United Nations A/73/218

General Assembly

Distr.: General
23 July 2018

Original: English

Seventy-third session
Item 148 of the provisional agenda*
Administration of justice at the United Nations

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Report of the Internal Justice Council

Summary

The 2018 report of the Internal Justice Council takes into account the relevant resolutions of the General Assembly and draws from extensive consultations with stakeholders in the internal justice system.

The Council puts forward the following recommendations:

(a) With regard to staff access to documentation and information at the management evaluation stage, management should make full disclosure to the applicant of all relevant, non-privileged documentary and other information at that stage;

(b) With regard to protection from retaliation, staff litigation against management before the Tribunals should be regarded as a protected activity, staff litigants and all witnesses should be accorded protection by the Ethics Office and the Tribunals should also have the authority to make orders for their protection;

(c) In respect of the issue of self-representation before the Tribunals, the Office of Staff Legal Assistance must be given adequate funding to meet its responsibilities, and the Office and staff associations should train volunteer advocates, including retirees, to represent claimants whom the Office has declined to represent;

(d) In respect of referrals for accountability from the Tribunals, the Secretary-General should take prompt and appropriate action on such referrals and relay information to the Tribunals on which actions have been taken and which have been considered and not taken. The Secretary-General should also include an anonymized summary of the cases in the annual information circular entitled “Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour”;

(e) In respect of action to promote the independence of the Tribunals, the Dispute Tribunal and its chambers should be relocated to an appropriate location in the Headquarters complex, and the General Assembly should request the Secretary-General to propose a separate, stand-alone classification for compensation purposes for Dispute Tribunal judges that would not be tied to any staff classification;

* A/73/150.

(f) In respect of judicial and administrative efficiency, judges should hold an early conference on case management with the parties, which can be conducted by teleconference or videoconference; the President of the Dispute Tribunal should consider developing a case disposal plan; the Principal Registrar should establish a dashboard showing the real-time status of all cases; the Tribunal should seek input from the Principal Registrar and other Registrars before finalizing its document, entitled "Judicial directions"; the President of the Tribunal should exercise greater administrative responsibility for the workings of the Tribunal, consistent with the principles of judicial independence and accountability; the statute of the Tribunal should be amended to provide that the President is to be selected from among the full-time judges and should be limited to a two-year term;

(g) In respect of the adequacy of resources for the Office of Staff Legal Assistance, it should be allocated sufficient funds to meet its responsibilities, as set out in Article 17 of the Charter of the United Nations;

(h) In respect of rescission or specific performance as a remedy for wrongful dismissal, management is obligated to consider in good faith the practicability of reinstatement, or instatement to a comparable open position, and to show to the Tribunal's satisfaction that a good-faith effort has been made. If the Tribunal is not satisfied with management's efforts, the Tribunal should consider whether payment in lieu of reinstatement or instatement may exceed the two-year cap in appropriate cases;

(i) In respect of the standing of staff associations before the Dispute Tribunal, the statute of the Tribunal should be amended to recognize the standing of such groups to file applications claiming violations of their institutional interests, such as claims of interference with the right of association of staff;

(j) In respect of the joinder of similar claims before the Dispute Tribunal, the Tribunal should encourage, in appropriate cases, joint submission of similar claims, and the Registrars and the Office of Staff Legal Assistance should help to facilitate such applications;

(k) In respect of investigation and disciplinary matters, including in relation to accusations of sexual harassment, the Secretary-General should further strengthen the Organization's capacity for a reasonably prompt, professional investigation of claims of sexual harassment and other misconduct and should implement a streamlined, comprehensive procedure to receive, process and address such complaints.

Contents

I. Preliminary remarks

1. The General Assembly established the Internal Justice Council by its resolution 62/228 to ensure independence, professionalism and accountability in the system of administration of justice.

2. The General Assembly established the internal system of justice of the United Nations as an independent, transparent, professionalized, adequately resourced and decentralized system operating consistently with the relevant rules of international law and the principles of the rule of law and due process in order to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike (resolution 61/261), and tasked the Council to provide its views to the Assembly on the implementation of the system of administration of justice (resolution 62/228).

3. A fundamental consideration that guides the Council is that, in order for the internal system of administration of justice to produce fair results for staff and management, and be so perceived, the judges of the Tribunals must enjoy complete decisional autonomy, without interference from management in the exercise of their judicial role.

4. In compiling the present report, the Council has been guided by prior resolutions of the General Assembly and its interviews with the various stakeholders in the internal justice system. Its focus included consideration of the following principles: the independence and autonomy of the Tribunals, access to information by staff and their representatives and other concerns of due process, protection against retaliation for parties and witnesses, and accountability for wrongdoing. An overall consideration is effectiveness: does the system provide an adequate framework and sufficient resources to meet its challenges, and what changes are required to ensure that the various components of the system perform their roles effectively?

5. The views of the United Nations Appeals Tribunal and of the United Nations Dispute Tribunal are annexed to the present report, in line with paragraph 45 of General Assembly resolution 71/266.

6. The current members of the Council, whose terms of office are effective until 12 November 2020, are Yvonne Mokgoro (South Africa), Chair; Carmen Artigas (Uruguay), external jurist nominated by staff; Samuel Estreicher (United States of America), external jurist nominated by management; Frank Eppert (United States of America), member nominated by management; and Jamshid Gaziyev (Uzbekistan), member nominated by staff.

7. As outlined below, the Council held meetings, in person and by videoconference, with stakeholders in New York from 9 to 18 May 2018. In view of existing vacant judicial positions, the Council simultaneously conducted an extensive recruitment exercise, which included administering an examination to eligible candidates for open positions in the Tribunals, and conducting in-person interviews with short-listed candidates in The Hague, the Netherlands, from 25 to 28 June 2018. The Council then produced the present report, as well as a separate recruitment report, which are both before the General Assembly for its consideration at its seventy-third session.

