Fifth activity report of the Office of Administration of Justice
1 July to 31 December 2011

Please recycle

CONTENTS

I. INTRODUCTION 4

II. EXECUTIVE SUMMARY 4

III. ACTIVITIES OF THE OFFICE OF THE EXECUTIVE DIRECTOR 5

IV. ACTIVITIES OF THE UNITED NATIONS DISPUTE TRIBUNAL 6

A. COMPOSITION OF THE DISPUTE TRIBUNAL 6
1. Judges of the Dispute Tribunal 6
2. Election of the President 6
3. Plenary meetings 6
B. JUDICIAL STATISTICS 6
1. General activity of the Tribunal 6
2. Cases transferred to the UNDT by the JABs and JDCs 7
3. Cases transferred to the UNDT by the former UN Administrative Tribunal 7
4. New applications received between 1 July and 31 December 2011 7
5. Cases disposed of between 1 July and 31 December 2011 7
6. Number of judgements, orders and hearings 8
7. Cases referred to the Mediation Division 8
8. Cases pending before the UNDT as at 31 December 2011 8
9. Cases by subject-matter 8
10. Legal representation of applicants before the UNDT 9
11. Outcome of disposed cases 10
12. Relief ordered and compensation awarded 10

V. ACTIVITIES OF THE UNITED NATIONS APPEALS TRIBUNAL 11

A. COMPOSITION OF THE APPEALS TRIBUNAL 11
1. Judges of the Appeals Tribunal: 11
2. Election of the President and Vice-Presidents 11
B. JUDICIAL STATISTICS 11
1. General activity of the Appeals Tribunal 11
2. Outcome of disposed cases 12
3. Relief ordered and compensation awarded, modified or set aside 12
4. Legal representation of staff members before the Appeals Tribunal 12

VI. ACTIVITIES OF THE OFFICE OF STAFF LEGAL ASSISTANCE 12

A. INTRODUCTION 12
B. WORKLOAD AND HUMAN RESOURCES 13
C. CHALLENGES AND OBSERVATIONS 13
D. STATISTICS/ACTIVITIES 14
1. Number of cases received in OSLA in the period 1 July to 31 December 2011 14
2. Advice and legal representation to staff appearing before recourse bodies 14
3. Representation before the Dispute Tribunal 14
4. Cases by subject-matter 15

5. Cases by client (Department, Agency, Fund or Programme) 15
6. Cases by gender 16

APPENDIX I: PROCEEDINGS OF THE UNDT 17

APPENDIX II: PROCEEDINGS OF THE UNAT 24

I. Introduction

1. The fifth report of the Office of Administration of Justice (OAJ) outlines the activities of the Office for period 1 July to 31 December 2011.

2. As was the case with our 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 reporting period, 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, particularly in regard to requests for additional resources, and provided additional information on the system of administration of justice to these bodies as requested. In its resolution 66/237, the General Assembly decided, inter alia, to extend the mandates for the ad litem judges and their staff for one year; to allow OSLA to continue to represent staff members; to amend the UNAT statute, extending the deadline for filing appeals of UNDT judgements from 45 to 60 days; to allow for extension by the UNDT of the time limit for completing management evaluations up to 15 days; to convert the NY UNDT regular P-2 post to a P-3 post; to continue the P-3 support account post for OSLA in Nairobi; to provide UNAT with an additional Legal Officer at the P-4 level; and, to provide additional resources to be used for travel, holding a third UNAT session in 2012 and 2013 and communications. The Assembly also adopted a Code of conduct for UNDT and UNAT judges, and asked for a number of reports for the 67th session.

4. OAJ continued to make improvements to the OAJ website and the new web-based case management system, which became operational on 6 July 2011. The OAJ supported the Internal Justice Council (IJC) in its work, including the selection process for various judicial vacancies expected to occur in the course of 2012.

5. To provide a general overview of the 30 months of operation of the new system of administration of justice (1 July 2009 to 31 December 2011), the UNDT received a total of 870 cases (including 312 cases transferred from the old system) and disposed of 601 cases, rendered 532 judgements, issued 1,606 orders and held 682 hearings; UNAT received a total of 284 cases (including cases transferred from the old system), rendered 190 judgements, issued 74 orders and disposed of 199 cases; and, OSLA received 1,902 cases, 1,224 of which it has closed or resolved.

6. During the period 1 July to 31 December 2011, the UNDT received a total of 151 new cases, including three remanded cases. It disposed of 123 cases, including two from the former Joint Appeals Boards and Joint Disciplinary Committees (JABs and JDCs), three remanded cases, and 23 from the former UN Administrative Tribunal. It rendered 97 judgements, issued 331 orders and held 114 hearings. As at 31 December 2011, 269 cases were pending, including 30 cases from the old system, including one remanded case.

7. During the same period, UNAT received 56 new cases, including three against UNRWA; one appeal of a decision of the International Civil Aviation Organization (ICAO), and one appeal of a decision of the International Maritime Organization (IMO); 51 cases appealing judgements of the UNDT (31 by staff members and 20 by the Administration); and, six requests for revision of judgement. It rendered 62 judgements and disposed of 67 cases. In addition, the Appeals Tribunal issued 20 orders. As at 31 December 2011, 87 cases were pending.

8. Between 1 July and 31 December 2011, OSLA received 458 new cases and closed 276 cases. As at 31 December 2011, OSLA had a total of 764 active cases.

9. Attached to the report (Appendix I) is a summary of main legal pronouncements made in judgements issued by the UNDT during the reporting period. Also attached (Appendix II) is a summary of main legal pronouncements made in judgements issued by UNAT at its 2011 summer and fall sessions.

III. Activities of the Office of the Executive Director

10. During the reporting period, the Office of the Executive Director closely monitored the discussions on the item "Administration of justice at the United Nations" in the Fifth and Sixth Committees of the General Assembly, particularly regarding to requests for additional resources. The Office of the Executive Director further supported the work of these bodies in their consideration of the item, providing briefings and additional information on the report of the Secretary-General (A/66/275) and the functioning of the system of administration of justice. Issues discussed by the Fifth and Sixth Committees included the amendments of the Rules of Procedure of the UNDT and UNAT proposed by the Judges, the Code of conduct for the judges and mechanism to address complaints against judges, proposals for staff-funded mechanisms to support OSLA and for recourse mechanisms for non-staff personnel, systemic issues relating to the case-law of the Tribunals, as well as the resources requirements for the functioning of the system of administration of justice.

11. The OAJ website was launched on 28 June 2010 in all six languages and provides information about the internal justice system at the United Nations. It is easy to navigate and provides practical step-by-step information. In the period 1 July to 31 December 2011, the OAJ website has continuously been updated to provide the most up-to-date information and to respond the various information needs expressed by the user community. During the period 1 July to 31 December 2011, the OAJ website was visited on average 8,000 times per month, compared to an average of 7,000 times per month as reported during the previous activity report. This constitutes an increase of approx 14%.

12. The Office reached another milestone on 6 July 2011, when it launched a fully web-based court case management system (CCMS), as part of its efforts to modernize operations, encourage innovation, build synergy and find further efficiencies in operations.

13. The CCMS comprises an integrated web interface (the eFiling portal) that is available through the OAJ website. It encourages staff members at any duty station to file their submissions electronically to the UNDT and UNAT and allows parties to monitor their cases electronically, regardless of their geographical location. Approximately 800 cases are currently managed through this new system. CCMS also includes an internal case-management tool for the Registries of the UNDT and the UNAT to centralize the management of cases before the Tribunals as well as a separate case management tool for OSLA.

14. During the reporting period, the Office conducted several training sessions with the various stakeholders, including Registry staff, offices representing the Secretary-General, OSLA and private attorneys representing staff members. Supporting the users of this new system, especially the external eFilers, has been of highest priority and all requests for assistance are responded to as expeditiously as possible. Continuous improvements to the system are rolled out on a regular basis and many are planned in the near future.

15. The Office of the Executive Director also provided support to the IJC in its work. During the reporting period, the IJC instituted a full public process, consistent with paragraph 45 of General Assembly resolution 65/251, to identify suitable candidates for judicial vacancies at the UNDT and UNAT, which will occur in the course of 2012. It should be recalled in this regard that, pursuant to article 4.4 of the UNDT Statute and article 3.4 of the UNAT Statute, two of the UNDT judges (one full-time judge and one half-time judge) and three of the UNAT judges, who were initially appointed effective 1 July 2009, were to serve for a term of only three years, with the possibility for reappointment for a further non-renewable term of seven years. Additionally, the General Assembly will be called upon to fill one or more *ad litem* positions. The Office supported the IJC in publishing vacancy announcements and inviting suitable candidates for written tests and interviews, in The Hague in September 2011.

16. At the 66th session, the General Assembly also considered the IJC's draft "Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal" (A/65/86). The Code of conduct was adopted by the General Assembly in its resolution (66/106).

