

**Fourth activity report of the Office of Administration of Justice  
1 July 2010 to 30 June 2011**

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## I. Introduction

1. The fourth report of the Office of Administration of Justice (OAJ) outlines the activities of the Office for period 1 July 2010 to 30 June 2011.
2. As the previous reports, this report covers the activities of the Office of the Executive Director, the UN Dispute and Appeals Tribunals and the Office of Staff Legal Assistance (OSLA).

## II. Executive Summary

3. During the second year of operation, the Office of the Executive Director, OAJ, closely monitored the discussions on the item administration of justice in the Fifth and Sixth Committees of the General Assembly, especially in regard to requests for additional resources. In its resolution 65/251, the General Assembly decided to provide the OAJ with one additional P-3 post in OSLA (peace-keeping support account) and one general service post in UNAT. It also decided to approve additional resources for interpretation and translation for OAJ under section 2, General Assembly and Economic and Social Council Affairs and conference management. OAJ also continued to make improvements to the OAJ website. The fully web-based case management system became operational on 6 July 2011. Three additional agreements were concluded under articles 2.9 and 2.10 of the UNAT Statute, bringing the total of such agreements to seven.<sup>1</sup> The OAJ carried out an outreach mission to and held a town-hall meeting at Entebbe Support Base (MONUSCO), Uganda, on 1 and 2 July 2010 and participated in the thirty-second session of the United Nations Staff-Management Coordination Committee in Belgrade, in June 2011. The OAJ supported the Internal Justice Council (IJC) in its work, including the preparation of its second report to the General Assembly on the implementation of the new system of administration of justice, to be considered by the Assembly at its 66<sup>th</sup> session. The code of conduct for the judges of the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), prepared by the IJC last year will be considered this fall.
4. To give a general overview of the first two years of operation of the new system of administration of justice (1 July 2009 to 30 June 2011), the UNDT received a total of 713 cases (including 312 cases transferred from the old system) and disposed of 466 cases, rendered 435 judgements, issued 1275 orders and held 568 hearings; UNAT received a total of 228 cases (including cases transferred from the old system), rendered 128 judgements, issued 54 orders and disposed of 132 cases; and, OSLA received 1447 cases, 865 of which it has closed or resolved.
5. During the current reporting period (1 July 2010 to 30 June 2011), the UNDT received a total of 201 new cases (including six remanded cases). It disposed of 244 cases, including 33 from the former Joint Appeals Boards and Joint Disciplinary Committees (JABs and JDCs), including three remanded cases, and 84 from the former UN Administrative Tribunal. It rendered 222 judgements, issued 688 orders and held 248 hearings. As at 30 June 2011, 247 cases were pending, including 56 cases from the old system.
6. During the same period, UNAT received 118 new cases, including seven against the United Nations Joint Staff Pension Board (UNJSPB); five against UNRWA; 100 cases appealing judgements of the UNDT (76 by staff members and 26 by the Administration); and, six requests for revision of judgement. It rendered 95 judgements and disposed of 99 cases. In addition, the Appeals Tribunal issued 52 orders. As at 30 June 2011, 96 cases were pending.
7. Between 1 July 2010 and 30 June 2011, OSLA received 506 new cases and closed 352 cases. As at 30 June 2011, OSLA had a total of 582 active cases.
8. Attached to the report (Appendix I) is a summary of main legal pronouncements made in judgments issued by the UNDT during the reporting period. Also attached (Appendix II) is a summary of main legal pronouncements made in judgments issued by UNAT at its third and fourth sessions.

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<sup>1</sup> See para. 11, below.

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

9. One of the main tasks of the Office of the Executive Director during the reporting period has been the coordination of the preparation of the report of the Secretary-General for the sixty-sixth session of the General Assembly. In its resolution 65/251, the Assembly requested the Secretary-General to provide it with a consolidated progress report on the new system of administration of justice as well as with responses to a number of questions. The report contains data and information on the functioning of the relevant substantive offices in the new system, including those of the Funds and Programmes and the Regional Commissions; resource requirements for the Secretariat offices involved in administration of justice; and, provides answers to a number of questions asked by the General Assembly. Also included, as requested by the Assembly, are information relevant to the General Assembly's review of the Statutes of the Tribunals; proposals for staff-funded mechanisms to fund OSLA; a proposal for recourse mechanisms for non-staff personnel; an overview of monetary compensation ordered by the tribunals; and, an overview of UNDT judgements with compensation equal to or more than six months' net base salary.

10. The OAJ website, which was launched on 28 June 2010 in all six languages and provides information about the internal justice system at the United Nations, is easy to navigate and provides practical step-by-step information. In the period 1 July 2010 to 31 May 2011, the website was visited on average 7000 per month. Constant efforts continue to be made to improve the website search capability, in particular the ability to search orders and judgments. In addition, the Office also reached another milestone on 6 July 2011, when it launched a fully web-based court case management system (CCMS), which enables staff members at any duty station to file and monitor their cases electronically. The CCMS is expected to expedite and harmonize the filing of documents, lighten the workload of the Registries and provide parties with electronic access to their individual case files.

11. The Office of the Executive Director successfully negotiated agreements with the International Tribunal for the Law of the Sea (ITLOS), the UN Joint Staff Pension Fund (UNJSPF) and the International Court of Justice (ICJ) under articles 2.9 and 2.10 of the UNAT Statute, allowing those entities access to the UN system of administration of justice. To date, seven such agreements have been concluded by the Secretary-General of the United Nations. In addition to the three latest agreements, agreements have been concluded 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).

12. The Office of the Executive Director also provided support to the IJC in its work, including in preparing its second report (A/66/158) to the General Assembly, as requested in resolution 65/251, providing its views on the implementation of the system of administration of justice and on how to enhance its contribution to the system.

13. The IJC's report to the General Assembly, requested by resolution 62/228, containing a draft "Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal" (A/65/86), will be considered by the Assembly at its 66<sup>th</sup> session.

### IV. Activities of the United Nations Dispute Tribunal

#### A. Composition of the Dispute Tribunal

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

14. The current composition of the UNDT is 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 Jean-François Cousin (France), ad litem judge based in Geneva

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

Judge Marilyn Kaman (United States), ad litem judge based in New York

15. At its 65th session, the General Assembly decided to extend the tenure of the three ad litem judges and their support staff for an additional six months until 31 December 2011. (See resolution 65/251.) The New York ad litem judge, Judge Marilyn Kaman was unable, for personal reasons, to accept a second term of office and she resigned effective 1 July 2011. In its report to the General Assembly A/65/853, the IJC decided, in view of the short period for the appointment, not to recommend any candidates for this vacancy.

## **2. Election of the President**

16. At the New York plenary meeting held from 27 June to 1 July 2011, Judge Memooda Ebrahim-Carstens was elected President for one year, from 1 July 2011 to 30 June 2012.

## **3. Plenary meetings**

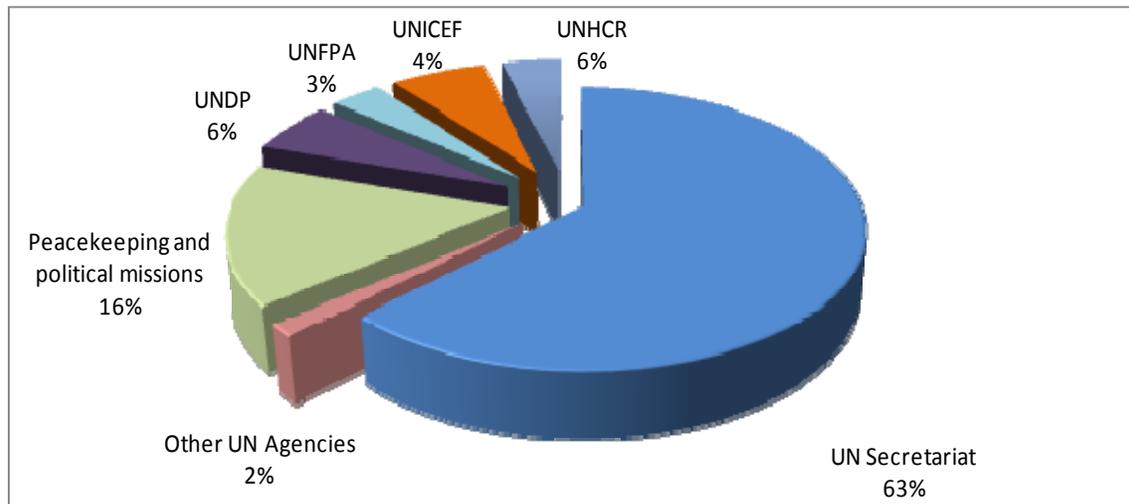
17. During the reporting period, the Judges of the Tribunal held two plenary meetings: from 13 to 17 December 2010 in Geneva and from 27 June to 1 July 2011 in New York. During the first of these meetings, the Judges discussed and agreed on a wide range of administrative and legal issues concerning their work; presented and discussed a series of practice directions and papers; considered and adopted an amendment to article 19 of the Rules of Procedure; and met with the OAJ Executive Director. At the second meeting, the Judges also presented and discussed a series of practice directions and papers; adopted a number of resolutions; held a closed round table with high-level United Nations officials, followed by a stakeholders' meeting; and met with the OAJ Executive Director.

# **B. Judicial statistics**

## **1. General activity of the Tribunal**

18. At the beginning of the reporting period, as at 1 July 2010, the UNDT had 290 pending cases. During the period 1 July 2010 to 30 June 2011, the UNDT received a total of 201 new cases (including six cases remanded by the Appeals Tribunal) and disposed of 244 cases (including four remanded cases). As at 30 June 2011, 247 cases were pending, including 56 cases from the old system.

19. Of the 201 cases received during the reporting period, 126 cases originated from the UN Secretariat (excluding peacekeeping and political missions), including the regional commissions, offices away from headquarters, ICTR and ICTY, and various UN departments and offices; 32 cases originated from peacekeeping and political missions; and 43 cases from UN agencies, including UNHCR, UNDP, and UNICEF.