8. In its report of 2017 (A/72/210, sect. D, paras. 70–73), the Council expressed its concern that work-related friction existed between some Dispute Tribunal judges and some registry staff. Since issuing that report, the Council has learned that additional friction has arisen between the Office of Administration of Justice and the Tribunal. The Council therefore proposed that it was necessary to discuss the friction with the concerned parties. Accordingly, it met separately on this issue with the Tribunal judges, the Executive Director of the Office of Administration of Justice, the

Principal Registrar and the Registrars. The Council thereafter held a joint meeting with all the parties for the purpose of facilitating a structured dialogue geared towards improving the situation. The Council's early impression is that its efforts in this respect have borne some fruit; time will tell if additional attention has to be given to the matter. Some of the recommendations set forth below are drawn from discussions at the aforementioned meetings.

9. The Council agreed to address certain topics in the present report, with an emphasis on specific recommendations, taking into account the principles on which the United Nations internal system of justice was established: independence, transparency, professionalism, decentralization and accountability. The Council held in-person meetings in New York and videoconferences with parties in Geneva and Nairobi and with various entities within the system of administration of justice. The meetings included the judges of the two Tribunals, management staff of the Office of Staff Legal Assistance, the Ethics Office, the Office of the United Nations Ombudsman and Mediation Services, the Investigations Division of the Office of Internal Oversight Services and representatives of staff and management from the United Nations system. All were invited to raise concerns and matters of interest, including their views on a number of important topics, such as the equal access to documentation and information of both parties before the Management Evaluation Unit; protection from retaliation; investigations in disciplinary proceedings, including cases involving charges of sexual harassment; referrals for accountability by the Tribunals; and the independence and efficiency of the Tribunals. In addition, specific and follow-up queries were directed to stakeholders on issues that had been raised at the May 2017 meetings and in the course of preparing the Council's report of 2017.

10. The Council notes that, while some general matters of concern were shared by a great number of stakeholders, others were raised or indicated as problematic only by particular groups or individuals. Therefore, in the present report, matters of general concern will be identified first, followed by those that have been prioritized or raised on a more limited basis by some stakeholders.

II. Recommendations

A. Staff access to documentation and information at the management evaluation stage

Recommendation 1

To promote earlier resolution of cases at the management evaluation stage and avoid the cost of litigation, and in fairness to applicants before the Tribunals, the Council recommends that management be required to make full disclosure of all non-privileged documentary and other relevant information in its possession or control at the management evaluation stage.

11. During the Council's consultations with the judges, concerns were raised that the failure of management to make the aforementioned disclosure is unfair to applicants and hinders early resolution of disputes. It is the Council's view that management is obligated to make full disclosure of such information at the management evaluation stage in order to advance the critical objectives of the internal justice system and ensure its efficacy.

B. Protection from retaliation

Recommendation 2

The Council recommends that staff litigation against management before the Tribunals be regarded as a "protected activity" and that staff engaged in litigation, together with all witnesses in such cases, be accorded protection by the Ethics Office.

12. In its report of 2017 (ibid., paras. 21–32), the Council expressed its concern regarding retaliation by managers against staff who litigate against management or serve as witnesses before the Tribunals. Regrettably, the Council has heard from some stakeholders that instances of retaliation have continued. The Council also notes that, under article 6, paragraph (d), of the code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, judges have a duty to protect witnesses and parties from harassment and bullying during Tribunal proceedings. At the same time, managers have an obligation to refrain from, and protect staff against, retaliation. Retaliation against litigants and witnesses amounts to an abuse of authority, which constitutes misconduct that must be addressed and sanctioned, in line with relevant staff rules and regulations.

13. When the Tribunals have reason to believe that litigating staff or their witnesses are at risk of being retaliated against, they have the authority to issue orders for their protection. Failure to comply with such orders calls for contempt proceedings against the responsible manager, and engages the Secretary-General's responsibility to ensure implementation of the orders. In this connection, and, as recommended previously by the Council (ibid., para. 33), there is a need to establish an explicit system-wide policy protecting parties and witnesses from retaliation. It is the Council's view that the Ethics Office should be expressly mandated to implement this policy, including ensuring compliance with Tribunal orders of protection, and that the existing administrative issuances and Secretary-General's bulletins on the subject should be amended to provide for and eliminate any current protection gaps for dealing with instances of retaliation against litigants or their witnesses.

C. Addressing the issue of self-representation

Recommendation 3

The Office of Staff Legal Assistance must be given adequate funding to meet its responsibilities (see sect. H below). In addition, the Office and staff associations should help to train volunteer advocates, including retirees, to represent claimants whom the Office has declined to represent and to facilitate self-representation, as requested by staff. Staff engaging in such training and representation should be recognized and given appropriate release time.

14. Applicants have a right to represent themselves, but it is often not in their best interest to do so. Self-representation also presents a continuing challenge to the administration of the system of internal justice. It is a common concern of judges and practitioners alike that self-representation is not conducive to judicial efficiency. In this connection, the Council considers that some, if not many, of the self-represented cases are attributable to the Office of Staff Legal Assistance not being able to handle all cases coming its way for lack of resources.

D. Referrals for accountability from the Tribunals

Recommendation 4

The Secretary-General should take prompt and appropriate action in cases in which managers or other employees have been referred by the Tribunals for accountability, and relay general information to the Tribunals on the actions that have been taken. In addition, the Secretary-General should include a separate section, entitled "Referrals for accountability by United Nations Tribunals", together with a summary of anonymized cases, in the annual information circular entitled "Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour".