IV. Activities of the United Nations Dispute Tribunal

A. Composition of the Dispute Tribunal

1. Judges of the Dispute Tribunal

17. 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

18. 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. This vacancy was not filled during the reporting period.

2. Election of the President

19. 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

20. During the reporting period, the Judges of the Tribunal did not hold a plenary meeting.

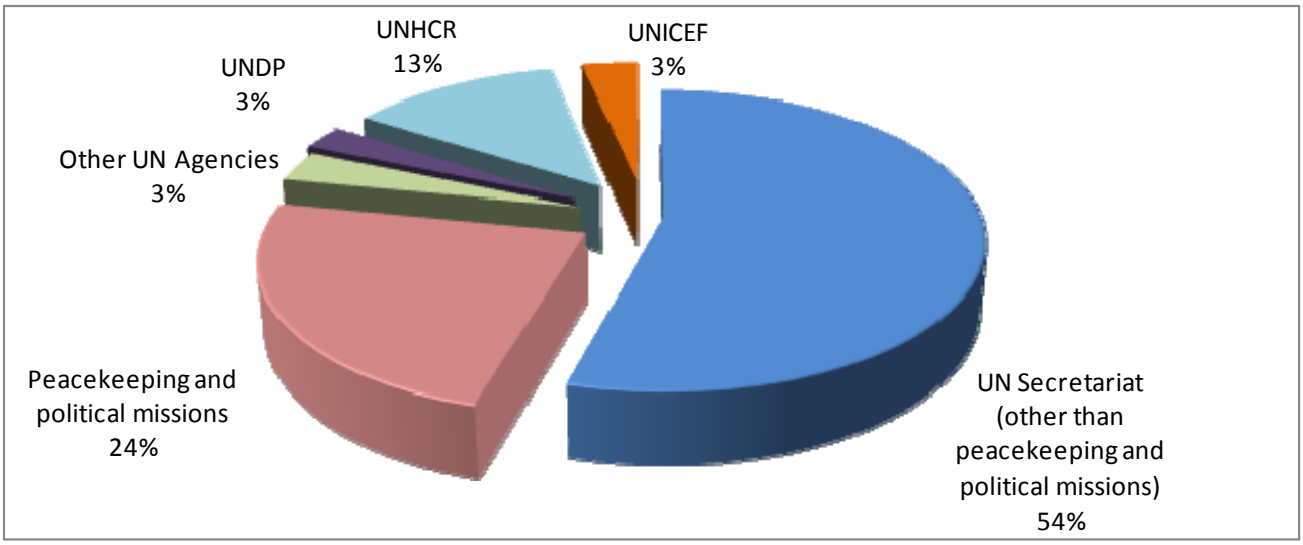
B. Judicial statistics

1. General activity of the Tribunal

21. At the beginning of the reporting period, as at 1 July 2011, the UNDT had 247 pending cases. During the period 1 July to 31 December 2011, the UNDT received a total of 151 new cases (including three cases remanded by the Appeals Tribunal and disposed of 123 cases, including three remanded cases. As at 31 December 2011, 269 cases were pending, including 30 cases from the old system (including one remanded case).

22. Of the 151 cases received during the reporting period, 82 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; 36 cases originated from peacekeeping and political missions; and 33 cases from UN agencies, including UNHCR, UNDP, and UNICEF.

Chart 1 Distribution of registered cases by clients (1 July-31 December 2011)



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

23. During the reporting period, two of the cases inherited from the JABs and JDCs in Geneva, Nairobi, New York and Vienna had been disposed of (including one remanded case): one (remanded) case in Geneva, none in Nairobi and one in New York. Six such cases, including one remanded case, are still pending: one in Geneva, four in Nairobi (including one remanded case) and one in New York.

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

24. During the same period, 21 of the cases transferred from the former UN Administrative Tribunal were disposed of: five in Geneva, eight in Nairobi and eight in New York. A total of 24 of such cases remain pending: two in Geneva, 13 in Nairobi and nine in New York.

4. New applications received between 1 July and 31 December 2011

25. Between 1 July and 31 December 2011, the UNDT received a total of 151 new applications, including three remanded cases. Each month, on average, 25 applications were filed with the UNDT. Of the new applications, 58 were received in Geneva (including two remanded cases), 57 in Nairobi and 36 in New York (including one remanded case, but not including cases registered in the reporting period and transferred to the Geneva Registry). As at 31 December 2011, 239 new cases (including one remanded case) are pending: 43 in Geneva (including one remanded case), 94 in Nairobi (including one remanded case) and 102 in New York (including one remanded case).

5. Cases disposed of between 1 July and 31 December 2011

26. The UNDT disposed of a total of 123 cases in the reporting period, including three remanded cases. The Geneva Registry disposed of 61 cases (including three remanded cases), the Nairobi Registry of 32 and the New York Registry of 30 cases (not including five cases registered prior to 1 July 2011 and transferred to the Geneva Registry in the reporting period)[1]. On average, the three Registries disposed of approximately 20 cases per month.

[1] As there was no ad litem judge in New York during the reporting period, the half-time judges served consecutive terms there for most of the period.

6. Number of judgements, orders and hearings

27. During the period 1 July to 31 December 2011, the UNDT issued 97 judgements on both the merits of cases and interlocutory matters. A total of 331 orders were issued and 114 hearings were held by the UNDT. Geneva rendered 40 judgements, issued 117 orders and held 18 hearings; Nairobi rendered 27 judgements, issued 79 orders and held 60 hearings; and, New York rendered 30 judgements, issued 135 orders and held 36 hearings.

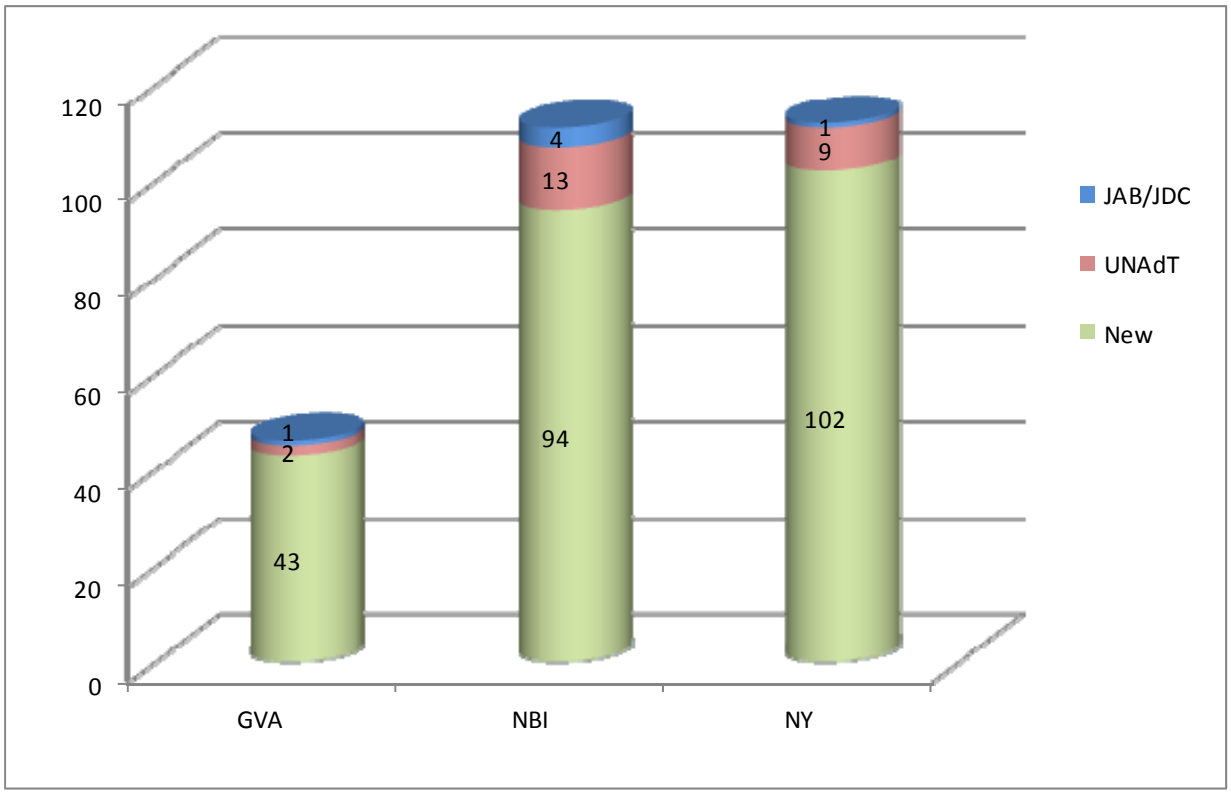
7. Cases referred to the Mediation Division

28. During the period covered by this report, there were four ongoing mediation cases previously referred by the UNDT to the Mediation Division in the Office of the Ombudsman. The UNDT identified two additional cases suitable for mediation and referred them. Of these, four cases were successfully mediated and two are still ongoing.

