error about their meaning.

#### **Production of documents and confidentiality**

67. In UNDT/2009/050, Koda, the Tribunal granted the applicant’s motion for access to the notes taken by a fact-finding panel who prepared a confidential fact-finding panel report that allegedly cleared the applicant of misconduct allegations but made adverse findings and made recommendations including that conditions should be attached to the extension of the applicant’s contract. The Tribunal ruled that the notes taken by the panel contain material that is or may well be relevant to the applicant’s case.

68. In UNDT/2010/080, Bertucci, the Judge stated that the issue of confidentiality of documents or evidence and their disclosure is determined by the Tribunal, not the parties. If the claim of confidentiality is upheld, the material will not be disclosed to the other party but, if justice requires that it be taken into account because it assists his or her case, then it must be given due weight although, of course, in such a way as to retain its confidential character. If the claim of confidentiality is rejected, then the material should be provided to the party seeking it if it is capable of assisting his or her case. Sometimes part of the material is confidential and part is not, in which case the applicant will be given access to that part which is not confidential. If this procedure had been followed in this case, no question of judgment by default would have arisen. Similarly, in UNDT/2010/035, Megerditchian, the Tribunal held that in accordance with article 18.2 of its Rules of Procedure, the Tribunal may order the production of evidence from either party and the parties have to provide such evidence, even though they consider it to be confidential. According to article 18.4 of its Rules of Procedure, it falls upon the Tribunal to assess the

confidentiality of the evidence and, if it finds the evidence to be confidential, it is the Tribunal's responsibility to ensure that measures are taken to preserve such confidentiality. In this case, the Tribunal did not use the confidential documents it had requested from the respondent and therefore did not communicate them to the applicant.

69. In Order No. 29 (GVA/2010), Calvani, the Tribunal held that, if it issues an order requesting the Administration to provide certain information, it is the duty of the Administration to comply with the order without delay. It is not within the prerogative of the Administration to discuss the relevance of the requested information for the resolution of the dispute, an assessment which is within the exclusive competence of this Tribunal.

70. In UNDT/2010/055, Abbasi, the Judge discussed various principles of document discovery and held that, given the difficulties of proving discrimination, staff members are entitled to have the opportunity of looking at such material which is in the possession of the Organization and which will be necessary to enable the Tribunal to consider the allegations and to arrive at a reasoned and just decision.

#### **Striking of submission, amended pleadings**

71. In its Judgment UNDT/2009/082, Krioutchkov, the Tribunal did not grant the respondent's motion that the applicant's submission be struck out on the basis that the submission raised new factual and legal issues, relied on new documentation and requested remedies different from those sought in the application on the merits. The Tribunal held that, since neither the Statute nor the Rules of Procedure of the Tribunal prescribe the form of the parties' submissions filed in accordance with an order of the Tribunal, the matter falls under article 36 of the Rules of Procedure and the applicant cannot be precluded from amending his earlier submission so long as the respondent's legal rights and interests are not impaired.

#### **Stay of proceedings, striking of application for abuse of process**

72. In UNDT/2009/020, Hussein, the Tribunal held that an applicant cannot seek a stay of the proceedings on the grounds that she wishes time to determine whether to continue, amend or terminate her appeal against a non-promotion decision, as appropriate, depending on whether or not an on-going recruitment process worked out in her favour. The Tribunal considered that such action is an abuse of process of the Tribunal.

73. Similarly, in UNDT/2010/003, Mwachullah, UNDT/2010/020, Saadeh, UNDT/2010/048, Atogo, and UNDT/2010/038, Attandi, the Tribunal held that the applicants had been dilatory in the pursuit of their claims and therefore entered a judgment to strike out the matters. In Saadeh, the Tribunal explained that it cannot allow the applicant's claim to continue to "hang like the sword of Damocles" over the efficient operations of the Organization. The applicant had failed to give instructions to his counsel in respect of his application. The applicant's counsel's responses showed disregard for the directions from the Tribunal.

#### **Summary dismissal judgment**

74. In UNDT/2009/027, Sina, the Tribunal dismissed the respondent's motion for summary dismissal judgment in a non-renewal case on the grounds that, where evidence is capable of establishing a likelihood of a connection between potentially extraneous considerations and a failure to obtain a renewal of a contract, summary dismissal of judgment is unlikely to be warranted. Where one party raises sufficient material suggesting a particular fact or facts and the other party has the sole means of refuting that inference, then an evidentiary burden to call that evidence will ordinarily arise so that a failure to do so will make it relatively easy for the other party to treat the fact as proven.