15. The Council has repeatedly underlined the importance of follow-up measures to the cases referred by the Tribunals for accountability,[1] which is an essential part of the General Assembly's broader expectation that the Secretary-General will ensure real and effective accountability in the Organization (see resolutions 61/261, 63/253 and 68/264).

16. All staff, including senior managers, are expected to operate within an established legal framework presided over by an independent and professional judiciary. The statutes of the Dispute Tribunal and the Appeals Tribunal, in articles 10.8 and 9.5, respectively, provide that judges may refer appropriate cases to the Secretary-General or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.

17. The Secretary-General has informed the General Assembly that the total number of cases referred to the Secretary-General, in addition to those vacated on appeal, was 14 at the end of November 2017. Notwithstanding reassurances that all referrals have been under active consideration or acted upon, the Council has heard repeated concerns expressed by interlocutors about a lack of information, in particular among staff, on the type of administrative measures taken or considered and not taken in those cases and why. The Council understands that letters by judges seeking feedback from the Secretary-General remain unanswered, and that staff at large have no inkling whether there was any follow-up to those cases, given the absence of publicly available information. The Council recommends that the Secretary-General relay general information to the Tribunals on the actions taken or considered and not taken with regard to the referrals, and that a separate section, entitled "Referrals for accountability by United Nations Tribunals", together with a summary of anonymized cases, be included in the annual information circular entitled "Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour".

E. Action to further promote the independence of the Tribunals

Recommendation 5

In order to further promote the independence and accessibility of the United Nations Dispute Tribunal, and how it is perceived by staff, the Tribunal and its chambers in New York should be relocated to an appropriate location in the Headquarters complex.

18. The Council agrees with the Tribunal judges that the Tribunal and its chambers in New York should be relocated. As noted in the Council's report of 2017 (see A/72/210, para. 59), the current arrangements give rise to an appearance that the Dispute Tribunal judges are not fully autonomous in respect of their judicial

[1] See, for example, A/71/158, paras. 160–167), and A/72/210, paras. 39–49.

functions, but, rather, are part of the Office of Administration of Justice and fall under its Executive Director's authority. The judges currently share space not only with the Office, but also with a unit of the Department of Political Affairs. Having a more appropriate location in the Headquarters complex would further promote the appearance of Tribunal independence.

Recommendation 6

A further measure that would help to ensure judicial independence, and the appearance thereof, is that the General Assembly request the Secretary-General to propose a revised compensation package for the Dispute Tribunal judges. The current package provides that judges are paid at a level equivalent to D-2, step IV, at the United Nations. The Council recommends a separate, stand-alone classification for the compensation package of Dispute Tribunal judges.

19. This would be a change in nomenclature only and would not result in a diminution or increase in the current level of compensation for Dispute Tribunal judges. The change would help to negate the ill-informed impression that judges are staff members and are therefore subject to the Secretary-General's direction or supervision in carrying out their judicial functions. It would also serve to highlight the Tribunal's judicial autonomy from the executive branch.

F. Judicial and operational efficiency

Recommendation 7

Judges should hold a case management conference with the parties, which can also be held through teleconference or videoconference, within a month of the filing of the responsive pleading, unless the parties otherwise agree.

Recommendation 8

In order to manage the backlog of cases that has recently arisen, the President of the Dispute Tribunal should consider developing and monitoring a case disposal plan.

20. Numerous interlocutors have informed the Council that, over the past year or so, there has been a noticeable reduction in the number of judgments that have been issued. In addition, long periods of time pass in many pending cases before any judicial action is taken at all. The Dispute Tribunal judges have explained that their operations have been adversely affected by the long process of recruiting a Registrar at the P-5 level in New York. It has also been suggested that case dispositions, which would include settlements or other dismissals not warranting an opinion, are a better indicator of judicial efficiency than the number of judgments issued.

21. While noting the issues outlined above, the Council is nevertheless convinced that a more proactive approach is needed. In expressing its opinion in this regard, the Council relied not only on oral statements made by its interlocutors, but also on data that it had requested from the Registries. The data, which took some time to compile (see recommendation 10 below), show a significant reduction in both the number of Dispute Tribunal judgments issued (100 in 2017, compared with 221 in 2016) and the number of orders issued (758 in 2017, compared with 1,036 in 2016). The data also show many cases in which no judicial action had been taken by Tribunal judges for extended periods of time, including a few cases that exceeded two years. Accordingly, the Council recommends that the President of the Tribunal, making use of the Principal Registrar and his or her staff, develop and implement a case disposal plan to manage the backlog of cases. Such a plan would appear to be of some urgency,

given the expected increase in cases mentioned by several of the interlocutors, the result of upcoming reforms and downsizing exercises at the United Nations.

Recommendation 9

To assist the judges in their work, the Principal Registrar, assisted by the Registrars, should establish a dashboard showing the real-time status of cases.

22. Currently, each of the Registrars maintains a separate database showing case status. The separate databases do not readily facilitate the Presidents of the two Tribunals discharging their monitoring responsibilities, under the statutes, to ensure the efficient functioning of their respective Tribunals. The establishment of a real-time dashboard, an information technology tool containing up-to-date data on case status, would permit such monitoring and also provide individual judges with standardized capacity to manage case disposal. The Council suggests that a dashboard be made available to provide information to applicants, counsel and, to the extent determined collaboratively by the Presidents of the Tribunals and the Principal Registrar, the public. The establishment of a dashboard would support both professionalism in operations and transparency.

Recommendation 10

The Council suggests that the Dispute Tribunal seek input from the Principal Registrar and the other Registrars before finalizing its document entitled "Judicial directions".