8. Cases pending before the UNDT as at 31 December 2011

29. As at 31 December 2011, the Dispute Tribunal had 269 cases pending, 239 of them being new cases (including three remanded cases), six cases transferred by the former JABs and JDCs (including one remanded case) and 24 cases transferred by the former Administrative Tribunal. Chart 2 below shows that, as at 31 December 2011, 46 cases were pending in the Geneva Registry (including one remanded case), 111 cases were pending in the Nairobi Registry (including two remanded cases) and 112 cases were pending in the New York Registry (including one remanded case).

Chart 2 Cases pending before the Dispute Tribunal as at 31 December 2011

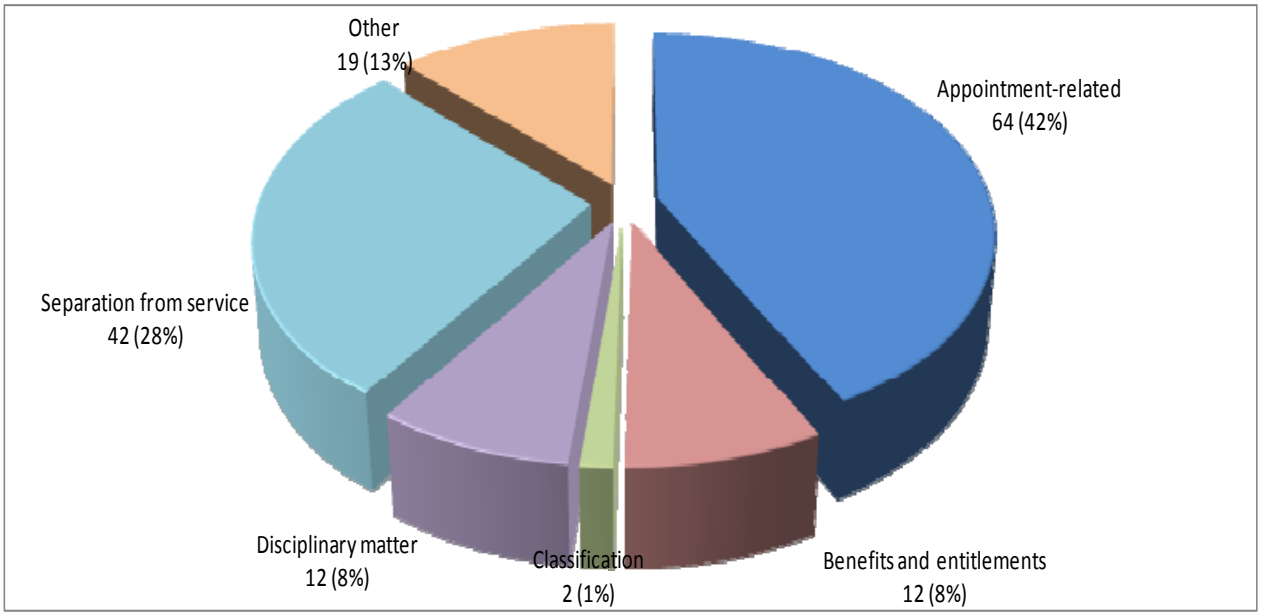


9. Cases by subject-matter

30. The nature of cases before the UNDT received during the reporting period fall into six main categories: (1) appointment-related matters (non-selection, non-promotion and other appointment-related matters): **64 cases**, (2) benefits and entitlements: **12 cases**, (3) classification: **two cases**, (4) disciplinary matters: **12 cases**, (5)

separation from service (non-renewal and other separation matters): **42 cases**, and (6) other: **19 cases**. The Chart below shows the number of cases registered between 1 July and 31 December 2011 by subject-matter for the three Registries.

Chart 3 Cases registered between 1 July and 31 December 2011 by subject-matter (combined data for the three Registries)

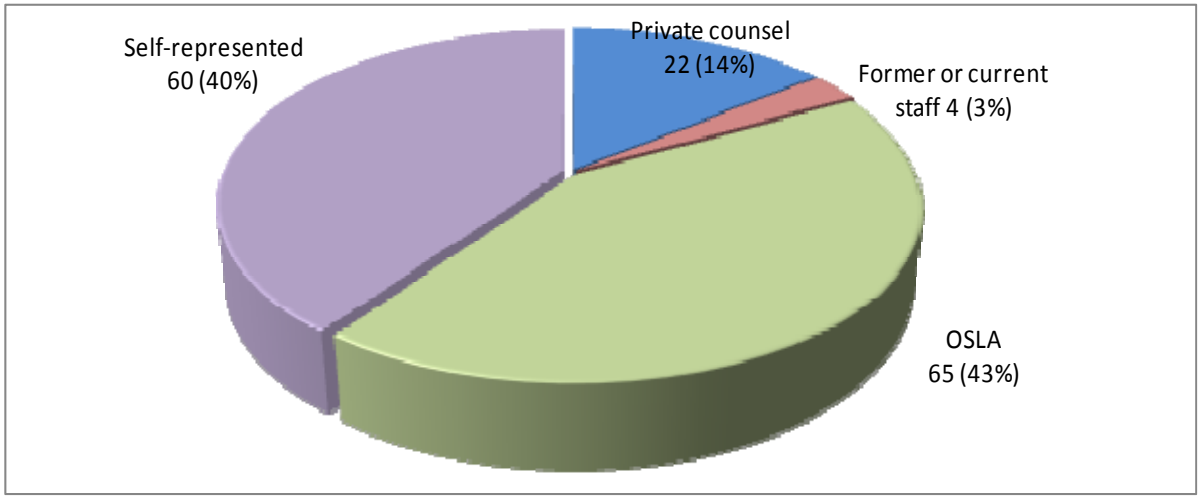


10. Legal representation of applicants before the UNDT

31. During the period covered by this report, for the 151 newly received cases, OSLA provided legal assistance in 65[2] of new cases before the UNDT, 22 staff members were represented by private counsel, four staff members were represented by volunteers who were either current or former staff members of the Organization, and 60 staff members represented themselves (see Chart 4).

[2] OSLA also counts cases in which is provides advice and assistance as cases in which it represents UINDT applicants. Thus, OSLA's number is higher than that provided by the UNDT. (See paragraph 54, infra)

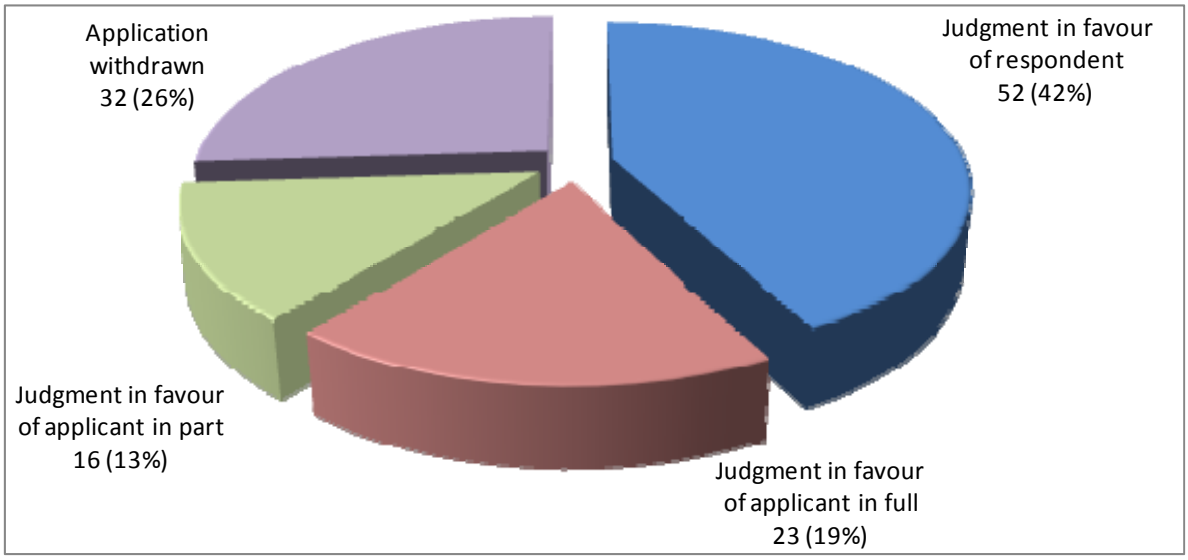
Chart 4 Legal representation of applicants (combined data for the three Registries)



11. Outcome of disposed cases

32. During the period covered by this report, the UNDT disposed of 123 cases. Of these cases, 52 judgements were in favour of the respondent (i.e., application rejected in full), 23 judgements were in favour of the applicant in full and 16 judgements were in favour of the applicant in part (i.e., some claims on liability granted). A total of 32 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

33. During the period covered by this report, 39 judgements were rendered in favour of the applicant either in full or in part. In 12 cases, only financial compensation was ordered. In eight cases, both financial compensation and specific performance were ordered. Specific performance only was ordered in five cases, and in one case, no compensation was ordered. In addition, suspension of action was granted in 13 cases.