**Chart 1 Distribution of registered cases by clients (1 July 2010-30 June 2011)**

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

20. During the reporting period, 33 of the cases inherited from the JABs and JDCs in Geneva, Nairobi, New York and Vienna had been disposed of (including three remanded cases): five in Geneva (including two remanded cases), 19 in Nairobi (including one remanded case) and nine in New York. Nine such cases, including two remanded cases, are still pending: two in Geneva (including one remanded case), four in Nairobi (including one remanded case) and three in New York.

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

21. During the same period, 84 of the cases transferred from the former Administrative Tribunal were disposed of: 32 in Geneva, 19 in Nairobi and 33 in New York. A total of 47 of such cases remain pending: seven in Geneva, 21 in Nairobi and 19 in New York.

## 4. New applications received between 1 July 2010 and 30 June 2011

22. Between 1 July 2010 and 30 June 2011, the UNDT received a total of 201 new applications (including six remanded cases). Each month, on average, 17 applications were filed with the UNDT. Of the new applications, 64 were received in Geneva (including three remanded cases), 56 in Nairobi (including three remanded cases) and 81 in New York. As at 30 June 2011, 191 new cases (including two remanded cases) are pending: 41 (including one remanded case) in Geneva, 61 in Nairobi (including one remanded case) and 89 in New York.

## 5. Cases disposed of between 1 July 2010 and 30 June 2011

23. The UNDT disposed of a total of 244 cases in the reporting period, including four remanded cases. The Geneva Registry disposed of 98 cases (including three remanded cases), the Nairobi Registry of 59 (including one remanded case) and the New York Registry of 87 cases. On average, the three Registries disposed of approximately 20 cases per month.

## 6. Number of judgements, orders and hearings

24. During the period 1 July 2010 to 30 June 2011, the UNDT issued 222 judgements on both the merits of cases and interlocutory matters. A total number of 688 orders were issued and 248 hearings were held by the UNDT. Geneva rendered 83 judgements, issued 139 orders and held 59 hearings; Nairobi rendered 50

judgements, issued 206 orders and held 123 hearings; and, New York rendered 89 judgements, issued 343 orders and held 66 hearings.

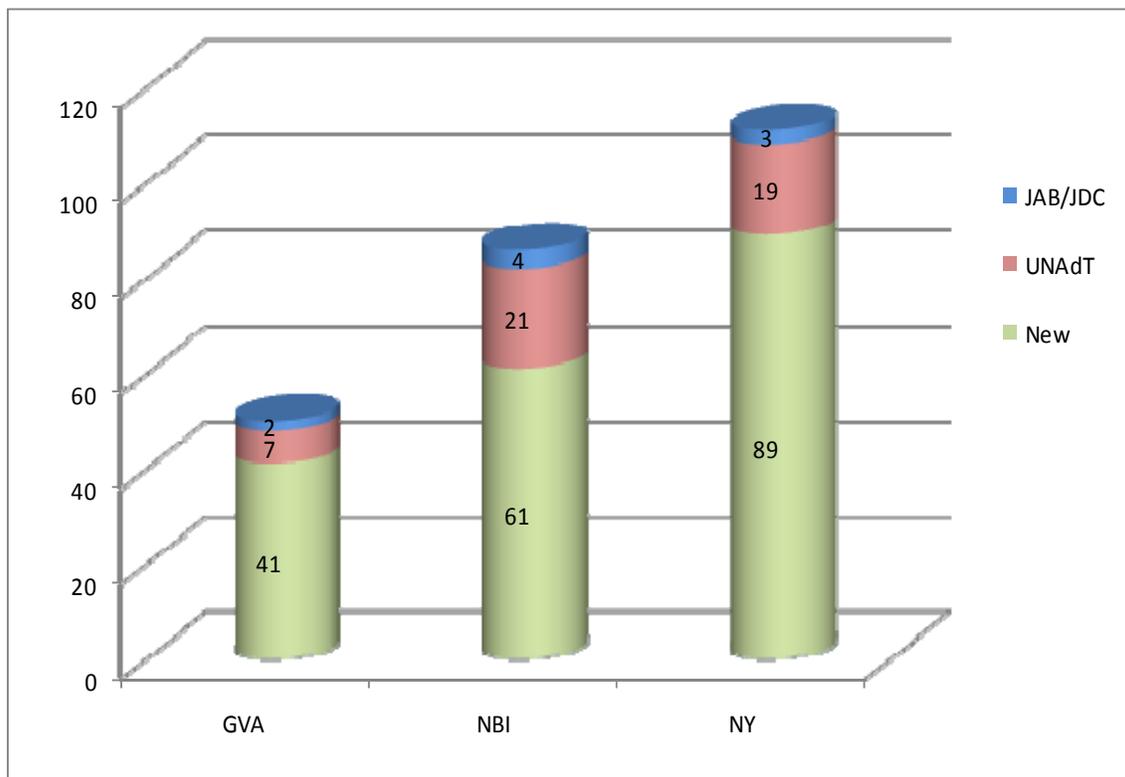
**7. Cases referred to the Mediation Division**

25. During the period covered by this report, the UNDT identified 14 cases suitable for mediation and referred them to the Mediation Division in the Office of the Ombudsman. Of these, seven cases were successfully mediated.

**8. Cases pending before the UNDT as at 30 June 2011**

26. As at 30 June 2011, the Dispute Tribunal had 247 cases pending, 191 of them being new cases (including two remanded cases), nine cases transferred by the former JABs and JDCs (including two remanded cases) and 47 cases transferred by the former Administrative Tribunal. Chart 2 below shows that, as at 30 June 2011, 50 cases were pending in the Geneva Registry (including two remanded cases), 86 cases were pending in the Nairobi Registry (including two remanded cases) and 111 cases were pending in the New York Registry.

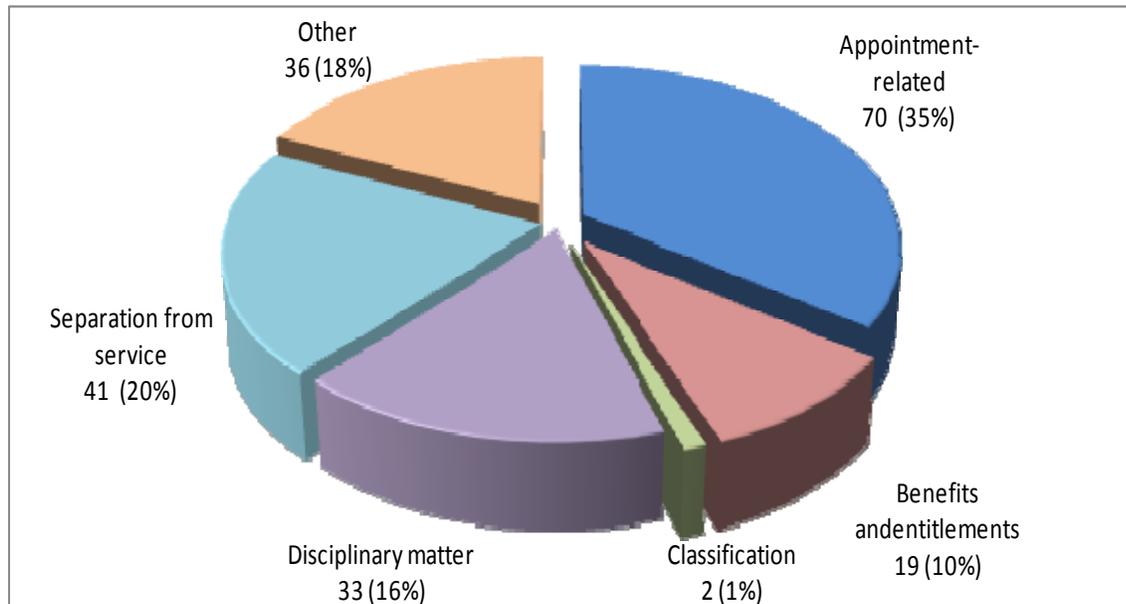
**Chart 2 Cases pending before the Dispute Tribunal as at 30 June 2011**



**9. Cases by subject-matter**

27. The nature of cases before the UNDT received during the reporting period may be distinguished into six main categories: (1) appointment-related matters (non-selection, non-promotion and other appointment-related matters), (2) benefits and entitlements, (3) classification, (4) disciplinary matters, (5) separation from service (non-renewal and other separation matters), and (6) other. The Chart below shows the number of cases registered between 1 July 2010 and 30 June 2011 by subject-matter for the three Registries.

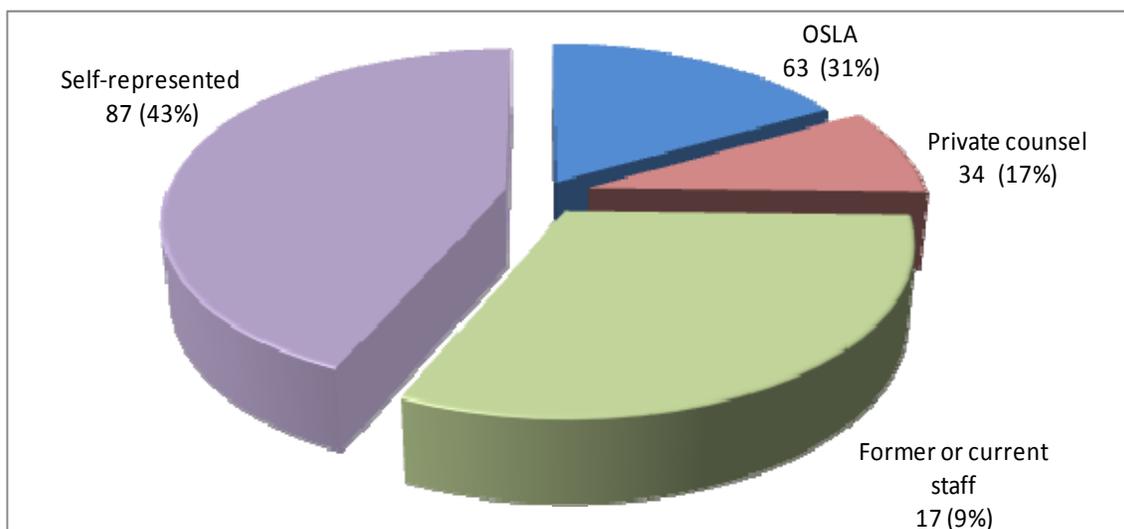
**Chart 3 Cases registered between 1 July 2010 and 30 June 2011 by subject-matter (combined data for the three Registries)**



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

28. During the period covered by this report, OSLA provided legal assistance in 63 of new cases before the Tribunal, 34 staff members were represented by private counsel, 17 staff members were represented by volunteers who were either current or former staff members of the Organization and 87 staff members represented themselves (see Chart 4).