23. In November 2017, the Dispute Tribunal issued judicial directions to the Registries regarding operations. While the Council is in complete agreement with the Tribunal on the usefulness of judicial rules, as well as its general authority to promulgate them for the conduct of its cases, the Tribunal may find it useful to obtain input on the directions from the Principal Registrar and the Tribunal Registrars prior to issuing the instruments. The Registry staff, who serve all of the judges, are well placed to assist in this respect and have called the attention of the Tribunal to possible inconsistencies in the directions. The Council believes that consultations and, indeed, collaboration in such matters would improve operational efficiency and the overall work environment. It may also be worthwhile for the Tribunal to solicit the views of the attorneys who practise regularly before the Tribunals when considering the issuance of judicial directions.

Recommendation 11

The Council urges the President of the Dispute Tribunal to exercise greater administrative responsibility in the light of the persistent difficulties that judges on the Tribunal have had in meeting their responsibilities, under article 7 (b) of the code of conduct for the judges of the Tribunals, to give judgment or rulings promptly and no later than three months from the end of hearings or the close of pleadings. The President has this authority under article 7 (c) to (f) of the code of conduct, but, judging from the separate yet consistent comments of the Council's interlocutors, the authority is not being fully exercised. Moreover, there have been various failures of coordination between the Dispute Tribunal and the Principal Registrar.

24. Consistent with the principles of judicial independence and accountability, the President is responsible for ensuring the overall efficiency of the Dispute Tribunal, including ensuring the adherence of the judges to the code of conduct; resolving work-related issues between the judges and staff and Registrars; maintaining regular work hours; coordinating regularly with the Principal Registrar on services provided to the Tribunal and its budgetary and personnel needs; regularly monitoring the case

management records and procedures of the judges, including with regard to the ageing of cases; maintaining up-to-date and sufficiently detailed rules of procedure, pleadings and evidence, as the Tribunal considers necessary; and meeting regularly with the President of the Appeals Tribunal to discuss, as necessary, issues pertaining to the consistent application of Appeals Tribunal jurisprudence. The Council is of the firm view that these responsibilities are within the ambit of the President's duty to ensure the necessary operational efficiency in the Dispute Tribunal.

Recommendation 12

In the interest of promoting continuity and building up institutional memory, the Council recommends that the General Assembly amend the statute of the Dispute Tribunal to provide that the President of the Tribunal shall sit for a two-year term. The proposed text for such an amendment is set forth below for the consideration of the Assembly.

> **Article 4.7 is amended to add the words "from among the full-time judges who shall sit for a two-year term, and" after the word "President".**

G. Consultations with the Office of Administration of Justice on budgets

Recommendation 13

The Council recommends that the Executive Director of the Office of Administration of Justice consult with the President of the Dispute Tribunal, the President of the Appeals Tribunal and the Office of Staff Legal Assistance on their respective budgets.

25. As noted in the Council's report of 2017 (see A/72/210, paras. 62–63), the Executive Director of the Office of Administration of Justice is responsible for soliciting budget requirements and preparing budget submissions for all of the functions that the Office supports or manages. The Council notes that the current budget is in effect until the end of 2019, and hopes that the budget process in future years will include due consultation with the affected stakeholders.

H. Adequacy of resources for the Office of Staff Legal Assistance

Recommendation 14

Cognizant of Article 17 of the Charter of the United Nations, in which it is stated that the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly, the Council recommends that the Office of Staff Legal Assistance be allocated sufficient funds by the Assembly to meet its responsibilities. Failure to do so is probably in contravention of the Charter, would be viewed sceptically by the staff at large and would not reflect well on the United Nations, given that it would undercut its own efforts to promote the rule of law throughout the world.

26. The Office of Staff Legal Assistance was established by the General Assembly as an integral component of the internal system of administration of justice of the United Nations. It is one of the key elements for ensuring meaningful access to justice, and the Office is to be commended for its provision of legal assistance to staff, whether they can afford a lawyer or not. Nevertheless, the high rate of self-representation in the Tribunals, coupled with the Council's discussions with interlocutors, suggests that the Office does not have the resources to represent all staff having meritorious claims (see recommendation 3 above).

27. The Office of Staff Legal Assistance provides independent, professional and confidential legal advice and representation to staff in relation to their employment. In particular, it offers a wide range of legal services, including advice and representation during informal resolution of disputes and the mediation process; assistance with the management evaluation review and during the disciplinary process; and legal representation before the two Tribunals.

28. Moreover, the Office of Staff Legal Assistance serves a very substantial filtering function, helping to reduce demand on the formal adjudication system by advising staff on the merits of their cases and proposing alternatives to litigation, such as mediation. For example, in 2016, 57 per cent of the requests for legal assistance received by the Office were settled or otherwise disposed of, thereby avoiding many formal proceedings.

29. Nearly all stakeholders interviewed by the Council conveyed their confidence in the professionalism of Office of Staff Legal Assistance personnel and mentioned the importance of its role in the overall administration of justice, noting that staff interests are well represented by the Office and that the overall system benefits from its legal assistance to applicants.

30. The Council believes that, because of budgetary constraints, the Office of Staff Legal Assistance is not in a position to assist applicants in all cases. The Council's impression corresponds to the conclusion of the Interim Independent Assessment Panel: that the Office is under-resourced and that its budget is insufficient, even if supplemented by the voluntary supplemental funding mechanism. The situation is bound to become even more critical owing to a number of downsizing exercises and large-scale reforms in the Organization, such as management reform and the global service delivery model. In sum, the function of the Office represents substantial value for money, and it is the Council's considered opinion that it could yield even greater value if its budget support needs were fully met by Member States.

I. Rescission or specific performance as a remedy

Recommendation 15

Before the Dispute Tribunal issues a final decision in a case of wrongful termination or non-renewal of a fixed-term contract, management should provide a statement of the reasons why reinstatement was not feasible in the particular case. If management does not provide the statement within a reasonable amount of time, or if the Tribunal does not believe that management has acted reasonably in exploring the feasibility of reinstatement, or instatement to a comparable vacant position, the Tribunal should consider this to be a factor in deciding whether payment in lieu of reinstatement or instatement may exceed the two-year cap in appropriate cases.