V. Activities of the United Nations Appeals Tribunal

A. Composition of the Appeals Tribunal

1. Judges of the Appeals Tribunal:

34. 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)

2. Election of the President and Vice-Presidents

35. In July 2011, 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 Appeals Tribunal

36. This report includes statistics from the Tribunal's 2011 summer session (27 June to 8 July) and from its 2011 fall session (10 to 21 October). At these two sessions, the Appeals 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 (UNJSPF) (see article 2.9 of the UNAT Statute); and, on appeals against decisions from entities that concluded a special agreement with the Secretary-General of the United Nations under article 2.10 of its Statute.[3]

37. During the 30 months of its operation (1 July 2009 to 31 December 2011), UNAT received a total of 284 cases (an average of 9.5 cases a month), rendered 190 judgements and disposed of 199 cases. It issued 74 orders.[4]

38. During the reporting period, the Appeals Tribunal received 56 new cases, rendered 62 judgements (61 judgements in-session and one judgement off-session) and disposed of 67 cases. In addition, the Appeals Tribunal issued 20 orders.

39. The 56 new cases included three appeals filed by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) staff members of decisions rendered by the UNRWA Dispute Tribunal, one appeal of a decision of ICAO, and one appeal of a decision of IMO. They further included 51 appeals against judgements of the Dispute Tribunal whereof 31 were filed by staff members and 20 on behalf of the Secretary-General.

[3] To date, seven such entities have concluded special agreements with the UN Secretary-General accepting the competence of the Appeals Tribunal: ICAO, IMO, UNRWA, the International Seabed Authority, the International Tribunal for the Law of the Sea, UNJSPF and the International Court of Justice.

[4] The UNAT adopted the practice of issuing orders effective 1 June 2010.

2. Outcome of disposed cases

40. During the period covered by this report, the Appeals Tribunal issued 62 judgements and disposed of 67 cases.

41. Four judgements were rendered on appeals of decisions taken by the Standing Committee, acting on behalf of the Pension Board. In three of these judgements, the Appeals Tribunal upheld the impugned decisions. In one judgement, the Appeals Tribunal overturned the decision of the Pension Board.

42. Two judgements were rendered on appeals filed by UNRWA staff members against decisions by the UNRWA Commissioner-General. The Appeals Tribunal affirmed the contested decision in one case and set aside the contested decision in the other case.

43. One judgement was rendered on an appeal filed by a former ICAO staff member. The appeal was dismissed for want of subject-matter jurisdiction.

44. As for appeals against UNDT judgements, 49 judgements were rendered, disposing of 39 appeals filed by staff members and 15 appeals filed on behalf of the Secretary-General. (Four appeals filed by two staff members, and two appeals filed on behalf of the Secretary-General were consolidated, resulting in three judgements. In addition, four appeals filed by both parties against two UNDT judgements were consolidated into two cases for review, resulting in two judgements.) In addition, one cross-appeal was filed by a staff member, which was considered by the Appeals Tribunal in the judgement disposing of the respective appeal. Of the 39 appeals filed by staff members, 34 were rejected, two were entertained in full or in part, and three cases were remanded to the UNDT. Of the 15 appeals filed by the Secretary-General, eleven appeals were allowed in full or in part, and four were rejected.

45. In addition, the Appeals Tribunal rendered four judgements on requests for revision, which it rejected. It also rendered two judgements on requests for interpretation, which it both allowed, one in full and one in part.

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

46. *UNDT cases*

In one case, the UNDT's order for compensation was annulled and in four cases, the Appeals Tribunal reduced the compensation awarded by the UNDT. In two cases, the Appeals Tribunal awarded compensation. In three cases, the Appeals Tribunal reversed the UNDT's judgement rescinding the impugned decision of non-promotion and awarding compensation as an alternative to the rescission of the non-promotion decisions.

47. *UNRWA cases*

The Appeals Tribunal ordered payment of compensation in one case.

48. *UNJSPB cases*

The Appeals Tribunal ordered payment of a widow's benefit in one case.

4. Legal representation of staff members before the Appeals Tribunal

49. During the period covered by this report, OSLA provided legal assistance in 17 cases before the Appeals Tribunal.

VI. Activities of the Office of Staff Legal Assistance

A. Introduction

50. OSLA's role in providing legal advice and representation to staff in the formal litigation process is mandated in the constitutive documents of the internal justice system.[5] In this context, the report of the Secretary-

[5] Article 12.1 (representation) of the Rules of Procedure (ROP) of the UNDT which provides: "A party may present his or her case to the Dispute Tribunal in person, or may designate counsel from … [OSLA] or counsel authorised to practice law in a national jurisdiction. Article 13.1 of the UNAT ROP employs similar wording.

General (A/66/275) noted the successful handling of a high volume of requests for assistance from staff around the work with a small number of legal officers and limited administrative support and in its report (A/66/158) the IJC has highlighted that requests by staff with meritorious claims greatly exceeds the capacity of OSLA to deal with them which remains an ongoing challenge.

51. Beyond formal litigation OSLA continues to play an important role in encouraging alternative dispute resolution in every case it handles and as the internal justice system matures and developments this is becoming a more prominent activity for the Office. The Office has a close working relationship with the informal dispute mechanisms including the Office of the Ombudsman and Mediation Division, and OSLA legal counsel regularly assist individual staff clients in mediation proceedings. In addition, OSLA legal counsel work with senior managers and administration personnel to settle cases and in so doing avoid the related time, expense, and stress of pursuing court proceedings. During the reporting period there has a marked increase in the number clients assisted in this capacity.

B. Workload and human resources

52. During the first 30 months of operation (1 July 2009 to 31 December 2011), OSLA registered 1,902 cases, including 346 cases transferred from the former Panel of Counsel and closed or resolved 1,224 cases. During the current reporting period (1 July to 31 December 2011), OSLA received 458 new cases and closed or resolved 362 cases. As at 31 December 2011, OSLA had 678 pending cases.

53. 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 the UNJSPF and ABCC), assisting staff members in informal dispute resolution, or otherwise providing legal assistance, including summary advice to staff members and their volunteer representatives.

54. 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 OSLA office in Addis Ababa, and in August 2011 a full-time P-3 Legal Officer was appointed in Beirut. In June 2011, a second full-time Legal Officer was appointed to the office in Nairobi under the support account for peacekeeping operations[6]. In its resolution 66/237, the General Assembly continued the P-3 position in Nairobi funded under the support account for the period of 1 January to 30 June 2012.

55. During the reporting period OSLA continues to benefit from a continuing arrangement with UNHCR which has provided a legal officer on loan to the OSLA Geneva Office during the reporting period. The High Commissioner's Office generously agreed to continue this arrangement and a new legal officer to OSLA began his assignment on 1 December 2011 after the former officer returned to UNHCR in October. OSLA also continues to benefit from *pro bono* legal assistance in a limited number of cases.

56. During the current reporting period, OSLA continued to benefit from the assistance of handful of counsel who are either retired or current staff members or lawyers working in other parts of the UN system. OSLA benefits from the ongoing assistance of legal interns and volunteers, both in New York and its overseas offices.

C. Challenges and observations

57. 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 internal justice system, has regrettably not received sufficient resources to assist the Office, even on a temporary basis. To date, there have only been a handful of donations from OSLA's clients and UN staff unions and as a consequence the current balance of the Fund is nominal.

58. Anticipated funds to conduct a training course for OSLA staff in 2011 did not become available and, consequently, it has not been possible to hold an in-person meeting of OSLA's professional and general staff from all the duty stations in 2011. The lack of available funds and support to permit OSLA to increase its human resources, as well as engage in training and dissemination activities, is a notable limitation.

[6] A/65/251.

D. Statistics/Activities

1. Number of cases received in OSLA in the period 1 July to 31 December 2011

52. As at 30 June 2011, OSLA had 582 pending cases. From 1 July 2011 to 31 December 2011 458 new cases were brought by staff members (including former staff members or affected dependants of staff members) to OSLA. During the reporting period, 362 cases were closed or resolved, bringing the number of cases pending before OSLA as at 31 December 2011 to 678.

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

53. The table below provides further details of the 458 new OSLA cases for the current reporting period (1 July to 31 December 2011), including a breakdown of formal cases before each of them main recourse bodies, other recourse bodies or where summary advice was provided.