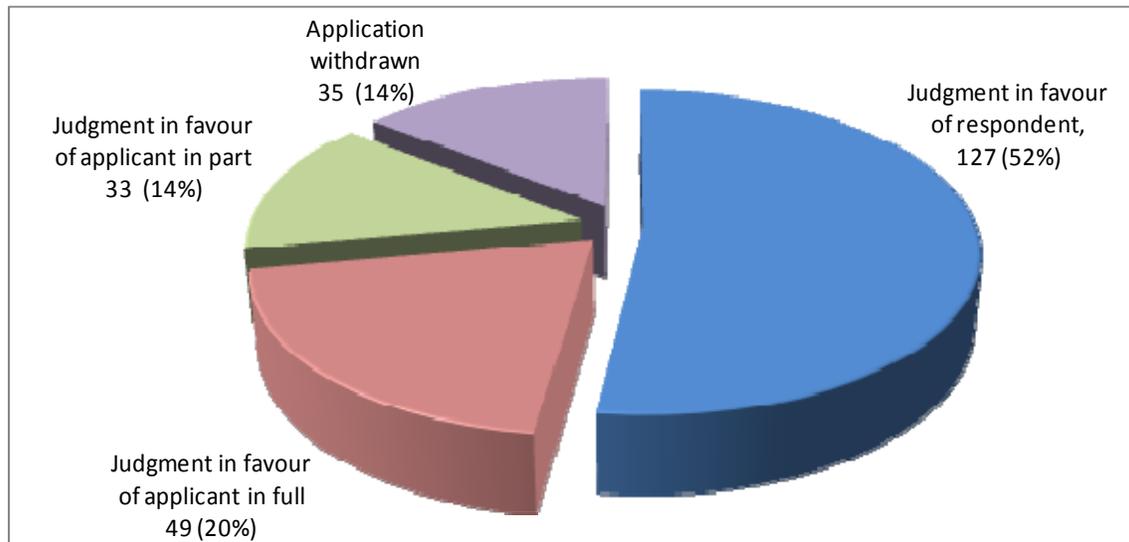
**Chart 4 Legal representation of applicants (combined data for the three Registries)**



## 11. Outcome of disposed cases

29. During the period covered by this report, 244 cases were disposed of. Of these cases, 127 judgements were in favour of the respondent (i.e., application rejected in full), 49 judgements were in favour of the applicant in full and 33 judgements were in favour of the applicant in part (i.e., some claims on liability granted). A total of 35 applications were withdrawn, including cases successfully mediated or settled (see Chart 5).

**Chart 5 Outcome of closed cases (combined data for the three Registries)**



## 12. Relief ordered and compensation awarded

30. During the period covered by this report, 82 judgements were rendered in favour of the applicant either in full or in part. In 44 instances, only financial compensation was ordered. In 22 instances, both financial compensation and specific performance were ordered. In addition, specific performance only was ordered in three cases, in eight cases compensation was settled between the parties and in five cases no compensation was ordered.

## V. Activities of the United Nations Appeals Tribunal

### A. Composition of the Appeals Tribunal

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

31. The current composition of UNAT is as follows:

Judge Jean Courtial (France)

Judge Sophia Adinyira (Ghana)

Judge Kamaljit Singh Garewal (India)

Judge Mark P. Painter (United States of America)

Judge Inés Weinberg de Roca (Argentina)

Judge Luis María Simón (Uruguay)

Judge Mary Faherty (Ireland)

32. On 11 October 2010, Judge Rose Boyko tendered her resignation from the Appeals Tribunal, for personal reasons, effective 15 January 2011. On 28 January 2011, the General Assembly elected Judge Mary Faherty (Ireland) to replace Judge Boyko.

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

33. From 1 July 2010 to 30 June 2011, Judge Courtial served as President, and Judge Adinyira and Judge Garewal as First and Second Vice-presidents, respectively. During the summer 2011 session, the UNAT elected Judge Adinyira as President and Judge Garewal and Judge Simón as First and Second Vice-Presidents, respectively, for the year from 1 July 2011 to 30 June 2012.

## B. Judicial statistics

### 1. General activity of the Tribunal

34. This report includes statistics from the summer 2010 session (held from 21 June to 1 July) of the Appeals Tribunal which were not yet available when the prior report was prepared, from its 2010 fall session (18 to 29 October) and its 2011 spring session (28 February to 11 March). At these sessions, the Tribunal heard and passed judgement on appeals filed against judgements rendered by the UNDT (see article 2.1 of the UNAT Statute); against decisions of the Standing Committee acting on behalf of the United Nations Joint Staff Pension Board (UNJSPB or Pension Board), alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund (see article 2.9 of the UNAT Statute); and, on appeals from entities that have concluded a special agreement with the Secretary-General of the United Nations under article 2.10 of its Statute.<sup>2</sup>

35. During the two-year period 1 July 2009 to 30 June 2011, UNAT received a total of 228 cases, rendered 128 judgements and disposed of 132 cases. It issued 54 orders.<sup>3</sup>

36. During the reporting period, from 1 July 2010 to 30 June 2011, UNAT received a total of 118 new appeals: seven against the Fund; five against UNRWA; 100 cases appealing judgements of the UNDT, of which 74 were filed by staff members and 26 by the Secretary-General; and, six requests for revision of judgement.<sup>4</sup> The Tribunal issued 52 orders. As at 30 June 2011, 96 cases were pending.

### 2. Outcome of disposed cases

37. During the period covered by this report, 95 judgments were rendered and 99 cases were disposed of.

38. One judgement was rendered in appeal against the UNJSPB, in which the Appeals Tribunal upheld the impugned decisions taken by the Standing Committee, acting on behalf of the UNJSPB and four judgements were rendered on appeals filed by UNRWA staff members against decisions by the UNRWA Commissioner-General. All five appeals were rejected.

39. As for appeals against UNDT judgments, 85 judgments were rendered. 54 appeals were filed by staff members and 31 on behalf of the Secretary-General. (Six appeals by staff members were consolidated into three cases for review, resulting in three judgments. Two appeals filed on behalf of the Secretary-General were consolidated into one case for review, resulting in one judgment.) In addition, four cross-appeals were filed, two on behalf of the Secretary-General and the other two by staff members, which were considered by the Appeals Tribunal in the same judgement as the corresponding appeal. Of the 54 appeals filed by staff members, 47 were rejected, five were entertained in full, and two were remanded to the UNDT. Of the 31 appeals filed by the Secretary-General, 17 appeals were entertained in full or in part, and 14 were rejected.

40. In addition, five requests for revision were rejected.

<sup>2</sup> To date, seven such entities have concluded special agreements with the UN Secretary-General accepting the competence of UNAT: ICAO, ICJ, IMO, ISA, ITLOS, UNJSPB and UNRWA.

<sup>3</sup> UNAT adopted the practice of issuing orders effective 1 June 2010.

<sup>4</sup> These numbers do not take into account three cases which were filed, but subsequently withdrawn and closed by order.

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

41. In four cases, the UNDT's order for payment of compensation was either annulled or modified.
42. In another case, the Appeals Tribunal annulled the UNDT's judgment affirming the impugned decision of summary dismissal and fixing the amount of compensation at 12 months' net base salary as an alternative to the rescission of the summary dismissal.
43. In a further case, the Appeals Tribunal set aside the UNDT's order to pay the applicant six months' net base salary and remanded the case for a retrial.

### **4. Legal representation of applicants before UNAT**

44. During the period covered by this report, OSLA provided legal assistance in 35 cases before the Appeals Tribunal.

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

### **A. Introduction**

45. OSLA provides professional legal assistance and representation to staff members and their volunteer representatives in processing claims through the formal system of administration of justice, which assistance includes representation of staff members in cases before the main recourse bodies.
46. During the first 24 months of operation (1 July 2009 to 30 June 2011), OSLA registered 1447 cases, including 346 cases transferred from the former Panel of Counsel and closed or resolved 865 cases. During the current reporting period (1 July 2010 to 30 June 2011), OSLA received 506 new cases and closed or resolved 352 cases. As at 30 June 2011, OSLA had 582 pending cases.
47. The numbers above and in Section D below reflect OSLA assisting and representing staff members before the main recourse bodies in the formal system (Management Evaluation Unit (MEU), UNDT and UNAT as well as the UNJSPF and ABCC), assisting staff members in informal dispute resolution, or otherwise providing legal, including summary advice to staff members and their volunteer representatives.

### **B. Resources of the Office of Staff Legal Assistance**

48. Under the regular budget, OSLA has seven Legal Officer posts (1 P-5, 5 P-3 and 1 P-2). In October 2010, a full-time P-3 Legal Officer was appointed to the office in Addis Ababa, and an offer was made to a selected and approved candidate for the full-time P-3 Legal Officer position in Beirut.
49. In June of 2011, as decided by the General Assembly in resolution 65/251, a second full-time Legal Officer was appointed to the office in Nairobi under the DPKO Support Account. OSLA now has a presence of two P-3 Legal Officers in Nairobi.
50. In order to augment its limited professional human resources OSLA has benefited from a continuing arrangement of UNHCR which has provided a staff member on loan to the OSLA Geneva Office during the entire reporting period and an additional staff member based in Accra, Ghana, during half of the reporting period. It is hoped that UNHCR will be able to continue this arrangement in Geneva. OSLA has also established professional relations with a few private lawyers and one law firm which have provided pro bono legal assistance to individual UN staff members or acted as co-counsel with OSLA Legal Officers in complex cases.
51. During the current reporting period, OSLA benefited from the continued assistance of several volunteer counsel who are either retired or current staff members, or lawyers working in other parts of the UN system. OSLA also greatly benefits from the ongoing assistance of legal interns, both in New York and in overseas OSLA offices.