31. Under the statute of the Dispute Tribunal, when staff are found to have been unlawfully terminated, management is given the choice of reinstatement or rescission, or payment in lieu thereof of an amount normally not exceeding two years of base salary. Management has uniformly opted for the payment option. Management's representatives could not identify a single case in which the option to pay compensation had not been chosen. As noted previously by the Council (A/72/210, paras. 80–83), the "no rescission/no reinstatement" approach has probably existed for decades, predating the establishment of the current administration of justice system, in 2009.

32. The Council recognizes that, although reinstatement, or rescission, may not be practicable or desirable for operational reasons in some cases, it is unlikely to be

impracticable in all cases. In the Council's view, management is obligated to consider in good faith the practicability of reinstatement, or instatement to a comparable open position, and to show to the Tribunal's satisfaction that it has made a good-faith effort. In this respect, the Council notes the well-expressed view of the Dispute Tribunal on the issue that the whole system of justice is put at risk by the attitude of management to systematically opt for payment in lieu of rescission (see UNDT/2016/204, para. 106).

J. Standing of staff associations

Recommendation 16

Staff associations and unions should be recognized as having the legal standing to file actions in the Dispute Tribunal regarding their institutional interests, such as claims of interference with the exercise of the rights of association of their members. The Council recommends that the General Assembly amend the statute of the Tribunal in the interest of recognizing such standing of staff associations and unions. The proposed text for such an amendment is set forth below for the consideration of the Assembly.

Article 2.1 is amended to add subsection (d), as follows:

(d) In addition, staff associations and unions may bring applications before the Dispute Tribunal against the Secretary-General regarding claimed violations of their institutional interests, such as claims regarding interference with the exercise of the rights of association.

33. During current and past discussions with staff unions and associations, the Council was informed of their concern that they are unable to file applications on their own behalf in the Dispute Tribunal regarding interference with their institutional interests, such as claims of interference with the exercise of rights of association of their members. In the Council's meetings with the judges and management, the Council heard no suggestion that this limited form of associational standing would create operational difficulties.

34. The Council recommends that the General Assembly consider the issue of the standing of staff associations to file applications in the Dispute Tribunal, upholding their members' rights to freedom of association, as recognized in staff rule 8.1 (g). If the statute of the Tribunal needs to be amended so that such standing is recognized, the Council recommends such an amendment, in the form presented above.

K. Joinder of similar claims

Recommendation 17

The Council recommends that the Dispute Tribunal encourage, in appropriate cases, joint submission of similar claims and that the Registrars and the Office of Staff Legal Assistance facilitate such applications. Staff unions and associations may provide valuable support to staff members in this regard.

35. The Dispute Tribunal has permitted joinder of similar claims in some cases. The Council encourages the regularization of the practice and the simplification of the processing of such claims for the sake of judicial efficiency.

36. Joint submissions should result in greater consistency in the application of rules and regulations, and reduce the incidence of unfair outcomes in which similarly situated staff are treated differently because they had not previously filed a claim in

the Tribunal. Joinder of similar submissions would also reduce the administrative burden on the system caused by multiple applications in which the same issues are raised.

37. The Council also recommends that the Dispute Tribunal, working in consultation with the Principal Registrar, consider whether its rules of procedure need to be amended to facilitate submission of joint claims.

L. Investigation and disciplinary matters, including in relation to sexual harassment

Recommendation 18

The Secretary-General should further strengthen the capacity of the United Nations to conduct reasonably prompt, professional investigation of claims of sexual harassment, and implement a streamlined, comprehensive procedure to receive, process and address complaints. The Organization should put in place procedures to ensure due process rights of the alleged victims and the accused, as well as to ensure the confidentiality of their information, and to ensure that complainants and witnesses are effectively protected against retaliation.

38. In its consultations with stakeholders, the Council has heard many anecdotes about the pervasive harassment and abuse of authority, including sexual harassment, in the workplace. In February 2018, the Secretary-General reiterated his commitment to zero tolerance of sexual harassment by sending a message to staff to underscore his commitment to encouraging and enabling staff to report sexual harassment in the workplace, and to support victims and witnesses. The "Speak up" helpline was set up and made operational as a resource which will allow Secretariat personnel to speak confidentially with an impartial and trained individual who can provide information on mechanisms for reporting, protection and support. The Investigations Division of the Office of Internal Oversight Services was tasked to investigate all complaints of sexual harassment and to implement a streamlined, fast-tracked procedure to receive, process and address complaints.

39. The Council strongly supports the efforts of the Secretary-General to combat and stamp out sexual harassment. The Council has been informed, however, that investigation by the Office of Internal Oversight Services takes, on average, 12 months. Tribunal cases may be an indication of concerns about due process and the quality of those investigations. There are further concerns about issues relating to burden of proof, retaliation against those who report sexual harassment, confidentiality of the information provided by the alleged victim and the accused, and sanctioning of individuals who have been found guilty of wrongdoing. The Council has also heard concerns about the complexity, length and high volume of cases in the field, indicating the preference of some stakeholders that disciplinary procedures there be centralized. Because the quality of fact-finding directly affects the outcome of a case, it is important that the Tribunals use their discretionary authority to craft effective remedial orders, to ensure compliance with all procedures, including investigations.

40. The Council has also understood from its interlocutors that there is generally insufficient knowledge and understanding of how sexual harassment manifests itself in the workplace, in particular given its close relationship with harassment and abuse of authority. The Council encourages greater dissemination of clear and accessible information on sexual harassment and more sensitivity training for managers and staff, paying particular attention to staff who may be more vulnerable to sexual harassment owing to their distant and isolated locations.