#### **Failure to comply with an order to show cause / striking of application**

75. In Manokhin, and Kouka, both applicants failed to respond to the order to show cause why their appeals against a decision to summarily dismiss them should not be struck out since they had no reasonable prospect of success. The Tribunal found that it had authority to strike out the applications. The Tribunal held that the orders to show cause had been properly served on the applicants; that the evidence was sufficient to substantiate the charges that these were cases of serious misconduct; and, that there was no evidence of procedural irregularities or improper

motive or abuse of power by the Administration. Both applications were struck out. Similarly, in UNDT/2009/069, Ghosn, the Tribunal struck the application on the grounds that the applicant failed to actively and diligently pursue his claim.

#### **Definition of an administrative decision**

76. In Luvai, the Tribunal elaborated on the definition of an administrative decision. Specifically, the Judge found that the fact that the applicant did not apply for a post and, as result, there was no administrative decision affecting the applicant's rights, including his due process rights, did not preclude him from contesting the selection decision on the grounds that a decision must not necessarily be of individual application for an applicant to have a cause of action. In UNDT/2009/090, Teferra, the Judge held that given the nature of the decisions taken by the Administration, "there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken."

77. By contrast, in various judgments (e.g. UNDT/2009/077, Hocking, Jarvis, McIntyre; UNDT/2009/086, Planas; UNDT/2009/089, Wilkinson et al.; UNDT/2010/085, Ishak; UNDT/2010/111; UNDT/2010/112, Buscaglia), the Tribunal upheld the definition of an administrative decision adopted by the former United Nations Administrative Tribunal in its judgement No. 1157, Andronov (2003), i.e. a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order.

78. In UNDT/2010/085, Ishak, the Tribunal held that mere preparatory decisions may not be contested before the Tribunal because they are not of such nature as to affect the staff member's rights per se. Such preliminary decisions may be subject to review when an applicant contests the main/final decision. Similarly, in UNDT/2010/111, Elasoud, the Tribunal held that recommendations for appointment are not administrative decisions that can be contested before the Tribunal in accordance with article 2 of its Statute. Such recommendations are preliminary steps in the selection process. The applicant has the right to contest his non-selection for a post but not a preliminary step in such process, which is not an administrative decision.

#### **Recusal / conflict of interest**

79. In UNDT/2009/005, Campos, the President of the Dispute Tribunal found that the applicant's claim that the Dispute Tribunal's Judges could not review the decision of the Secretary-General not to nominate him as a staff representative on the IJC had no merit. The President held that the Judges were elected by the General Assembly and that they are not subservient to the members of the IJC. In Onana, the Tribunal, to address the applicant's counsel's concerns about a potential conflict of interest, given that the Registrar of the Tribunal was partly involved in the contested decision-making processes, excused the Registrar from his functions in respect of this case so that he would have no substantive involvement in the matter.

#### **Mediation**

80. In UNDT/2009/053, Adrian, the Tribunal considered that the case at hand was one that was eminently suitable for mediation as the mediation process would give the parties an opportunity to reach a satisfactory solution in what appeared to be a case of error and misunderstanding.

#### **Legal costs**

81. In Crichlow, the Judge held that legal costs will be awarded if the Tribunal finds that in the course of the proceedings there has been an abuse of the process by a party. There may be other instances when the Tribunal will feel compelled to order award of costs.

#### **Public hearing**

82. In UNDT/2010/004, Dumornay, the Tribunal remarked that the principle of open justice was a fundamental element of the Tribunal's exercise of its jurisdiction and a hearing was required unless there were good reasons for not holding one. With respect to the merits of the case, the Judge held that it was found at the hearing that a preponderance of evidence supported the conclusion that the post abolition was motivated by genuine organizational readjustments and was not influenced by any improper considerations. By contrast, in UNDT/2010/023, Lesar, the

Tribunal held that in non-disciplinary cases, it is a matter of judicial discretion to hold an oral hearing or to abstain from it and that in cases deemed suitable to be decided by summary judgment, an oral hearing was usually not necessary.