54. 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. [7]

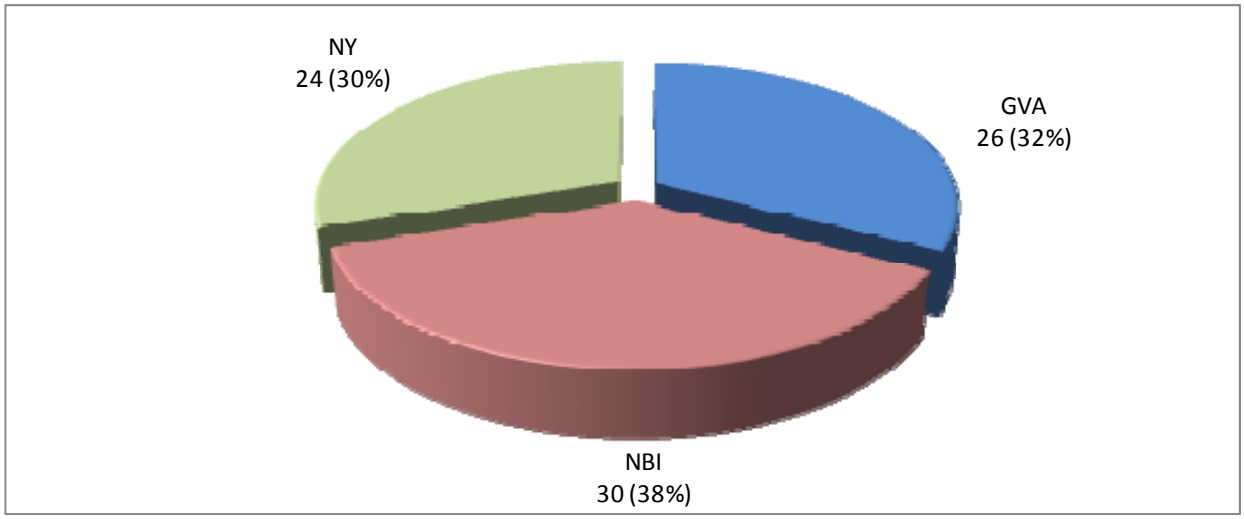
Forum:	New cases
Disciplinary Cases	37
Management Evaluation	69
UN Dispute Tribunal	80
UN Appeals Tribunal	17
Other	1
Summary legal advice	254
Total	**458**

3. Representation before the Dispute Tribunal

55. Chart 6, below, shows a breakdown of new OSLA cases registered in the current reporting period (1 July 2011 to 31 December 2011) before the UNDT by venue.

[7] OSLA also counts cases in which is provides advice and assistance as cases in which it represents UINDT applicants. Thus, OSLA's number is higher than that provided by the UNDT. (See paragraph 33, supra)

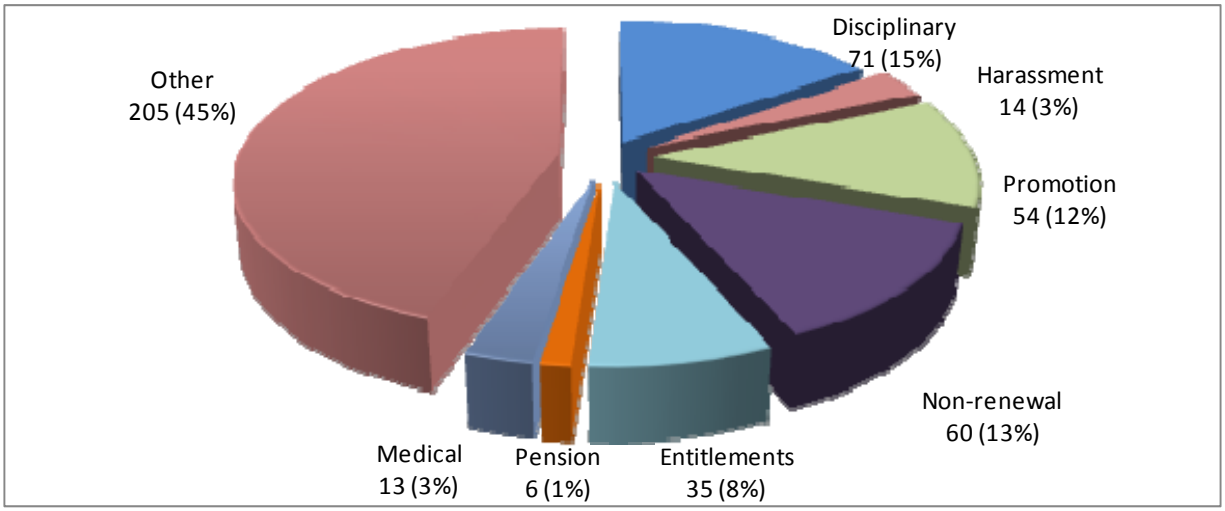
Chart 6 OSLA new cases before UN Dispute Tribunal by venue (Geneva, Nairobi and New York)



4. Cases by subject-matter

56. Chart 7, below, provides an overview of the new OSLA cases registered during the period 1 July to 31 December 2011 by subject matter.

Chart 7 New cases by subject matter for the period 1 July to 31 December 2011



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

57. 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 to 31 December 2011, as well as cases by duty station.

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

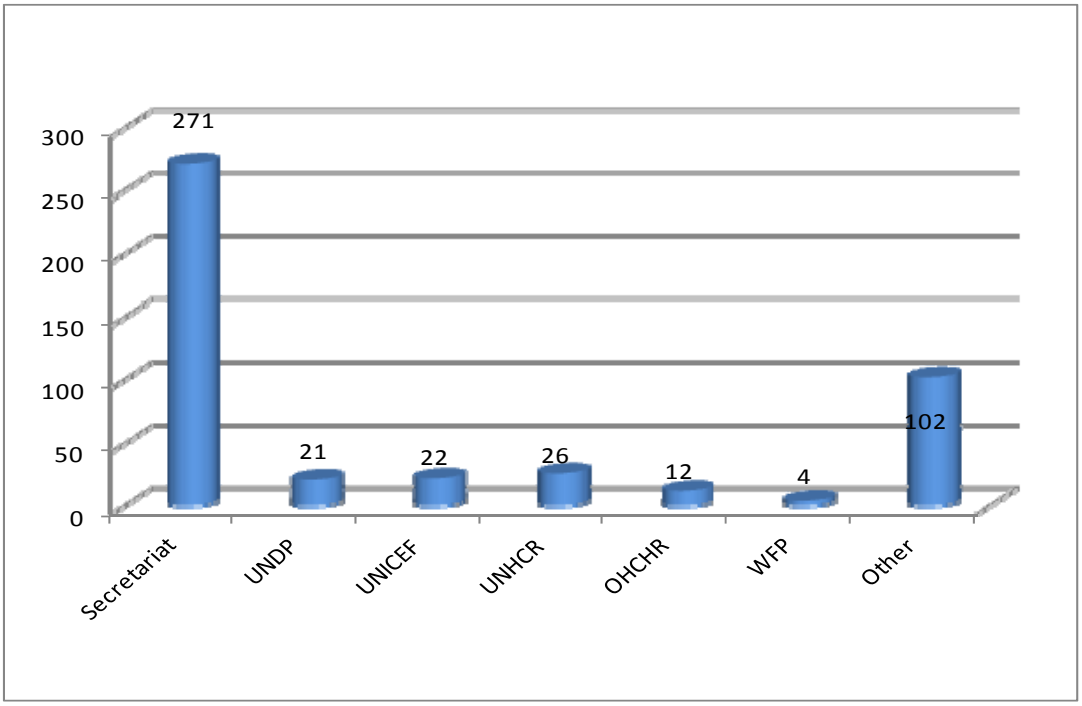
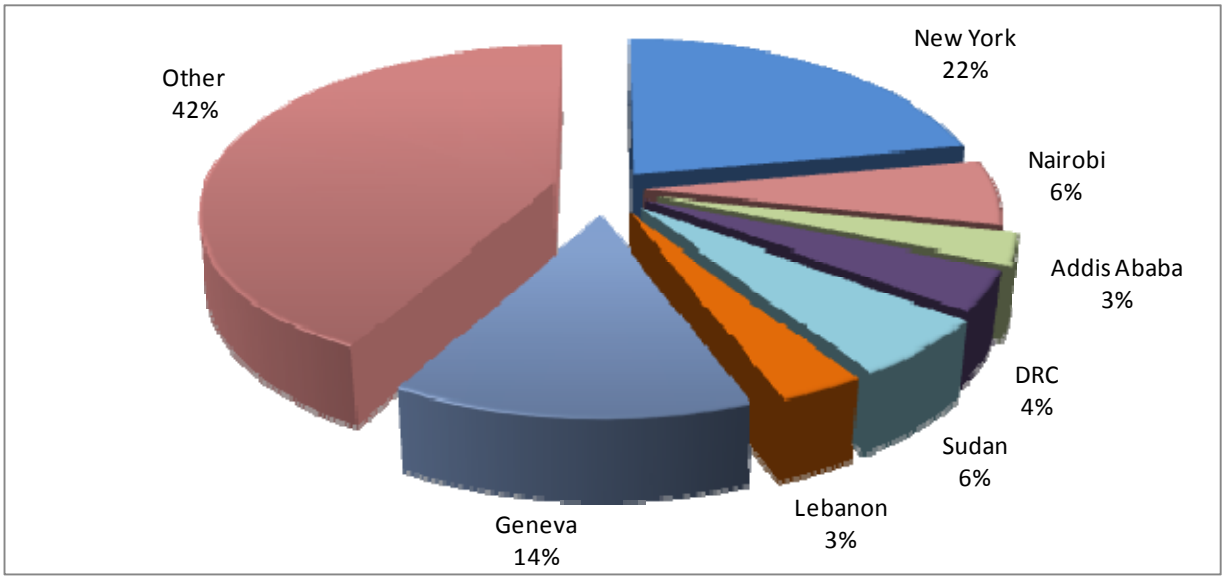


Chart 9 Cases by duty station (arranged according to jurisdiction)



6. Cases by gender

58. Of the 458 new cases, 293 were brought by male staff members and 165 by female staff members.

APPENDIX I: PROCEEDINGS OF THE UNDT

Introduction

1. A summary of major legal pronouncements made by the UNDT in judgements rendered from 1 July to 31 December 2011 is provided below. The summaries are not authoritative and the judgements cited below are not comprehensive. For a complete set of UNDT judgements issued during the period covered by this report, please consult the OAJ website (http://un.org/en/oaj/dispute). It should also be borne in mind that, as UNDT judgements may be appealed to UNAT by either party, the findings made by the UNDT in a number of the judgements 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.