41. The United Nations should show leadership by acting decisively against the incidence of sexual harassment within its own ranks. The reporting, protection and support procedures at the Organization must demonstrate the seriousness with which the need to eradicate and prevent sexual harassment is regarded. Reporting sexual harassment must not be viewed as an action bringing the Organization into disrepute, as staff have complained during the consultation process. Rather, it must be regarded as the first and most critical step to take in addressing sexual harassment in the workplace. Accused individuals should be accorded all due process rights. If they are found to be guilty, however, decisive action must be taken, and be seen to be taken, so that perpetrators in the workplace are never perceived to be acting with impunity.

42. The Council understands that there are number of pending changes to the legal framework governing the issues relating to investigations, the disciplinary process and sexual harassment. The Secretary-General's Bulletin on, among other things, sexual harassment (ST/SGB/2008/5) is under review, with a view to ensuring that it reflects the recent actions and intentions of the Secretary-General. The current administrative instruction on unsatisfactory conduct, investigations and the disciplinary process (ST/AI/2017/1) may be also amended further, one year after its implementation. Furthermore, the management reform proposed by the Secretary-General to the General Assembly will change the organizational structure of the Department of Management and the Department of Field Support. The Council will pay close attention to the changes and, in the meantime, encourages management to consult closely with the staff at large on these important matters and ensure that sexual harassment concerns are dealt with in a comprehensive manner, bearing in mind broader concerns about due process and abuse of authority.

III. Additional matters

43. In its report of 2017, the Council noted its need for more comprehensive terms of reference that detail the legal and administrative framework governing its work (see A/72/210, para. 6). The Council was unable to fully consider the matter during its recent session and will address it in a future report.

44. In its resolution 72/256, the General Assembly noted that staff, in particular those serving in field missions and offices, still appear to have limited awareness of the system of administration of justice. Numerous interlocutors cited the same issue to the Council, in particular those who are locally employed by the Organization. Taking into account the foregoing, and noting also the efficiency-related benefits that will inure to the operations of the internal justice system when staff better understand their rights and obligations, the Assembly should request the Secretary-General to establish an outreach task force from among entities with a strong field presence, such as the Department of Field Support, to work collaboratively with Headquarters and local staff associations and unions to effectively address the Assembly's expressly noted need for the improvement of staff knowledge and understanding. The establishment of such a task force would also address the emphasis that the Assembly has placed on access to the system of administration of justice that staff at all duty stations should have (see resolutions 71/266, para. 12, and 66/237, para. 12).

45. The Council notes the General Assembly's request that the Secretary-General and the Office of Human Resources Management ensure that staff have a more comprehensive understanding of the rules, regulations, instructions and administrative issuances (see resolution 72/256, para. 9) and notes also the Office's continuing project to consolidate, harmonize and systematize those instruments. Some staff associations have expressed concern that consultations with the Office on the project

were inadequate. If that is the case, the Council would suggest that this issue be addressed through existing mechanisms for staff-management consultation.

IV. Acknowledgements

46. The Council wishes to express its gratitude to all stakeholders for their availability and their clarifying and constructive contributions during the interviews and thereafter. Their input was crucial to the understanding of many challenges and to the development of the recommendations contained in the present report.

47. The Council is further indebted to the Office of Administration of Justice for its understanding and attention to the Council's requirements and its tireless follow-up to the Council's requests.

(*Signed*) Yvonne **Mokgoro**

(*Signed*) Carmen **Artigas**

(*Signed*) Samuel **Estreicher**

(*Signed*) Frank **Eppert**

(*Signed*) Jamshid **Gaziyev**

Annex I

Views of the United Nations Appeals Tribunal

1. The United Nations Appeals Tribunal is the tribunal of final instance in the internal justice system of the United Nations dealing with employment law issues of staff members of the United Nations, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the International Civil Aviation Organization and several other international agencies and entities, as well as for participants of the United Nations Joint Staff Pension Fund. The Appeals Tribunal functions well and delivers on its mandate within the limitations of its jurisdiction and powers. There is a strong sense of collegiality among the judges and the Registry staff and a conscientious commitment to the tasks at hand.

2. The Appeals Tribunal currently composed of six judges, namely:

Martha Halfeld (Brazil)

Sabine Knierim (Germany)

Richard Lussick (Samoa)

John Murphy (South Africa)

Dimitris Raikos (Greece)

Deborah Thomas-Felix (Trinidad and Tobago)

3. In the period from July 2017 to June 2018, the Appeals Tribunal held three two-week sessions: two in New York (October 2017 and June 2018) and one in Amman, at the invitation of the Commissioner-General of UNRWA (March 2018).

4. As at 30 June 2018, the Appeals Tribunal has received 1,183 appeals and disposed of 1,135; 48 appeals are thus pending final adjudication. The Appeals Tribunal finalizes between 25 and 35 appeals per session.

5. The Appeals Tribunal is ably assisted by a small complement of Registry staff and legal officers and administrators in administrative support; preparatory work; legal research; the drafting of briefing notes; and the finalization and publication of judgments. The tasks are extensive and demanding but are consistently carried out by staff with professionalism, efficiency and enthusiasm.

6. Following the adoption of General Assembly resolution 72/256, in which the Assembly approved remuneration of judges for adjudicating interlocutory motions, it became possible in January 2018 for the Appeals Tribunal to reinstate the duty judge system to deal with interlocutory motions filed between the sessions of the Tribunal. The system is working well and ensures that motions and procedural matters are dealt with timeously, appropriately and in a manner that facilitates the efficient adjudication of the appeals during sessions.