## C. Challenges and observations

52. Funding limitations continue to present many challenges for OSLA's ongoing operations. In his second report to the General Assembly on the functioning of the system (A/66/275), the Secretary-General re-emphasized the need to strengthen OSLA with a number of additional posts, both at the professional and general service level. The report also contains a proposal for staff-funded mechanisms to fund OSLA, in response to a request from the General Assembly at the 65th session (see resolution 65/251, paragraph 40).

53. The OSLA Trust Fund, which was created in January 2010 to enhance the ability of OSLA to provide legal advice and/or representation to UN staff members within the new internal system of justice, has regrettably not received sufficient resources to meaningfully assist OSLA in augmenting its human resources, even on a temporary basis. To date there have only been a handful of donations from clients and UN staff unions, and the current balance of the Fund is nominal.

54. OSLA continues to develop and strengthen its ties with the representatives of UN staff unions and associations and staff-at-large, and with the Office of the Ombudsman and Mediation Services, Ethics Office and MEU. OSLA is also working to strengthen its liaisons with counterparts in the legal offices of the Secretariat and UN agencies, funds and programmes. Positive and good progress has been made in this regard, both through resolving individual cases and formal and informal exchanges with colleagues.

55. OSLA conducted a number of outreach missions to Peacekeeping Operations in the summer of 2010 and in the spring of 2011 aimed to disseminate, to both managers and staff members, information about the new system of administration of justice, the developing jurisprudence and OSLA's role and function

## D. Statistics/Activities

### 1. Number of cases received in OSLA in the period 1 July 2010 to 30 June 2011

56. As at 30 June 2010, OSLA had 428 pending cases. From 1 July 2010 to 30 June 2011 506 new cases were brought by staff members (including former staff members or affected dependants of staff members) to OSLA. During the reporting period, 352 cases were closed or resolved, bringing the number of cases pending before OSLA as at 30 June 2011 to 582.

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

57. The table below provides further details of the 506 new OSLA cases for the current reporting period (1 July 2010 to 30 June 2011), including a breakdown of formal cases before each of them main recourse bodies, other recourse bodies or where summary advice was provided.

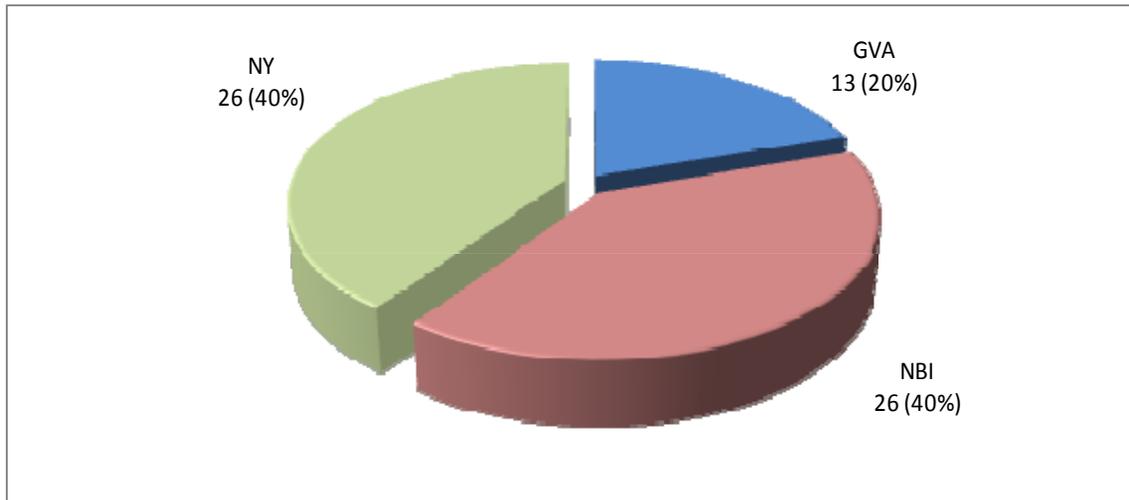
58. In Table 1, "Disciplinary cases" indicate those cases where OSLA provided assistance to staff members in responding to allegations of misconduct. In cases before the UNDT and UNAT, as well as the former UN Administrative Tribunal, OSLA held consultations and provided legal advice to staff member 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.

Forum:	New cases
Disciplinary Cases	42
Management Evaluation	78
UN Dispute Tribunal	65
UN Appeals Tribunal	26
Other	34
Summary legal advice	261
<b>Total</b>	<b>506</b>

### 3. Representation before the Dispute Tribunal

59. Chart 6, below, shows a breakdown of new OSLA cases registered in the current reporting period (1 July 2010 to 30 June 2011) before the UNDT by venue.

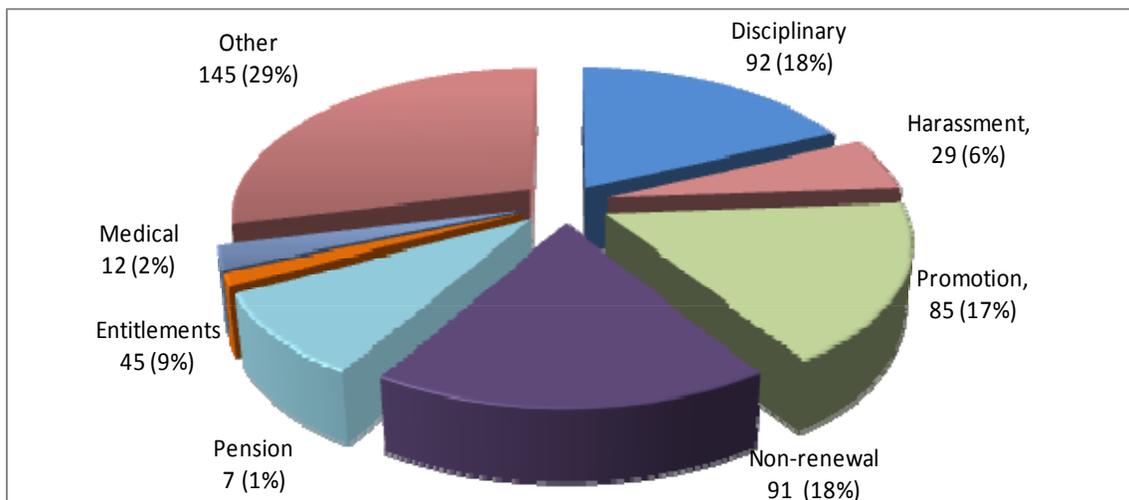
**Chart 6 OSLA new cases before UN Dispute Tribunal by venue (Geneva, Nairobi and New York)**



### 4. Cases by subject-matter

60. Charts 7, below, provides an overview of the new OSLA cases registered during the period 1 July 2010 to 30 June 2011 by subject matter.

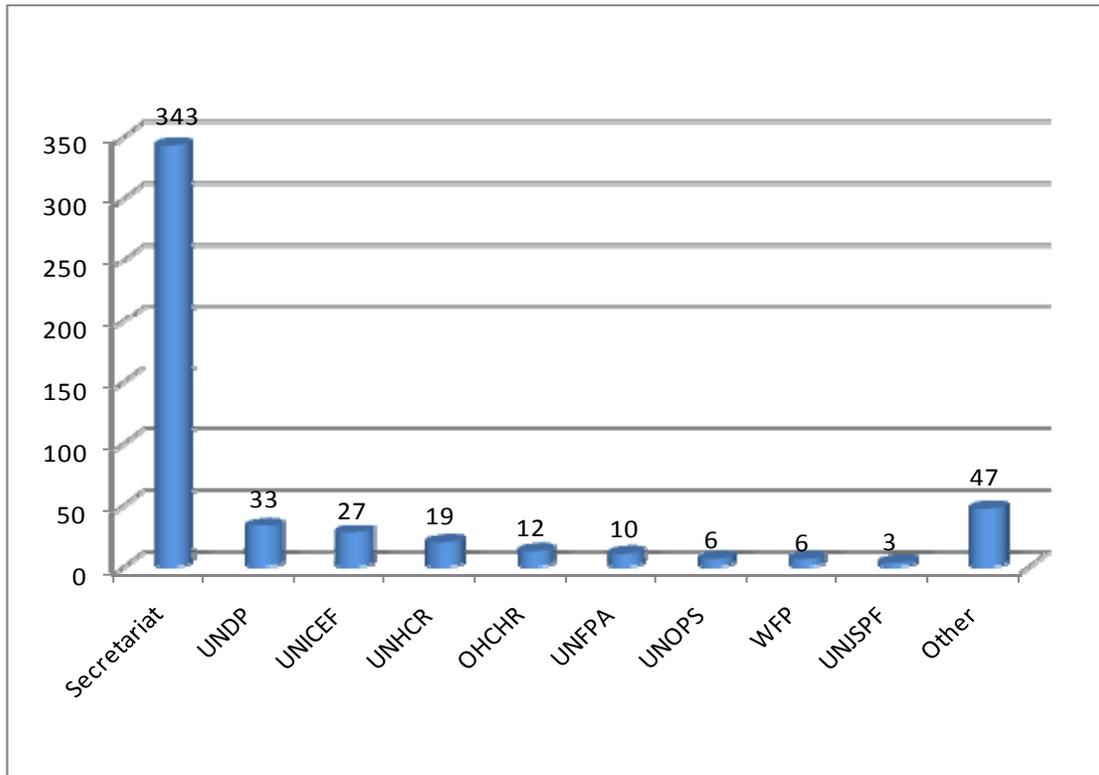
**Chart 7 New cases by subject matter for the period 1 July 2010 to 30 June 2010**