Investigative matters and disciplinary and administrative measures

2. In *Mushema* UNDT/2011/162 and *Mwamsaku* UNDT/2011/163, the Applicants were separated from service following disciplinary proceedings in which they were found guilty of "gross negligence" for failing to notice that a large amount of vegetable oil had been stolen from a World Food Programme warehouse. The Tribunal found that the facts alleged by the Respondent had been established but that these facts did not amount to misconduct within the meaning of former staff rule 110.3, and that the Applicants had not been negligent in the performance of their duties. The Tribunal found that a reasonable person in the Applicants' position would not have been able to identify the semi-empty/empty cartons in the performance of his routine daily duties, and if the Organization itself fails to appreciate a risk, it is unfair to condemn staff members when they fail to appreciate the same risk.

3. In *Choi* UNDT/2011/181, the Tribunal held that investigators are not required by the rules applicable to disciplinary matters to allow the subject of an investigation to cross-examine a complainant during the investigation. It further found that the Secretary-General erred in relying, in the decision to dismiss the applicant, on an administrative issuance that was not applicable at the time of the misconduct.

4. In *Rasool* UNDT/2011/207, the Tribunal held that the Administration was required to provide the Applicant with the investigation report, as well as all documentary evidence of those charges, including documents and testimonies obtained, and that its failure to do so violated the Applicant's due process rights. It was not for the Administration to decide which documents warranted provision and which did not. Also in *Rasool*, the Tribunal found that when the imposition of a disciplinary measure is tainted by a procedural flaw, the Tribunal must determine which consequences to draw from such flaw.

5. In *Abubakr* UNDT/2011/219, the Tribunal held that the Panel on Discrimination and other Grievances, which was the body mandated to investigate the Applicant's complaint of harassment and discrimination, was under an obligation to act expeditiously in bringing the Applicant's case to conclusion and issue its final report. The Panel's failure to complete its work on a timely basis was in breach of the Applicant's contract.

Non-selection and non-promotion

6. In *Muratore* UNDT/2011/129, the Tribunal held that, given the large discretion of the Administration in selection matters, the review of such decisions by the Tribunal is limited to abuse of power, procedural flaws, errors of fact and manifest errors of judgment. In *Ljungdell* UNDT/2011/208, the Tribunal held that it is for the Administration to determine the suitability of each candidate and the Tribunal should not substitute its judgment to that of the Secretary-General in the assessment of a candidate's suitability for a given post. Similarly, in *Gordon* UNDT/2011/173 and *de Saint Robert* UNDT/2011/175, the Tribunal found that in reviewing selection decisions, it is not for the Tribunal to substitute its own assessment for that of the selection panel, except where errors of fact have been committed.

7. The Tribunal stated in *Douaji* UNDT/2011/160 that a promise of priority consideration must be understood as giving priority only over other equally qualified candidates. When other candidates exist whose qualifications are superior, the Administration is by no means bound to grant the post to the candidate enjoying priority consideration.

Benefits and entitlements

8. In *Johnson* UNDT/2011/144, the Tribunal held that in the Organization, as in most national systems, only the deliberative assembly may set the amount of taxes. While the executive power is responsible for setting procedural rules applicable to the collecting of taxes, it is not for that power to take decisions which modify the amount set by the assembly. Accordingly, the Tribunal found that the Controller had no authority to add to staff regulation 3.3 and administrative instruction ST/AI/1998/1 by stating in ST/IC/2010/10 that foreign tax credits ought to be applied to reduce a staff members' total income tax liability. In so providing, ST/IC/2010/10 contravened the principle of equal treatment of staff, which was recognized by the General Assembly in both resolution 13(I) and staff regulation 3.3.

Separation from service

9. In *Mistral Al-Kidwa* UNDT/2011/199, the Tribunal found that the onus is on the Respondent to show that the Organization acted in accordance with its obligations toward the Applicant as a permanent appointee on an abolished post, and to demonstrate what good faith steps it took to assist the Applicant with finding alternative employment.

Suspension of action

Prima facie unlawfulness

10. In *Villamoran* UNDT/2011/126, the Tribunal held 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.

Urgency

11. In *Dougherty* UNDT/2011/133, *Jitsamruay* UNDT/2011/206 and *Evangelista* UNDT/2011/212, the Tribunal held that the requirement of particular urgency will not be satisfied if the urgency was created or caused by the Applicant. The Applicant must come to the Tribunal at the first available opportunity, taking the particular circumstances of her or his case into account. The onus is on the applicant to demonstrate the particular urgency of the case and the timeliness of her or his actions.

Irreparable damage

12. In *Evangelista* UNDT/2011/212, the Tribunal held that mere financial loss is generally not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage. For an application to be successful, there must be at least an averment of irreparable harm to the applicant.

Implementation

13. In *Osmanli* UNDT/2011/190, the Tribunal stated that suspension of action is only possible regarding decisions which have not yet been implemented. For a selection decision to be implemented, an employment offer from the Organization and its unconditional acceptance by the selected candidate are, at least, required.

Urgency, irreparable damage and implementation

14. In *Slade* UNDT/2011/136, the Tribunal rejected the Application for suspension of action for not having satisfied the three conditions required under the Statute and Article 13 of the Tribunal's Rules of Procedure, while underscoring the fact that the grant of a suspension of action is not a "one size fits all" procedure. Whilst the present Application posed far-reaching questions that needed to be decided on the merits, it did not merit the grant of a suspension of action.

Decision to impose a break in service

15. In *Omer* UNDT/2011/188, *Garcia* UNDT/2011/189, and *Neskorozhana* UNDT/2011/196, the Tribunal held that the decision to impose a requirement of a break in service between appointments had continuing legal effect on the rights of the affected staff member and is therefore capable of being suspended.

Other matters

Receivability

16. In *Lorand* UNDT/2011/157, the Tribunal held that where the Administration reverses a decision before an application against that decision is filed with the Tribunal, such application must be rejected as irreceivable. In *Gehr* UNDT/2011/211, it held that in cases where the Administration reverses the contested decision during the proceedings before the Tribunal, the application may become moot.

17. In *Applicant* UNDT/2011/213, the Tribunal held that it clearly followed from staff rule 11.2(b) that the exemption from the requirement of requesting the management evaluation of a disciplinary measure only applied to disciplinary measures imposed following the completion of a disciplinary process.

Confirmative decisions

18. In *Muratore* UNDT/2011/125, *Cremades* UNDT/2011/180, *Rahman* UNDT/2011/183 and *Payman* UNDT/2011/193, the Tribunal held that a decision that merely confirms a previous one does not reopen the time limit for appeal.

Interlocutory/preparatory decisions

19. In *Payman* UNDT/2011/193, the Tribunal stated that when interlocutory decisions lead to an administrative decision, these interlocutory decisions may be challenged only in the context of an appeal against the final administrative decision, but cannot be, alone, the subject of an appeal to the Tribunal.

20. Similarly, in *Gehr* UNDT/2011/211, the Tribunal stated that it would be inconsistent with its standard of review for it to interfere with the review of a performance appraisal before a final rating resulting from the rebuttal process has been given.

Formation of contract

21. The Tribunal found in *Gabaldón* UNDT/2011/132 that, although the contract by which an individual acquires staff member status can only be concluded validly on the date at which an official of the Organization signs the staff member's letter of appointment, this does not mean that an offer of employment never produces any legal effects.

22. In *Philippi* UNDT/2011/210, the Tribunal held that the terms and conditions of employment of the staff member are not limited to those set out in writing. They may be expressed or implied, and may be gathered from correspondence and surrounding facts and circumstances.