7. The Office of Administration of Justice has recently upgraded the website of the internal justice system, which is as a result much improved and user-friendly. There remains a need to improve the search function to allow for search by topic and search term, which will help the judges and other stakeholders to prepare more proficiently. The problems with the court case management system continue to make it difficult to access the records of proceedings of the Dispute Tribunal and to source and locate documentary evidence. The system is simply too slow and unreliable and thus continues to frustrate and present challenges. However, the Appeals Tribunal is aware that the Office is making concerted efforts to address the challenges through the introduction of a new system and is confident that the issues will be resolved soon.

8. The Appeals Tribunal appreciates the General Assembly's amendments to the system of remuneration for judges of the Appeals Tribunal to provide payment for the adjudication of interlocutory motions and a monthly stipend for the President. Concerns remain about the "pay per judgment" system, which introduces conflicts of interest in relation to the distribution of cases, dissenting and concurring minority judgments and postponements. It may be preferable for judges to be paid a flat rate per session.

9. The attenuated power of the Appeals Tribunal to award reinstatement remains a concern among judges. Article 9 (1) of the statute of the Appeals Tribunal provides that when the Appeals Tribunal orders reinstatement (specific performance) in dismissal cases it shall also set an amount of compensation that the Secretary-General may elect to pay as an alternative to reinstatement. Anecdotal evidence suggests that the Administration routinely does not give effect to orders of reinstatement and opts rather to pay the amount of in-lieu compensation.

10. The limited remedial power often will not do justice to staff members who deserve to be reinstated to pursue United Nations careers which may have been illegally terminated by an abuse of power. Moreover, without the protection of an effective reinstatement remedy, it is easier for managers to abuse the managerial prerogative and victimize staff members who lodge grievances seeking to assert their rights. Anecdotal evidence suggests that this kind of retaliation has happened from time to time. In the circumstances, perceptions about judicial effectiveness are at risk of becoming negative among staff members. The tribunals will be seen as unable to provide an effective and protective remedy. An employment tribunal that lacks the power of reinstatement will soon lose legitimacy. It will be better to repose greater trust in the internal judiciary by permitting the tribunals a power of reinstatement circumscribed by appropriate requirements of practicability and tolerability. [a] In addition, dismissals which are procedurally unfair, but in all other respects lawful and reasonable, normally should not lead to reinstatement or re-employment.

11. With regard to the matter of referrals for accountability, it may be prudent from a judicial point of view for the Secretary-General to report on actions taken pursuant to individual referrals for accountability. This will guarantee the efficacy of the remedy. Futile referrals to the Secretary-General will further undermine the legitimacy of the tribunals and will do little to foster the values of transparency or accountability aimed at changing managerial behaviour in compliance with the applicable ethos.

[a] Several other international administrative tribunals, such as the International Labour Organization Administrative Tribunal, the World Bank Administrative Tribunal, and the Council of Europe Administrative Tribunal, have such power. See, for example, International Labour Organization Administrative Tribunal statute, article VIII: "In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to her or him."

Annex II

Views of the United Nations Dispute Tribunal

Report of the President of the United Nations Dispute Tribunal for the period from 1 January to 31 December 2017

Introduction

1. The report of the judges of the United Nations Dispute Tribunal includes facts regarding the Tribunal as well as its activities during the period from 1 January to 30 December 2017. The report also provides a summary of the Tribunal's achievements during the period and identifies present and future challenges.

2. The Tribunal commenced operation on 1 July 2009 as the first instance tribunal of a two-tier formal system of administration of justice, providing internal dispute resolution in respect of matters arising from disputes between the staff and the United Nations concerning employment and disciplinary matters. The judges are committed to the ideals, the mission and the work of the United Nations.

3. The Tribunal refers matters for mediation where possible. The decisions of the Tribunal are such as to not only resolve disputes but also to interpret the administrative issuances of the United Nations. Its decisions guide and inform in respect of policy development. The Tribunal further provides an internal justice system which supports the immunity of the United Nations by providing a system of justice separate from that of the jurisdictions of its Member States.

4. The Tribunal plays an important role in the review of disciplinary cases brought before it. In that respect, it examines the specific complaints of an applicant in respect of the carrying out of investigations, the observance of due process and procedural fairness, considerations for the meeting of the standard of proof and the proportionality of any imposed penalty. It also adjudicates in other cases including those alleging abuse of power, harassment, the absence of fairness in selection processes and terminations and retaliation against a staff member for any reason.

5. By the work it does, the Tribunal is also generally an important contributor to the promotion of accountability throughout the Organization, in particular by the reference of staff for accountability where appropriate.

6. There are several major challenges, including concerns about judicial independence in relation to the Tribunal, considerations of the application of the principle of the rule of law, administrative delays in recruitment and many systemic issues that appear not to reflect the intentions of the General Assembly when it established the new internal justice system.

7. The number of cases currently before the Tribunal is increasing. Some cases are effectively multiple applicants involving identical or nearly identical applications. Owing to the current reforms and consideration of future reforms in the United Nations, it is anticipated that this trend is likely to continue.

8. From its inception, the notion of the independence of the Tribunal has lacked definition and does not appear to be understood within the hierarchy of the Organization. It is apparent to the judges of the Tribunal that independence is being equated with and limited to a policy of direct non-interference by the executive branch in respect of judicial decisions, rather than meeting the international standards of judicial independence and autonomy holistically.

9. In Geneva, the Tribunal has a pilot monthly dialogue with counsel from the Office of Staff Legal Assistance and the counsel who represent the respondent to discuss issues and procedures. In Nairobi, the Tribunal judges participated in a forum organized by the Ombudsman on the internal justice system.

10. During the reporting period, the Tribunal held a plenary meeting in May 2017 in New York, during which it considered issues of independence and judicial autonomy and held meetings with the Secretary-General, officials of the General Assembly and Secretariat officials. Immediately following the plenary meeting, the judges held a workshop, at which they addressed issues of procedure and legal policy and conducted a review of certain aspects of the applicable case law and general trends and developments in the law.