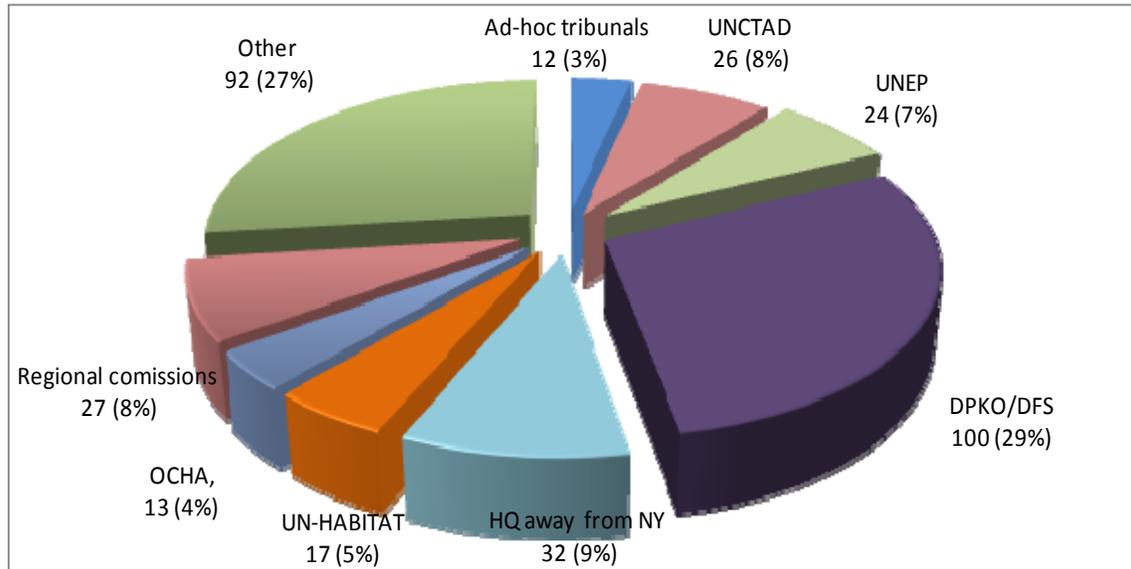
**5. Cases by client (Department, Agency, Fund or Programme)**

61. Charts 8 and 9, below, provide a breakdown of new OSLA cases received from Secretariat departments or UN agency, peacekeeping and political missions, and funds or programmes between 1 July 2010 to 30 June 2011.

**Chart 8 Cases by client (department, agency, fund or programme)**



**Chart 9 Cases submitted by office in UN secretariat during reporting period**



**6. Cases by gender**

62. Of the 506 new cases, 302 were brought by male staff members and 204 by female staff members.

## APPENDIX I

### Proceedings of the UNDT

#### Introduction

1. A summary of major legal pronouncements made by the UNDT in judgments and rendered and orders issued from 1 July to 30 June 2011 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. Please note that a number of UNDT judgments are still under appeal before the UNAT.

#### Investigative matters and disciplinary and administrative measures

##### *Judicial review*

2. In *Yapa* UNDT/2010/169, the Tribunal clarified that, “[i]n reviewing disciplinary cases, the Tribunal must examine: (a) whether the procedure followed was regular, (b) whether the facts in question are established, (c) whether those facts constitute misconduct and, (d) whether the sanction imposed is proportionate to the misconduct committed”.

3. In *Applicant* UNDT/2011/054, the Tribunal held that, in deciding disciplinary cases, the Tribunal’s role is not to conduct merit-based review, but a judicial review, which is concerned with examining how the decision-maker reached the impugned decision. The role of the Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate.

4. In *Applicant* UNDT/2011/106, the Tribunal held that all material gathered in the course of investigating a case, whether incriminating or exculpatory, ought to be placed before the Tribunal. It amounts to a deliberate misleading of the Tribunal to pick and choose what evidence can be shown to it. In *Borhom* UNDT/2011/067, the Tribunal observed that it is for the Tribunal to determine the admissibility of hearsay evidence and its probative value in any given case.

5. In *Applicant* UNDT/2011/054, the Tribunal held that in disciplinary procedures, the concept of proof beyond reasonable doubt is not appropriate. However, in *Borhom*, the Tribunal observed that in disciplinary cases where the charges against a staff member are quasi-criminal in nature, the burden of proof rests with the Secretary-General to produce evidence that raises a reasonable inference, higher than the balance of probabilities standard that misconduct has occurred.

6. In *Zoughy* UNDT/2010/204, the Tribunal held that, in deciding whether there is misconduct, the Tribunal is not bound by the characterizations of the Administration but only by the facts alleged against the staff member. Also, in *Zoughy* and *Hallal* UNDT/2011/046, the Tribunal ruled that it is not sufficient for an applicant to allege procedural flaws in the disciplinary process, s/he must also demonstrate that such flaws have affected her/his due process rights. In *Hallal*, the Tribunal held that, if the Secretary-General provides evidence that raises a reasonable inference that misconduct occurred, the burden shifts to the applicant to provide satisfactory evidence justifying the conduct in question.

##### *Disciplinary procedures*

7. In *Applicant* UNDT/2010/148, the Tribunal held that, in cases where allegations of impropriety are made against staff members, ST/AI/371 contains a requirement for programme managers to undertake an initial inquiry, which has to be adequate and timely, to determine whether there was “reason to believe” that the identified staff members had “engaged in an unsatisfactory conduct for which a disciplinary measure may be imposed”.

8. In *Ryan* UNDT/2010/174, the Tribunal held that it falls within the managerial discretion of the head of office or responsible officer to draw conclusions from the preliminary investigation report. While s/he is bound

by the facts as established by the investigation, s/he is not bound by their legal characterization and it falls within her/his discretion to determine whether or not the investigation produced sufficient evidence of misconduct. Such discretion is not unfettered, however, and the Tribunal must examine whether the head of office or responsible officer drew clearly erroneous conclusions from the investigation report.

9. In *Buendia et al.* UNDT/2010/176, the Tribunal held that it could not uphold the findings and conclusion of a disciplinary process where due process rights were breached, and rescinded the decisions to impose disciplinary sanctions against the applicants.

10. In *Ryan*, the Tribunal stated that it is not competent to order the Secretary-General to initiate disciplinary proceedings. In *Kamunyi* UNDT/2010/214, the Tribunal concluded that the actions of several UN officials were unlawful, careless or negligent but left it to the Secretary-General to take any disciplinary or other steps in the light of the findings in the judgment and in the interests of the maintenance of the rule of law in the United Nations. In *Kozlov & Romadanov* UNDT/2011/103, the Tribunal referred the case to the Secretary-General for possible action to enforce accountability under art. 10.8 of the Tribunal's Statute.

### *Due process*

11. In *Zerezhghi* UNDT/2010/122, *Yapa* and *Zoughy*, the Tribunal reiterated that only when a staff member is charged with misconduct does s/he become entitled to specifically enumerated due process rights, i.e. the right to be informed in writing of the charges, the right to receive a copy of the documentary evidence and the right to seek the assistance of counsel in her/his defence. The Tribunal found that such rights exist during the investigation.

12. However, in *Ibrahim* UNDT/2011/115 and *Johnson* UNDT/2011/123, the Tribunal held that it is a fundamental principle of due process that once, an individual has become the target of an investigation, s/he should be accorded certain basic due process rights. Once the Administration forms an opinion as to the likelihood that the staff member committed the acts in question, due process rights under sec. 6 of ST/AI/371 attach. In *Ibrahim* the Tribunal held that a staff member would have the right to counsel once the investigation starts to focus adversely on her/him, including before the formal charges of misconduct have been filed.

13. In *Goodwin* UNDT/2011/104 and *Johnson* UNDT/2011/124, the Tribunal held that the Secretary-General, having exercised the option under ST/AI/371 to close the case and drop disciplinary charges, could not later reinstate disciplinary or administrative proceedings.

14. Further, in *Applicant* UNDT/2011/054, the Tribunal held that the disciplinary part of the process, including the interview of the alleged offender, should only occur once all the preliminary evidence has been made available to the staff member and the specific allegations against her/him have been finalised. If there is to be an interview it should be the last step in the investigation as envisaged by sec. 6 of ST/AI/371.

15. In *Borhom*, the Tribunal observed that an investigator must be neutral, without bias and must approach the case s/he is mandated to investigate from the standpoint of a presumption of innocence of the subject of the investigation.

### *Sexual and work harassment*

16. In *Borhom* and *Applicant* UNDT/2011/106, the Tribunal discussed the definitions of sexual and workplace harassment.

17. In *Hallal*, the Tribunal held that the subjective belief of the victim must be taken into account in determining whether sexual harassment has occurred.

18. In *Applicant* UNDT/2011/106 and *Guimaraes* UNDT/2011/116, the Tribunal held that, when a staff member is investigated for sexual and workplace harassment, a copy of the written complaint against the staff member must be provided to her/him during the investigation. In *Guimaraes*, the Tribunal held that the accused staff member shall be given an opportunity to answer the allegations in writing and to produce evidence to the contrary, as well as the right to the advice of another staff member to assist in her/his response.

***Proportionality of sanction***

19. In *Applicant* UNDT/2010/171, the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to assess where to pitch the appropriate sanction. In *Yisma* UNDT/2011/061 and *Goodwin* UNDT/2011/104, the Tribunal discussed various mitigating and aggravating circumstances that may be considered in assessing the appropriateness of a sanction. In *Yisma*, the Tribunal held that it may order imposition of a lesser measure if it finds that the disciplinary measure imposed by the Administration was disproportionate.

20. In *Sow* UNDT/2011/086, the Tribunal found that the principles of equality and consistency of treatment in the workplace, which apply to all UN employees, dictate that where staff members commit the same or broadly similar offences, in general, the penalty should be comparable.

21. In *Goodwin*, the Tribunal held that there may be instances where certain performance failures may constitute misconduct and warrant disciplinary measures.

***Reprimand***

22. In *Johnson* UNDT/2011/124, the Tribunal held that, although reprimand is not a disciplinary measure and therefore does not carry the same procedural safeguards that apply to disciplinary procedures, certain protections nevertheless apply as it is adverse material; for instance, prior to the issuance of reprimand, the Administration must seek comments of the staff member.

23. In *Goodwin*, the Tribunal, with respect to the imposition of reprimand, held that the concerned staff member is entitled to the same kind of review by the Tribunal as s/he would have received if the measure had been a disciplinary one.

***Special leave with full pay***

24. In *Kamunyi* UNDT/2010/214, *Cabrera* UNDT/2011/081 and *Johnson* UNDT/2011/123, the Tribunal found that although former staff rule 105.2 conferred a general power on the Secretary-General to grant special leave in exceptional cases, it could not be used to place staff on suspension pending investigation. Under the former staff rules, a staff member could be placed on special leave with full pay only under former staff rule 110.2, pursuant to charge of misconduct and in compliance with relevant procedural requirements.