Frustration of contract

23. The Tribunal further held in *Gabaldón* UNDT/2011/132 that, in employment law, if a contract of employment is frustrated by a supervening event, both parties are discharged from further performance of it. A frustrating event is one that is unforeseen or not in the direct control of either party. It so alters the nature of the contract that the continued employment of the employee would be radically different from what was contemplated at the time the contract was entered into. It would therefore be unjust to hold the parties to its original terms. Where a putative employee becomes ill after the agreement to employ has been concluded, the illness must be of sufficiently long lasting seriousness to amount to frustration.

Conversion to permanent appointment

24. In *Corbett* UNDT/2011/195, the Tribunal found that although the decision to grant or deny permanent appointment is a discretionary decision, it is subject to certain requirements, including consideration of whether

that determination was reasonably open to the Administration to make. Whilst acknowledging that it is for a staff member's managers and not for the Tribunal to make decisions as to the competence of the staff member and her or his suitability for a permanent appointment, the Tribunal may, in appropriate cases, call into question that assessment if it appears to lack essential components of rational decision-making or appears to have been arrived at in circumstances that could reasonably be considered to have been unfair.

Breaks in service

25. In *Villamoran* UNDT/2011/126, the Tribunal held that for staff on fixed-term appointments who are being reappointed under temporary appointments following the expiration of their fixed-term appointments, there was no requirement, in law, to take a break in service prior to the temporary appointment. (*Note*: since *Villamoran*, the Under-Secretary-General for Management promulgated ST/AI/2010/4/Rev.1, introducing the break in service requirement).

Delegation of authority

26. In *Muratore* UNDT/2011/129, the Tribunal held that the Assistant Secretary-General for Human Resources Management cannot derogate from an administrative instruction issued by the Under-Secretary-General for Management, who is a higher authority in the Organization.

27. In *Gehr* UNDT/2011/150 and *Gehr* UNDT/2011/178, the Tribunal held that a delegation of power should not be guessed at or presumed. In *Gehr* UNDT/2011/150, the Tribunal endorsed the view that "the principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike".

Legal hierarchy

28. In *Villamoran* UNDT/2011/126, the Tribunal stated that the Charter of the United Nations is at the top of the hierarchy of the Organization's internal legislation, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions. Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

Proper promulgation of administrative issuances

29. In *Villamoran* UNDT/2011/126, the Tribunal stated that due to the importance of administrative issuances, the Administration must follow specific steps when promulgating them. Administrative issuances regulate matters of general application and directly concern the rights and obligations of staff and the Organization. Decisions of general application that affect contractual rights must be issued through properly promulgated administrative issuances.

Exceptions to staff rules

30. In *Villamoran* UNDT/2011/126, the Tribunal held that the right to request and to be properly considered for an exception is a contractual right of every staff member and that it cannot be unilaterally taken away. Under staff rule 12.3(b), any request for an exception to the Staff Rules—and, by extension, to administrative issuances of lesser authority—must be properly considered in order to determine whether the three parts of the test established by staff rule 12.3(b) are satisfied. Failure to do so would result in a violation of contractual rights of the staff member requesting the exception.

Reassignment and transfer

31. In *Rees* UNDT/2011/156 and *Gabriel-van Dongen* UNDT/2011/197, the Tribunal stressed that while the Administration has wide discretionary power in deciding to reassign its staff, this discretion is not unfettered and can be challenged on the basis that the decision is arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith. The Tribunal further clarified in this respect that "consultation" does not necessarily include negotiation and certainly does not guarantee agreement, but it must be carried out in good faith. Consultation should occur before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined.

32. In *Gehr* UNDT/2011/142, the Tribunal reiterated that the Secretary-General enjoys broad discretion in the organization of work and the assignment of tasks to staff members. Such discretion is not unfettered but is subject to limited control by the Tribunal.

Right to harmonious work environment

33. In *Corbett* UNDT/2011/195, the Tribunal held that every staff member has the right to a harmonious work environment that protects his or her physical and psychological integrity. If this right is violated, proper compensation is warranted.

Performance evaluation

34. In *Rees* UNDT/2011/156, the Tribunal held that the lawful way to provide a factual basis for the Administration's finding that the applicant was lacking in performance was through the use of the performance evaluation system, which affords both manager and staff member the opportunity for an objective and fair evaluation of the staff member's performance.

35. In *Ehounoubakrohi* UNDT/2011/141, the Tribunal found that it is not its function to substitute its judgment for that of a properly constituted assessment panel, including on issues concerning the performance of staff members. The internal mechanisms are designed to perform that review function. However, it is right and proper for the Tribunal to intervene if it considers that there was a lack of due process in the manner in which the internal processes operated.

36. In *Rees* UNDT/2011/156, the Tribunal held that the heads of departments and offices have primary responsibility for the timely execution, overall compliance with, and fair implementation of performance evaluation reports. Without a document that properly and fairly reflects the staff member's shortcomings in accordance with the administrative instruction, the Administration has no reliable grounds for taking decisions based on poor performance, whether they be about reassignment, non-renewal or others.

37. In *Gabriel-van Dongen* UNDT/2011/197, the Tribunal held that although heads of departments and offices have the primary responsibility for the timely execution of, overall compliance with, and fair implementation of the performance evaluation process, staff members also bear responsibility for complying with the established procedures.

Medical fitness

38. In *Gabaldón* UNDT/2011/132, the Tribunal found that the decision on the medical fitness of a staff member to discharge certain functions is within the discretion of the Organization's medical service. It is not for the Tribunal to interfere with a well-founded expert opinion or to substitute its own views for that of the medical service.

39. In *Shanks* UNDT/2011/209, the Tribunal held that it is not for the Tribunal to review the medical decisions of the Organization's medical service. However, the medical service has the responsibility to act in a consistent and coordinated manner in the best interests of staff and Organization, and the Tribunal may review whether this responsibility has been met.

Compliance with procedures

40. In *Gordon* UNDT/2011/172, the Tribunal reiterated that when the Administration decides to use a specific procedure, it is bound to fully comply with this procedure.

41. In *Allen* UNDT/2011/203, the Tribunal stated that the fact that the Administration has mistakenly taken a different decision on previous occasions does not create any right for the staff member, given that the Administration must put an end to its errors.

Acquired rights

42. In *Omer* UNDT/2011/188, *Garcia* UNDT/2011/189, and *Neskorozhana* UNDT/2011/196, the Tribunal discussed the general principle of acquired rights, drawing the distinction between fundamental or essential and non-fundamental and non-essential elements of the conditions of employment. In *Chattopadhyay*

UNDT/2011/198, the Tribunal held that an acquired right is breached only when an amendment to the rules adversely affects the balance of contractual obligations by altering fundamental or essential terms of employment.

Release of investigation reports

43. In *Klein* UNDT/2011/169, the Tribunal found that the Organization has the obligation to reasonably exercise the discretion to withhold or modify investigation reports requested by the Member States. The Organization is required to only produce, maintain and disseminate investigation reports that have been created in accordance with the requirements of fairness and due process. Inherent in this obligation is a corollary obligation not to produce, maintain or disseminate improperly created material.

Note in file of a former employee

44. In *Seddik Ben Omar* UNDT/2011/182, the Tribunal found that a note placed on a staff member's personnel file should be accurate and the staff member must be given a fair and genuine opportunity to comment on it. Failure to be given an opportunity to comment is a breach of due process rights. The Tribunal found that the Organization is permitted to place adverse material on the file of a former staff member, provided the staff member is afforded the fundamental rights set out in ST/AI/292.

Redaction of applicant's name

45. In *Abubakr* UNDT/2011/219, the Tribunal found that the applicant must establish sound and valid reasons for redacting her or his name from published rulings.

The Administration's exercise of its lawful discretion

46. In *Shanks* UNDT/2011/209, the Tribunal found that a decision-maker, in this case a human resources office, has the obligation to ensure that its administrative decisions are taken on a proper factual basis and, if necessary, make the necessary enquiries to ensure this to protect an affected staff member's rights. When making the decision, in the proper exercise of his discretion, he must thereafter weigh up all relevant considerations about the particular case in hand.

Effect of appeal, jurisdiction of the UNDT with respect to judgementsunder appeal

47. In *di Giacomo* UNDT/2011/200, the Tribunal found that it had no jurisdiction to consider the applicant's application for correction and revision of *di Giacomo* UNDT/2011/168, as the applicant had already filed an appeal against that judgment before the UNAT. The Tribunal stated that to have some aspect of the proceedings continuing concurrently in the trial instance would be an abuse of process.

Relief

48. In *Massabni* UNDT/2011/127 and *Gordon* UNDT/2011/172, the Tribunal held that compensation may be awarded only where there is a link between the unlawfulness of the contested decision or the irregularity found and the harm suffered by the applicant. In *Kisselev* UNDT/2011/165, the Tribunal held similarly that compensation may not be awarded for a procedural flaw that did not cause any damage to the applicant.