### **Default judgment**

83. In UNDT/2010/080, Bertucci, the Judge awarded default judgment (with the amount of compensation not yet determined) after excluding the respondent from the proceedings for failure to comply with the Tribunal's orders to produce documents to the Tribunal. The respondent had also refused to permit the applicant to prove facts and had made it clear that he did not intend to adduce any facts on his own behalf. He therefore declined to prove that any, let alone, full and fair consideration, was given to the applicant's candidacy in the case. As the respondent chose not to litigate the question of the likelihood of the applicant's selection and would not provide the information that would enable a comparison of the applicant's claims with those of the other candidates, the only fair inference able to be drawn was that which was most favourable to the applicant; that he was the outstanding candidate and, had all necessary and proper things been done, would have been so likely to have been appointed that his compensation should be awarded on the basis that he would have been appointed. Where the favourable inference concerns a crucial fact such as this, it will result almost invariably in a favourable judgment.

### **Requirement to follow process of challenging administrative decision**

84. In UNDT/2010/033, Zhang, the Judge confirmed that a contested administrative decision must be a decision which is taken by or on behalf of the Organization in the course of managing its affairs and that requests for administrative review and management evaluation are necessary steps in the appeal process of such a decision. The applicant's claims in the matter that the Organization had not properly used its human resources, nor promoted gender equality did not impugn any specified administrative decision. The Judge also reiterated that, in the absence of a properly contested administrative decision, the Tribunal is not an appropriate forum in which to request the awarding of a post commensurate with an applicant's skills and qualifications.

### **Appraisal of staff on short-term contract**

85. In UNDT/2010/078, Miyazaki, the Judge held that ST/AI/292 alone does not provide adequate "rebuttal" procedures for short-term staff. The creation of two classes of short-term staff which may occur via ST/AI/2002/3 has the potential to violate the doctrine of equal treatment in like circumstances. Accordingly, the applicant was allowed to undertake a rebuttal process, as she sought. In Riquelme, the Judge stated that although the undertaking of an ePAS appraisal where the staff member's term of employment is less than one year is "discretionary" pursuant to ST/AI/2002/3, this discretion is not to be exercised arbitrarily but in accordance with proper principles of managerial decision-making. If it is "appropriate" pursuant to section 1 of the instruction to undertake such an appraisal, then it must be undertaken. It was stated that it would be useful to provide some guidelines to management as to when it will or might well be appropriate to exercise this discretion.

### **Participation in proceedings**

86. In Lutta, the Tribunal held that an application by the respondent for permission to participate in proceedings may also contain a motion for belated filing of a reply under Article 19 of the UNDT Rules of Procedures. Such an application should give the reasons why the reply was not filed in a timely manner.

## APPENDIX II

### Proceedings of the UNAT

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#### **Introduction**

1. As indicated above, during the period covered by this report, the UNAT rendered a number of judgments on issues which can be roughly divided into the following categories: pension cases; disciplinary matters; entitlements; conflict of interest; interlocutory appeals; and, receivability.

2. A summary of the legal pronouncements made by the UNAT in judgments rendered during its first session held from 15 March to 1 April 2010 is provided below. The summaries are not authoritative and the judgments cited below are not comprehensive. For a complete set of the judgments issued during the period covered by this report by the UNAT, the website of the UNAT (<http://un.org/en/oaj/appeals/>) should be consulted.

#### **1. Pension cases**

3. The Appeals Tribunal rendered eight judgments on appeals against decisions of the Standing Committee of the UNJSPB. Several judgments concerned the interpretation of Article 24 of the UNJSPF Regulations which provides for a participant's option to restore prior contributory service.

4. In Judgment No. 2010-UNAT-019, Carranza, the Appeals Tribunal confirmed the Fund's interpretation of Article 24 of the Regulations to the effect that the 2007 amendment to Article 24 of the Fund's Regulations only applies to staff who prior to 2007 had been ineligible to restore previous contributory service and that it therefore did not apply to Carranza who was eligible to restore previous contributory service but had failed to do so.

5. In Judgment No. 2010-UNAT-023, Nock, the Appeals Tribunal affirmed the UNJSPF's decision denying the appellant's request for restoration of her first participation period. The Appeals Tribunal found that the amended Article 24 of the UNJSPF's Regulations only allows for restoration of a participant's most recent period of contributory service and that Nock requested restoration of a participation period which was not the most recent one.