25. In *Lauritzen* UNDT/2010/172, the Tribunal held that, while former staff rule 105.2(a) allowed the Secretary-General to place, at his own initiative, a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization, such measure should only be taken in exceptional cases and for a limited period of time. Staff members, as long as they remain in the service of the Organization, have the right not only to be remunerated, but also to be given work.

***Discretion to withhold investigation reports***

26. In *Klein* UNDT/2010/207, the Tribunal found that the Office of Internal Oversight Services (“OIOS”) has an obligation pursuant to both the Organization’s rules and general principles of law to ensure that its reports are the result of proper investigative procedures and that, in cases when these reports are requested by Member States, its discretion to withhold or modify these reports is exercised reasonably.

***Non-selection and non-promotion***

27. The Tribunal held in a number of judgments that, although the Secretary-General has broad discretion in matters of appointment and promotion, the Tribunal may examine whether the selection process was carried out in an improper, irregular or otherwise flawed manner, and assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable (*Liarski* UNDT/2010/134, *Tsoneva* UNDT/2010/178, *Vangelova* UNDT/2010/179, *Solanki* UNDT/2010/180, *Ippolito* UNDT/2010/181, *Dualeh* UNDT/2010/187, *Bouchardy* UNDT/2010/188, *Akyeampong* UNDT/2010/189 and *Bofill* UNDT/2010/190, *De Cruze* UNDT/2011/099).

## Benefits and entitlements

### *Home leave*

28. In *Wang* UNDT/2010/132, the Tribunal held that the change of the country of home leave referred to in administrative instruction ST/AI/367 is subject to the Secretary-General being satisfied of the three specified conditions. Staff members have the right to enjoy entitlements acquired by the application of an exception, but only for as long as the circumstances meet the conditions of the exception; if those circumstances materially change, the staff member may lose those acquired rights.

### *Special post allowance*

29. In *Bhatia* UNDT/2010/157, the Tribunal held that, where a special post allowance has been paid for a period, withdrawn, and then paid again for a later period where no change in functions has been documented, it should have been paid for the entire period.

## Classification

30. In *Meesukul* UNDT/2010/141, the Tribunal dismissed the applicant's appeal of the decision not to reclassify her post, holding that where an applicant raises general complaints of unfairness and denial of due process, it is incumbent upon the applicant to provide sufficient detail and evidence to sustain the complaint. In *Jaen* UNDT/2010/165, the Tribunal held that it would not be proper to circumvent the established budgetary procedures by shifting the posts approved by the General Assembly for specific functions to create other posts with different functions without the General Assembly's approval.

31. In *Aly et al.* UNDT/2010/195, the Tribunal granted compensation for excessive delay in responding to the applicants' original request for reclassification and for the breach of their procedural rights.

## Separation from service

### *Non-renewal of contract*

32. In *Eldam* UNDT/2010/133, *Dzintars* UNDT/2010/150 and *Applicant* UNDT/2010/211, the Tribunal reiterated that, while decisions on the renewal of fixed-term appointments are within the Secretary-General's discretionary power, they must not be improperly motivated and must not violate due process, and that when the Administration gives a justification for the exercise of its discretionary power, especially as regards non-renewal of a contract, the reason must be supported by the facts.

33. It was stated in *Eldam* that the Administration bears the burden of proving that it respected the prescribed procedure in deciding on non-renewal of a fixed-term appointment.

34. In *Eldam* and *Dzintars*, the Tribunal held that the Administration is entitled to refuse renewal of a contract when, after it has taken steps to try to improve the staff member's work, s/he receives a negative rating for two consecutive years. However, in *Jennings* UNDT/2010/213, the Tribunal found that as soon as performance shortcomings are identified they must be brought to the attention of the staff member and improvement measures be instituted. If the performance of a short-term staff member does not improve, it is a sufficient ground not to renew a contract. The Administration is not required to institute another round of improvement measures and renew a short-term contract further just because the staff member has failed during the duration of the contract to respond positively to the performance improvement measures.

35. In *Eldam*, *Applicant* UNDT/2010/211 and *Jennings*, the Tribunal ruled that, though the Administration is not bound to apply ST/AI/2002/3 to evaluate the performance of 300 series staff members and of staff members on fixed-term appointments for a period of less than one year, once it has decided to apply this administrative instruction, the latter must be fully complied with.

36. In *Hepworth* UNDT/2010/193, the Tribunal held that no promise could override the clear words of the subsequent letters of appointment signed by the applicant which stated that fixed-term appointments do not carry any expectancy of renewal. In *Abdalla* UNDT/2010/140, the Tribunal held that, while there is no right to renewal

for staff members serving on a temporary appointment, it is for the Tribunal to examine whether improper motives or countervailing circumstances existed which may have tainted the contested decision with illegality.

37. In *Hepworth*, the Tribunal held that the Organization was not bound to give any justification for not extending a fixed-term appointment. However, in *Obdeijn* UNDT/2011/032, the Tribunal held that a decision not to renew a fixed-term contract may not be taken for improper motives. The Tribunal held that, when a staff member alleges that the decision not to renew her/his contract was improper and the Administration fails to disclose the reasons for the contested decision to the Tribunal, the Tribunal may draw appropriate negative inferences. The Tribunal further stated that, generally, reasons for non-renewal of a contract should be disclosed when requested by the staff member.

38. In *Pirnea* UNDT/2011/059, the Tribunal held that whether reasons should be given or not when a staff member's contract is not being renewed should be decided on a case by case basis. If no reasons are initially available but are subsequently in the proceedings before the Tribunal, the Tribunal would be in position to assess whether the reasons for non-renewal were valid or not.

39. In *Philippart* Order No. 338 (NY/2010), the Tribunal held that, where an applicant's letter of appointment states that s/he is employed in respect of a particular project, the Secretary-General will have to show that that project has actually been terminated if such termination has been used as a stated reason for non-renewal.

40. In *Zúñiga Rojas* UNDT/2010/218, the Tribunal held that comments relating to a performance appraisal, made in the course of the performance evaluation process, do not give rise to an expectation of renewal.

#### ***Other types of separation***

41. In *Jemiai* UNDT/2010/149, the Tribunal held that an agreed termination on terms negotiated free from any duress or misrepresentation is an essential feature of good employment relations and should be given effect and honoured by the contracting parties.

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

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

42. In *Corna* Order No. 90 (GVA/2010), the Tribunal explained that to satisfy the requirement of *prima facie* unlawfulness the applicant must demonstrate an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt. In *Jaen* Order No. 29 (NY/2011) and *Hashimi* Order No. 93 (NY/2011), the Tribunal stated that, for the *prima facie* unlawfulness test to be satisfied, it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith.

#### ***Irreparable harm***

43. In *Fernández de Córdoba Briz* Order No. 334 (NY/2010), the Tribunal held that, to obtain a suspension of action, the applicant must—as a necessary minimum—be able to refer to some specific, albeit non-pecuniary, damage. In *Hashimi*, the Tribunal held that mere financial loss is not enough to satisfy the requirement of irreparable harm. In *Jaen*, the Tribunal held that the requirement of irreparable harm will be satisfied when the breached right is so valuable (such as fundamental human rights) that its value cannot be expressed in mere financial terms.

#### ***Particular urgency***

44. The Tribunal held, in *Corna*, *Applicant* Order No. 164 (NY/2010) and *Yisma* Order No. 64 (NY/2011), that the requirement of particular urgency will not be satisfied if the urgency was created by the applicant.

## Other matters

### *Jurisdiction of the Tribunal*

45. In *Comerford-Verzuu* UNDT/2011/005 and *Kunanayakam* UNDT/2011/006 the Tribunal asserted jurisdiction over the decision of OIOS not to conduct an investigation. It considered in particular that, in spite of its “operational independence”, OIOS acts “under the authority of the Secretary-General”. Thus, the Secretary-General is ultimately liable for any breach of a staff member’s rights by OIOS. The Tribunal will interfere with the discretion of OIOS only where it finds that the procedure was irregular, the decision is based on an error of fact or a clearly mistaken conclusion has been drawn from the facts.

46. In *Worsley* UNDT/2011/024 and *Larkin* UNDT/2011/028, the Tribunal declared itself competent to hear applications challenging decisions by the Office of Staff Legal Assistance (“OSLA”). It deemed that, while OSLA enjoys functional or operational independence in the sense that it does not receive instructions from its hierarchy when providing advice to staff members or representing their interests, it remains administratively subject to the Secretary-General. Actions of bodies endowed with functional independence, such as OSLA, are attributable to the Secretary-General in his capacity as Chief Administrative Officer. The Tribunal further specified that, unlike providing legal advice to staff members or pursuing complaints on their behalf, deciding whether or not to provide assistance to a staff member does imply making a determination of the right laid down in staff rule 11.4(d), thereby modifying her/his legal situation.

47. In *Hunt-Matthes* UNDT/2011/063, the Tribunal held that a decision of the Ethics Office not to find *prima facie* case of retaliation had direct consequences for the rights of the applicant so as to make it an administrative decision.

48. In *Bridgeman* UNDT/2011/018, *Simmons* UNDT/2011/085 and *Ibrahim*, the Tribunal found the Secretary-General responsible for delays and flaws in the proceedings of the former Joint Appeals Board (“JAB”) and the former Joint Disciplinary Committee (“JDC”). The Tribunal found that the Secretary-General was vicariously liable for the proper functioning of the Organization and for damages suffered by employees.

49. In *Kisambira* Order No. 36 (NY/2011), *Hassanin* Order No. 83 (NY/2011) and *Hassanin* Order No. 139 (NY/2011), the Tribunal held that it has no jurisdiction to consider applications filed by or on behalf of a staff union or over matters involving the internal affairs of a staff union.

### *Definition of an administrative decision*

50. In *Jaen* UNDT/2010/165, the Tribunal held that for an appeal against an administrative decision to be receivable, the contested decision has to affect the applicant’s—and not someone else’s—rights. In such instances, the application will generally be receivable, regardless of whether the alleged breach affected one or several staff members.