49. In *Muratore* UNDT/2011/129, it was stated that it is not for the Tribunal to order priority consideration of a candidate in future selection procedures as this would go against the right to fair and equal consideration of the other candidates.

50. In *Rees* UNDT/2011/201, the Tribunal held that, in assessing the appropriate amount of compensation to be awarded on account of a non-renewal decision, the Tribunal must assess (i) the chances of the applicant having her contract renewed but for the procedural breaches identified and (ii) the period of that renewal. The purpose is to place the applicant in the position that she would have been but for the breach of her terms of appointment, as far as it is reasonably possible.

51. In *Klein* UNDT/2011/169 and *Abubakr* UNDT/2011/219, the Tribunal stated that in assessing the quantum of compensation the Tribunal may consider actual pecuniary (or economic) loss and non-pecuniary damage, including emotional distress and harm to reputation (which is distinct from direct economic loss). The

Tribunal specified that non-pecuniary harm is sometimes referred to as "moral damage" or "moral damages", particularly in jurisdictions with civil law tradition. The Tribunal held that, generally, the burden is on the injured party to substantiate her or his claims for such damages.

52. In *Bridgeman* UNDT/2011/145, the Tribunal held that it should not uncritically accept compensation-related claims based on the subjective assessment of an individual. The Tribunal must be satisfied that the injuries suffered by the Applicant were caused by the breach of rights or that the infringement, in any significant degree, contributed to this harm.

53. In *Seddik Ben Omar* UNDT/2011/182, the Tribunal held that, in determining appropriate relief, it is necessary to take into account the actions of the Applicant to ascertain whether he or she failed to mitigate his or her losses or contributed to the harm suffered.

Conduct of proceedings

54. In *Bridgeman* UNDT/2011/145, the Tribunal held that if a party knowingly furnishes false evidence to the Tribunal, or allows this to be furnished, this may constitute an abuse of proceedings.

55. In *Mistral Al-Kidwa* UNDT/2011/199, the Tribunal found that a withdrawal of an admission of liability upon which the parties have relied may result in a finding of manifest abuse of proceedings, warranting an award of costs. The Tribunal found a manifest abuse of process by the Respondent and awarded the amount of USD1,500 as a portion of the Applicant's costs that was the direct result of the Respondent's conduct.

Contempt of court; abuse of proceedings

56. In *Bagula* UNDT/2011/138, the Applicant contested his dismissal for taking payment from local citizens in exchange for, or with the promise of, securing them jobs. During the court hearings, the Applicant tried to bring impostors to appear before the Tribunal in Kinshasa. The Tribunal found that the Applicant's actions were criminal in the extreme and amounted to a blatant abuse of the Tribunal's process and aggravated contempt of court *in facie curiae*. This case amply illustrates some of the dangers inherent in conducting judicial proceedings via audio conference.

Execution of judgments

57. In *Bangoura* UNDT/2011/202, the Tribunal held that the former UN Administrative Tribunal had wrongly considered it did not have power to order execution of its own judgments. The Dispute Tribunal was therefore able to deal with applications for execution of former Administrative Tribunal judgements just as it could with applications for execution of its own judgments. The Tribunal considered whether there was a time limit to apply for execution of a judgment, and held that as no time limit was set in the rules, a party should not be without a remedy if a judgment remains unexecuted.

Organization's involvement in staff members' private legal disputes

58. In *Marshall* UNDT/2011/205, the Tribunal held that allegations of domestic violence and conflicts over child custody, maintenance or paternity are properly matters for a criminal court and family court to entertain. The Organization has no business using its administrative procedures to involve itself in a personal dispute when other appropriate legal channels were available to the parties to sort out their rights and responsibilities.

Accountability of managers

59. In *Applicant* UNDT/2011/192 the Tribunal found that the Applicant had been wrongly dismissed and awarded judgment in his favour. The Tribunal called to attention the conduct of some managers who have engaged in actions in their official capacity that not only embarrass the Organization but bring about heavy cost-implications in the award of monetary compensation.

APPENDIX II: PROCEEDINGS OF THE UNAT

Introduction

1. A summary of the major legal pronouncements made by the Appeals Tribunal in judgements rendered during the reporting period (1 July 2011 to 31 December 2011) is provided below. The summaries are not authoritative and the judgements cited below are not comprehensive. For a complete set of the judgements issued by the Appeals Tribunal during the period covered by this report, please consult the OAJ website (http://un.org/en/oaj/appeals/).

Jurisdiction

Ratione materiae

2. In *Larkin* (2011-UNAT-135), the Appeals Tribunal held that the services provided by the Office of Staff Legal Assistance (OSLA) and the way the representation is implemented can have an impact on a staff member's terms of employment and can therefore fall within the jurisdiction of the UNDT, without interfering with the professional independence of counsel. The Appeals Tribunal found that the decision taken by the Chief of OSLA not to disclose a potential conflict of interest in Mr. Larkin's case could have an impact on Mr. Larkin's terms of employment and therefore constituted an administrative decision subject to review by the UNDT.

3. In *Koda* (2011-UNAT-130), the Appeals Tribunal held that the Office of Internal Oversight Services (OIOS) operates under the "authority" of the Secretary-General, but has "operational independence". To the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned. For example, an OIOS report might be found to be so flawed that the Administration's taking disciplinary action based thereon must be set aside.

4. In *Cherif* (2011-UNAT-165), the Appeals Tribunal held that the contested decisions of the governing body of ICAO requiring "the written approval of the President of the Council for any hiring, appointment, promotion, extension and termination of P-4 employees and above" are not, within the mandate of the Appeals Tribunal, administrative decisions. These decisions are regulatory decisions that are not subject to the review by the Appeals Tribunal.

Ratione personae

5. In *Basenko* (2011-UNAT-139), the Appeals Tribunal recalled that access to the new system of administration of justice can be extended to persons who are not formally staff members but who can legitimately be entitled to rights similar to those of a staff member. This exception must be understood in a restrictive sense. The Appeals Tribunal held that interns have no access to the new system of administration of justice.

Non-promotion

6. In *Vangelova* (2011-UNAT-172), *Bofill* (2011-UNAT-174) and *Dualeh* (2011-UNAT-175), the Appeals Tribunal held that an irregularity in promotion procedures will only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Thus, where the irregularity has no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, he or she is not entitled to rescission or compensation.

Standard of proof in disciplinary cases

7. In *Molari* (2011-UNAT-164), the Appeals Tribunal recalled that when a disciplinary sanction is imposed by the Administration, the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence. It ruled that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof means that the truth of the facts asserted is highly probable. It requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.

Preliminary suspension of action by the UNDT

8. In *Villamoran* (2011-UNAT-160), the Appeals Tribunal held that, where the implementation of an administrative decision is imminent, through no fault or delay on the part of the staff member, and takes place before the five days provided for under Article 13 of the Rules of Procedure of the UNDT have elapsed, and where the UNDT is not in a position to take a decision under Article 2(2) of the UNDT Statute, i.e. because it requires further information or time to reflect on the matter, it must have the discretion to grant a suspension of action for these five days. To find otherwise would render Article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules of Procedure meaningless in cases where the implementation of the contested administrative decision is imminent.

Execution of UNDT orders pending interlocutory appeals

9. In *Villamoran* (2011-UNAT-160), the Appeals Tribunal held that an order rendered by the UNDT requires execution in cases where the order is being appealed. It found that Article 8(6) of its Rules of Procedure, which provides that "[t]he filing of an appeal shall suspend the execution of the judgement contested", does not apply to appeals of interlocutory orders rendered by the UNDT. It falls to the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration cannot refrain from executing an order by filing an appeal against it on the basis that the UNDT exceeded its jurisdiction.

Revision

10. In *Eid* (2011-UNAT-145), the Appeals Tribunal held that a change in law is not a "fact" contemplated by the provision for revision of judgements in the UNDT Statute. The issuance of new jurisprudence by the Appeals Tribunal is an issue of law, not of fact.

Compensation

11. In *Cohen* (2011-UNAT-131), the Appeals Tribunal recalled that Article 10(5) of the UNDT Statute limits the total compensation awarded under subparagraphs (a) or (b), or both, to an amount that shall normally not exceed two years' net base salary of the applicant, unless the Tribunal orders the payment of higher compensation and gives the reasons for that decision. In cases where the UNDT rescinds an illegal decision to dismiss a staff member, the Administration must both reinstate the staff member and pay compensation for loss of salaries and entitlements. If, in lieu of execution of the judgment, the Administration elects to pay compensation in addition to the compensation that the Tribunal ordered it to pay for the damage suffered by the applicant, that election may, depending on the extent of the damage, render the circumstances of the case exceptional within the meaning of Article 10(5)(b) of the Statute of the UNDT. In such a situation, the Tribunal is not bound to give specific reasons to explain what makes the circumstances of the case exceptional. The option given to the Administration to pay compensation in lieu of performance of a specific performance should not render ineffective the right to an effective remedy.