#### **2. Disciplinary measures**

6. The Appeals Tribunal issued a number of judgments on the issue of disciplinary measures. It established that, when reviewing a sanction imposed by the Administration, it needed to examine whether the facts on which the sanction is based are established; whether the established facts legally amount to misconduct; and whether the disciplinary measure applied is disproportionate to the offence.

7. In Judgment No. 2010-UNAT-022, Abu Hamda, the Appeals Tribunal affirmed the UNRWA Commissioner-General's decision to discipline Abu Hamda for misconduct. It however found that the disciplinary measure was disproportionate to the offence, and substituted the disciplinary measure of demotion with that of written censure. Similarly, in Judgment No. 2010-UNAT-025, Doleh, the Appeals Tribunal found that Doleh's termination under Area Staff Regulation 9.1 was disproportionate and ordered her re-instatement.

8. In several cases, the Appeals Tribunal confirmed the Commissioner-General's decision to dismiss a staff member for misconduct. (Judgment No. 2010-UNAT-018, Mahdi; Judgment No. 2010-UNAT-024, Haniya; Judgment No. 2010-UNAT-028, Maslamani). In Haniya, the Appeals Tribunal considered that

Haniya's termination purportedly "in the interest" of the agency, was in fact a disciplinary measure, and therefore reviewed it as such.

### **3. Entitlements**

9. In Judgment No. 2010-UNAT-031, Jarvis, the Appeals Tribunal held that the UNDT erred in finding that by accepting a lump-sum payment for home leave travel, the appellants forfeited any right of appeal the amount of the lump-sum received. It remanded the case to the UNDT for consideration on the merits.

### **4. Conflict of interest**

10. In Judgment No. 2010-UNAT-001, Campos, the Appeals Tribunal affirmed the UNDT findings that there was no flaw in the procedure used by the Staff-Management Coordinating Committee to select a staff representative on the Internal Justice Council. It also affirmed the UNDT judgments rejecting Campos' allegations of conflict of interest on the part of the UNDT and the Appeals Tribunal judges.

### **5. Receivability**

11. In Judgments No. 2010-UNAT-005, Tadonki, No. 2010-UNAT-008, Onana, and No. 2010-UNAT-011, Kasmani, the Appeals Tribunal was seized of appeals by the Secretary-General against UNDT decisions ordering the suspension of the contested decisions beyond the deadline for management evaluation. The Appeals Tribunal clarified that, generally, only appeals against final judgments would be receivable, because otherwise, cases would seldom proceed if either party was dissatisfied with a procedural ruling. It however noted that prohibitions on appeals in Articles 2(2) and 10(2) of the UNDT Statute cannot apply where the UNDT issues orders that purport to be based on these articles, but in fact exceed its authority. Article 2(2) of the UNAT Statute authorizes the UNDT to order a suspension of a contested decision only "during the pendency of the management evaluation". The Appeals Tribunal found that the UNDT exceeded its jurisdiction in ordering suspension of the contested decision beyond the deadline for management evaluation.

12. In Tadonki, the Appeals Tribunal emphasized that almost no preliminary matters would be receivable, for instance, matters of evidence, procedure, and trial conduct. Only when it is clear that the UNDT has exceeded its jurisdiction, a preliminary matter will be receivable.

13. In Judgment No. 2010-UNAT-032, Calvani, the Appeals Tribunal rejected the Secretary-General's interlocutory appeal against a UNDT order for production of documents. The Appeals Tribunal considered that the UNDT has discretionary authority in case management and the production of evidence in the interest of justice, and that an order for production of documents cannot be subject of an interlocutory appeal.

14. In Judgment No. 2010-UNAT-025, Doleh, the Appeals Tribunal found that it was a common practice of the Administration to raise pleas of appeals being time-barred without verifying the facts. It held that this practice deserved to be deprecated in the strongest possible terms.

15. In Judgment No. 2010-UNAT-013, Schook, the Appeals Tribunal elaborated that an "administrative decision" for the purpose of former Staff Rule 111.2(a) of the Staff Rules needs to be communicated to a staff member in writing to ensure that time-limits are correctly calculated.

16. In Judgment No. 2010-UNAT-010, Tadonki, the Appeals Tribunal dismissed an appeal by the Secretary-General against the interpretation of a judgment. It found that the appeal was not receivable because interpretation of a judgment is not a judgment within the meaning of Article 2(1) of the Appeals Tribunal's Statute.