51. In *Warintarawat* UNDT/2011/053, the Tribunal held that an applicant may plead the unlawfulness of a regulatory decision only in the context of an appeal against an individual administrative decision taken on the basis of such regulatory decision. The Tribunal may not rescind a regulatory decision.

### *Requests for administrative review and management evaluation*

52. In a number of judgments, the Tribunal reiterated that requests for administrative review or management evaluation are mandatory first steps in the appeal process (*Znamenski* UNDT/2010/208, *Ryan, Osman* UNDT/2010/158, *Ibekwe* UNDT/2010/159, *Dualeh* UNDT/2010/187, *Leboeuf et al.* UNDT/2010/206, *Jennings*). The Tribunal further held, in *Behluli* UNDT/2011/052 and *Kayed* UNDT/2011/112, that the Administration should not be excessively formalistic and demand that for a request for review to be considered as such it must necessarily be addressed to the Secretary-General. However, such a request must be formulated in sufficiently clear terms to be regarded by its addressee as a formal request for review.

### *Time limits*

53. In *Muratore* UNDT/2010/139, *Ryan* UNDT/2010/174 and *Zia* UNDT/2010/198, the Tribunal stated that exceptional circumstances are circumstances beyond the control of the applicant that prevented her/him from

submitting an appeal in time. In *Benhamou* UNDT/2011/087, *Al-Behaisi* UNDT/2011/111 and *Kayed*, the Tribunal also stated that, as held by the Appeals Tribunal in *Costa* 2010-UNAT-036, it has no authority pursuant to article 8.3 of its Statute to waive the deadline for management evaluation.

54. In *Ryan*, *Sahel* UNDT/2011/023, *Scheepers* UNDT/2011/074 and *Patterson* UNDT/2011/091, the Tribunal reiterated that negotiations between the parties and attempts to informally resolve the matter directly with management do not normally have the effect of suspending the time limits for the filing of an internal appeal or an appeal with the Tribunal and that they do not constitute exceptional circumstances.

55. In *Larkin*, the Tribunal found that it is of no relevance at what point the applicant developed the idea that the circumstances s/he already knew warranted contesting the decision. The mandatory time limits for contestation run from the moment the concerned staff member had knowledge of the relevant circumstances.

56. In *Ryan*, *Bernadel* UNDT/2010/210, *Nwokeabia* UNDT/2011/082 and *Patterson* UNDT/2011/091, the Tribunal held that, when a staff member repeats the same request to the Administration, only the first decision denying it is subject to appeal and the time limits for appeal start running from that first decision. Subsequent refusal decisions are confirmative decisions which are not subject to appeal. The Administration has the obligation to examine a new request only when it is supported by new circumstances; in those cases, the resulting decision is not a confirmative decision.

57. In *Vangelova*, the Tribunal held that although the Statute requires staff members to file their application with the Tribunal within 90 days following the expiry of the period for the management evaluation, if no response to the request for management evaluation was provided, when the Administration replies after the period for management evaluation but before the expiry of the next 90-day period, a new 90-day period to contest the decision before the Tribunal will start to run.

#### ***Burden of proof***

58. In *Finniss* UNDT/2011/060, the Tribunal held that in civil litigation the burden of proving an assertion to the required degree of certainty normally lies on the party bringing the matter or making the allegation; the standard of proof is that of preponderance of the evidence or balance of probabilities.

59. In *Simmons* UNDT/2011/084, *Simmons* UNDT/2011/085, *De Cruze* and *Ibrahim*, the Tribunal held that, when an applicant alleges bias or any other improper motivation against her/him, the onus is on the applicant to provide sufficient evidence to prove the contention.

#### ***Relief***

60. In *Tolstoptatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, among other judgments, the Tribunal held that the purpose of compensation is to place the staff member in the same position s/he would have been in had the Organization complied with its contractual obligations. In *Kozlov & Romadanov*, *Johnson* UNDT/2011/123 and *Johnson* UNDT/2011/124, the Tribunal held that compensation may be awarded for actual pecuniary or economic loss, non-pecuniary damage, procedural violations, stress and moral injury.

61. In *Fröhler* UNDT/2010/135, the Tribunal held that in order to obtain compensation the applicant should establish that the irregularity caused her/him a direct prejudice. In *Tolstoptatov*, *Squassoni* UNDT/2011/070 and *Zhouk* UNDT/2011/102, the Tribunal held that it would not award compensation where no harm had been suffered.

62. In *Lauritzen*, the Tribunal held that moral injury arising from an unlawful decision may be compensated if evidence of the injury suffered is provided; however, moral injury arising from a lawful decision cannot be compensated. In *Obdeijn* UNDT/2011/032 and *Kozlov & Romadanov*, the Tribunal held that to be recompensed for emotional distress or moral injury, the applicant must establish the grounds for her/his claims. In *Cabrera* UNDT/2011/081 and *Johnson* UNDT/2011/123, the Tribunal held that the applicant's demeanour at the hearing may be evidence of emotional stress and injury.

63. In *Tsoneva*, *Vangelova*, *Akyeampong* and *Bofill*, the Tribunal held that apart from the compensation granted in accordance with article 10.5(a) of its Statute, in cases of non-promotion, it will only grant compensation for moral damage if it considers that the applicant would have had a chance of promotion had no irregularity been committed.

64. In *Tolstopiatov, Sprauten* UNDT/2011/094, *De Cruze* and *Kozlov & Romadanov*, the Tribunal discussed various methods of calculation of compensation for loss of chance/opportunity.

65. In *Kamunyi*, the Tribunal held that the remedy of rescission is not appropriate where the unlawfulness relates to procedural failures such as those which occurred in the handling of the request for waiver of immunity. However, the applicant was entitled to compensation under article 10.5(b) for the negative effects of both the breaches and the failures of procedure.

66. In *Applicant* UNDT/2010/148, the Tribunal held that it is more appropriate to express compensation for emotional distress and injury in lump sum figures, not in net base salary, since such damages, unlike actual financial loss, are generally not dependent upon the applicant's salary and grade level. The Tribunal also held that when basic fundamental human rights are at stake, a failure by the Organization to afford adequate consideration and protection of such rights may be an aggravating factor. In *Fayek* UNDT/2010/194, the Tribunal held that in assessing compensation only reasonable assumptions can be allowed, and that a staff member cannot have an unqualified legitimate expectation to work in any organization until her/his retirement age.

67. In order to set the appropriate amount of compensation for material damage in two cases of non-promotion (*Edelenbos* UNDT/2011/036 and *Mezoui* UNDT/2011/098), the Tribunal assessed the difference between the applicants' net take-home pay before promotion and that which they would have received after promotion during the relevant period. The Tribunal also took into account whether or not the non-promotion affected the applicants' pension benefits in view of the applicable regulations and rules of the United Nations Joint Staff Pension Fund.

68. In *Garcia* UNDT/2011/068, the Tribunal held that the lost salary should be subject to interest on the basis that it would have been paid in separate monthly instalments, with interest on each instalment calculated from the date it became due.

69. In *Tolstopiatov* and *Garcia* UNDT/2011/068, the Tribunal held that the applicant party must act reasonably to limit her/his losses and has the burden of proving her/his damages with a reasonable degree of certainty and exactness.

#### ***Formation of contract***

70. In *Garcia* UNDT/2010/191, the Tribunal held that it is not the case that the only document capable of creating legally binding obligations between the Organization and its staff has to be called a "letter of appointment". The Tribunal further held that parties may enter into a binding contract on a particular date with a future date for commencement of duties.

#### ***Privileges and immunities***

71. In *Bekete* UNDT/2010/175 and *Kamunyi*, the Tribunal held that, when the Organization fails to follow correct procedures in cases of arrest and detention of staff members, and when it fails to safeguard applicable privileges and immunities and to protect the interests, standards, and values of the Organization, it will be held responsible for harm, both mental and physical, suffered by the affected staff member.

#### ***Reassignment and transfer***

72. In *Lauritzen, Znamenski, Hunt-Matthes* and *Guimaraes*, the Tribunal recognized that the Secretary-General enjoys a broad discretion with regard to assigning and transferring staff members within departments and offices in the best interests of the Organization. This discretion, however, is not unfettered and is subject to the Tribunal's review. In *Rosenberg* UNDT/2011/045, the Tribunal held that it will not interfere with a genuine organisational restructuring, even though it may have resulted in the loss of employment for an applicant.

73. However, in *Gaskins* UNDT/2010/119, the Tribunal found that the decision to remove a staff member from his position and deprive him of performing essential aspects of his duties in response to a peremptory demand by a third party based on an unjustified grievance against the staff member, and not done in the interests of economy and efficiency, could not be permitted.

74. In *Lauritzen*, the Tribunal found that removing the applicant from her post was a way to put an end to a dysfunctional situation and it is not for the Tribunal to determine whether another measure could have been

taken. However, when an organizational measure affecting a staff member is taken based on the personal circumstances of that staff member, s/he must have the possibility to present observations before the decision is taken.

#### ***Work conditions***

75. In *Edwards* UNDT/2011/022 and *Applicant* UNDT/2011/106, the Tribunal acknowledged the existence of a general principle of law according to which the Administration is bound to provide a safe work environment.

76. In *Leboeuf et al.*, the Tribunal examined in detail the definitions of “scheduled workday” and “hours of work” in order to determine the scope and application of compensation for overtime.

#### ***Performance evaluation***

77. In *Simmons* UNDT/2011/084 and *Simmons* UNDT/2011/085, the Tribunal held that, although the Administration shoulders the ultimate responsibility for implementing and completing the performance evaluation report, including the workplan, staff members also have certain obligations, including preparing a draft workplan.

78. In *Jennings*, the Tribunal held that rebuttal proceedings constitute part of the performance evaluation process and must be completed with maximum dispatch. The rating resulting from the rebuttal process cannot be appealed.

#### ***Retaliation***

79. In *Shkurtaj* UNDT/2010/156, the Tribunal found that the Ethics Office’s determination of whether there is a *prima facie* case of retaliation involves the determination of whether there is an arguable—as distinct from proven—case that the applicant was retaliated against.

#### ***Legal assistance***

80. In *Larkin*, the Tribunal ruled that the duty incumbent on OSLA under staff rule 11.4(d) to grant legal assistance does not go as far as to include an obligation to represent staff members willing to instigate procedures before the Tribunal. OSLA has a duty to provide advice, which entails, first, the duty to examine the issues presented by a potential applicant and, second, the duty to take and communicate a decision in due time as to the further assistance, if any, it intends to provide to the staff member. Apart from the above, OSLA possesses a large margin of discretion to decide whether it undertakes to represent a given client or ceases to do so.

#### ***Status of defence counsel at UN ad hoc tribunals***

81. In *Turner* UNDT/2010/170, the Tribunal held that counsel assigned by the Registrar of the International Criminal Tribunal for Rwanda to represent indigent accused persons before that tribunal were not staff members and did not hold the status of international civil servants.

#### ***Abandonment of proceedings***

82. In *de la Fayette* UNDT/2010/137, having been advised that the applicant had passed away since filing and after having sent a letter to the applicant’s estate with no response, the Tribunal noted the importance of ensuring that only current proceedings be maintained before it and closed the proceedings on the basis of lack of prosecution. In *Li* UNDT/2010/163, the Tribunal dismissed the case for want of prosecution, having found that the applicant had failed to file her application within the time limits granted by the Tribunal and had demonstrated a lack of vigilance and diligence, and that she must be deemed to have abandoned the proceedings.

#### ***Conduct of proceedings***

83. In *Simmons* UNDT/2011/085, *Ibrahim* and *Pandey* UNDT/2011/117, the Tribunal held that it is the responsibility of an applicant to clearly define the issues of her/his case, as well as the contested administrative decision. In *Borg-Oliver* UNDT/2010/155, the Tribunal reiterated its jurisprudence in *Abu-Hawaila*

UNDT/2010/102 that it cannot and should not, except in rare situations, excuse an applicant for the failure of her/his counsel to successfully defend her/his case.

84. In *Morin* UNDT/2011/069, the Tribunal held that the principle of the equality of arms requires that a fair balance exist between parties involved in litigation and that each party to a dispute be able to prepare and present her/his case fully and adequately before the court.

85. In *Squassoni*, the Tribunal held that counsel are required to meet the standard of reasonable diligence when representing their clients. In *Amar* UNDT/2011/040, the Tribunal held that counsel appearing before the Tribunal are bound by ethical rules and should act as officers of the court whose first duty is to guide the Tribunal and to honestly advise her/his clients with a view to achieving the just determination of the case.

86. In *Squassoni*, the Tribunal held that compliance with the Tribunal's orders is mandatory and that the Tribunal may draw adverse inferences from non-compliance with its orders.

## APPENDIX II

### Proceedings of the UNAT

#### Introduction

1. A summary of the major legal pronouncements made by the UNAT in judgments rendered (1 July 2010 to 30 June 2011) 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 Appeals Tribunal, the website of the Appeals Tribunal (<http://un.org/en/oaj/appeals>) should be consulted.

#### Access to the internal justice system

2. In *Gabaldon* (2011-UNAT-120), the Appeals Tribunal recalled that an employment contract of a staff member subject to internal laws of the Organization is not the same as a contract between private parties, and that the issuance of a letter of appointment by the Administration can not be regarded as a mere formality. The issue before the Appeals Tribunal was whether the appellant, who had received an offer of employment, but not a letter of appointment, from the Organization, should be regarded as a staff member and thus should have access to the internal justice system to contest the legality of the Administration's withdrawal of the offer of employment. The Appeals Tribunal held that an offer of employment, though it does not constitute a valid employment contract, may produce legal effects, if all the conditions set forth in the offer of employment were unconditionally accepted and fulfilled by the offeree in good faith. In such a situation the offeree should be regarded as a staff member for the limited purpose of seeking recourse within the internal justice system. The Appeals Tribunal overturned the UNDT's judgment and remanded the case to the UNDT for examination of facts of the case in light of its holding.

#### Production of documents

3. In *Bertucci* (2011-UNAT-121), the Appeals Tribunal stated the principle that the UNDT has the right to order the production of any document relevant for the purposes of the fair and expeditious disposal of its proceedings. If the Administration opposes the UNDT's order to produce a certain document in its possession, it may, with sufficiently specific and justified reasons, request the UNDT to verify the confidentiality of the document in question. Before such verification is completed, the said document may not be transmitted to the other party. If the UNDT considers the confidentiality of the document justified, it must remove the document, or part of it, from the case file. The UNDT may not subsequently use such a document against a party unless the said party has had an opportunity to examine it.

4. In the case at hand, the Appeals Tribunal held that the UNDT judge had sufficient grounds to order the production of the documents withheld by the Administration concerning the selection process that led to the impugned administrative decision. The Appeals Tribunal also held that the objections proffered by the Secretary-General in declining to comply with the UNDT's order to produce were neither specific nor justified.

5. However, the UNDT may not exclude a party from its proceedings if that party refuses to execute the UNDT's order to produce a document, because to do so would run afoul of the principle of respect for the right to a defence and the right to an effective remedy set forth in the Universal Declaration of Human Rights. When a party refuses to execute the UNDT's order to produce a document, the UNDT is entitled to draw appropriate conclusions from the refusal in its final judgment.

#### Interlocutory appeals

6. In *Bertucci* (2010-UNAT-062), the Appeals Tribunal determined that, generally, only appeals against final judgments are receivable. It observed that an interlocutory appeal is receivable exceptionally in cases where the UNDT has clearly exceeded its jurisdiction or competence, citing *Tadonki* (2010-UNAT-005), *Onana* (2010-UNAT-008), and *Kasmani* (2010-UNAT-011). The Appeals Tribunal held that it would not interfere lightly with the broad discretion of the UNDT in the management of cases. Further, one of the goals of the new system of

administration of justice is rendering timely Judgments. Cases before the UNDT could seldom proceed if either party were able to appeal interlocutory decisions.

7. One judge dissented on the grounds that privilege, if claimed, is a threshold issue and must be determined finally before the trial may proceed. To do otherwise could lead to error by the trial judge that would result in a new trial. If the evidence in question is truly privileged, it cannot be ordered to be produced as this would destroy the privilege. Also, if truly privileged, the trial judge would err in drawing an adverse inference against its non-production.

8. In *Wasserstrom* (2010-UNAT-060), the Appeals Tribunal, applying its ruling in *Bertucci* (2010-UNAT-062), rejected as not receivable an interlocutory appeal against the UNDT decision that the determination by the Ethics Office that no retaliation occurred constituted an administrative decision falling within the jurisdiction of the UNDT. The alleged lack of jurisdiction of the UNDT was not clearly established in this case: the question of whether there was an administrative decision required adjudication on the merits of the case and could not be the subject of an interlocutory appeal.

9. The Appeals Tribunal further held in *Wasserstrom* that the appeal against the UNDT's order for production of documents was not receivable because it was interrelated with the alleged lack of jurisdiction. Interlocutory appeals on matters of evidence, procedure, and trial conduct were not receivable.

#### **Anonymous evidence in disciplinary proceedings**

10. In *Liyararachchige* (2010-UNAT-087), the Appeals Tribunal determined that the UNDT erred in law by upholding the decision to summarily dismiss the staff member, which was taken in violation of the requirements of adversarial proceedings and due process. The Tribunal held that, while the use of statements gathered in the course of an investigation from witnesses who remain anonymous throughout the proceedings, including before the Appeals Tribunal, cannot be excluded as a matter of principle from disciplinary matters, a disciplinary measure may not be founded solely on anonymous statements.

#### **Power to award interest and applicable interest rate**

11. In *Warren* (2010-UNAT-059), the Appeals Tribunal found that both the UNDT and the Appeals Tribunal have the power to award interest in the normal course of ordering compensation. Noting the inconsistent approach of the UNDT in several of its judgments, the Appeals Tribunal decided to award interest at the US Prime Rate applicable at the due date of the entitlement, calculated from the due date of the entitlement to the date of payment of the compensation awarded by the UNDT. The Appeals Tribunal further decided that its judgments must be executed within 60 days of the date the judgment is issued to the parties. If the judgment is not executed within 60 days, five per cent must be added to the US Prime Rate from the date of expiry of the 60-day period to the date of payment of compensation.

12. One judge dissented on the ground that the UNDT had no statutory authority to impose interest and therefore exceeded its jurisdiction in awarding interest.

13. In later judgments (*Castelli* (2010-UNAT-082); *Mmata* (2010-UNAT-092); *Ianneli* (2010-UNAT-093), the Appeals Tribunal modified or set aside the UNDT judgments on the issue of interest rate so as to bring them in line with *Warren*.

#### **Payment of, and maximum amount of, compensation**

14. In *Crichlow* (2010-UNAT-035), the Appeals Tribunal noted that the Secretary-General had already paid the damages awarded by the UNDT. By paying the compensation ordered, the Secretary-General accepted the UNDT judgment and his cross-appeal was therefore moot.

15. In *Mmata*, the Appeals Tribunal affirmed the UNDT award of compensation for loss of earnings for seven months from the date of *Mmata*'s separation from service to the date of the UNDT judgment (as an alternative to the order for reinstatement of the staff member) plus an additional amount of two years' net base salary. The Secretary-General maintained that, while the total of these amounts exceeded the compensation limit of two years' net base salary, the UNDT did not particularize any reasons to justify an increased award under article 10.5 (b) of the UNDT Statute. In the opinion of the Appeals Tribunal, article 10.5 (b) of the UNDT Statute

does not require a formulaic articulation of aggravating factors; rather it requires evidence of aggravating factors which warrant higher compensation. In addition to finding that the staff member was unfairly dismissed for serious misconduct, the UNDT found evidence of blatant harassment and an accumulation of aggravating factors that supported an increased award.

**Damages awarded without evidence of economic loss**

16. In *Abboud* (2010-UNAT-100), the Appeals Tribunal noted that the UNDT found that the irregularities did not create any economic loss or actual damage for the appellant. It also noted that the appellant had not requested any damages. Nonetheless, the UNDT awarded him damages. The Appeals Tribunal vacated the award of damages.

17. In *Hastings* (2011-UNAT-109), the Appeals Tribunal reaffirmed the principle that an award for “moral” damages must be supported by specific evidence.