11. It is important for the future of the Tribunal and the internal justice system of the United Nations that the General Assembly, the Internal Justice Council and the judges address the key challenge of judicial independence to ensure that both the mandate of the Tribunal and the universal principle of the separation of powers are properly understood and appreciated.

President of the Tribunal

12. In accordance with article 1 of the rules of procedure of the Tribunal, during its plenary meeting of May 2016, the judges elected Judge Rowan Downing as President for a period of one year, from 1 July 2016 to 30 June 2017. This period was extended to 31 December 2017 to realign the term of the President of the Tribunal with the calendar year and the reporting year used for the United Nations. Judge Nkemdilim Amelia Izuako was elected as President of the Tribunal commencing on 1 January 2018.

Judges of the Tribunal

13. During the reporting period, the Tribunal was composed of the following judges:

Teresa Maria da Silva Bravo (Portugal), full-time, based in Geneva

Rowan Downing (Australia), ad litem, based in Geneva

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

Alessandra Greceanu (Romania), ad litem, based in New York

Alexander W. Hunter, Jr. (United States of America), half-time

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

Agnieszka Klonowiecka-Milart (Poland), full-time, based in Nairobi

Goolam Meeran (United Kingdom of Great Britain and Northern Ireland), half-time.

Deployment of half-time judges

14. During the reporting period, the two half-time judges completed deployments in New York, Nairobi and Geneva. Judge Meeran served a three-month deployment in Geneva from 30 January to 30 April 2017 and another three-month deployment in Nairobi from 15 November 2017 to 15 February 2018. Judge Hunter was deployed in Nairobi from 3 January to 14 April 2017 and in Geneva from 21 August to 10 November 2017.

Judicial statistics of the Tribunal

15. The general judicial activity of the Tribunal for the period from 1 January to 31 December 2017 is set out below.

16. During the reporting period the Tribunal registered a total of 382 new cases, including 24 inter-Registry transfers. The Tribunal disposed of 268 cases, rendered 100 judgments, issued 763 orders and held 210 hearings. The number of judgments does not equate to the number of cases disposed of because some of the cases have been closed by orders on withdrawal and because of settlements following case management discussions. There were moreover several instances when a single judgment was issued in relation to two or more cases that concerned similar issues.

17. Of the 268 cases disposed of during the reporting period, 63 cases (23.50 per cent) were closed on withdrawal of application. Nine cases were closed following successful mediation through the Office of the Ombudsman, 24 cases were closed following direct informal settlement between the parties and 54 cases were otherwise closed.

18. As already stated, the Tribunal registered 382 new cases during the reporting period. As at 31 December 2017, 372 cases were pending. Geneva had 158 pending cases; Nairobi had 118 pending cases; and New York had 96 pending cases.

19. Overall, from its inception in July 2009 to the end of December 2017, in the eight-year period of its existence, the Tribunal registered a total of 3,030 cases, disposed of 2,658 cases, rendered 1,516 judgments, issued 6,626 orders, and held 1,930 hearings.

20. For this reporting period, 31 per cent of applicants in the cases filed were self-represented.

21. The President of the Tribunal during the reporting period issued two orders on requests for recusal of a judge and one order on the reassignment of a remanded case to a judge.

22. During the reporting period, there were no complaints causing reference to, or consideration of the judicial complaints mechanism.

Hearings

23. During the reporting period, the Tribunal held a total of 211 hearings. Of these, 130 were on the merits, and 81 were case management discussions. The breakdown per Registry is as follows: Geneva, 97 hearings; Nairobi, 71 hearings; New York, 43 hearings. The hearings were of varying length, from one day to 10 days.

24. Hearings are becoming the norm, cases generally being considered on the papers only at the request of both parties and upon a decision by a judge that it is appropriate to do so. Those matters considered on the papers upon the motion of the Tribunal generally involve suspension of action applications and issues of obvious lack of receivability (admissibility). Hearings are rarely held in respect of suspension of action (injunction) applications where necessary, as those are based on prima facie findings and dependent on the material provided in an application and the reply, unless treated as an ex parte application.

25. Case management discussions involve a scheduled meeting of the parties with the Tribunal for a discussion about the application and the way it shall proceed. Such discussions are undertaken in all substantive cases except those that exhibit an obvious lack of receivability, when a hearing is urgent, or when only submissions are made and evidence is not presented.

26. The purpose of a case management discussion is to identify the claim and issues to be determined between the parties, ask parties to address legal issues of concern to the Tribunal, schedule hearings and encourage the parties before the Tribunal to mediate through the Office of the Ombudsman or to directly resolve matters, where possible.

27. The judges of the Tribunal have observed that when issues, both legal and factual, are isolated and discussed with a judge in case management discussion, there is an increasing desire to proceed to mediation or settlement discussions. It often appears that counsel before the Tribunal can better discuss matters with those instructing them in a more focused manner after a case management discussion.

Issues of independence

General considerations

28. It is essential to note that the independence and the autonomy of judges are not for their benefit. They are for the benefit of the judicial institution, the Organization and ultimately for the parties appearing before the Tribunal.

29. This is at least the third report in which the issues of independence and judicial autonomy have been raised. The judges of the Tribunal are particularly concerned that in the reporting period significant disruption to the work of the Tribunal has occurred because the matter has not been addressed.

30. In its report dated 15 July 2016 (A/71/158), the Internal Justice Council noted the importance of an independent and professional judiciary (para. 4) and stated that:

> It is a characteristic of a mature legal system that all three elements of high authority — the Legislature, the Executive and the Judiciary — respect the separation of powers. This requirement is challenging especially in a hierarchical organization such as the United Nations, but it is nevertheless essential if the rule of law is to be respected. (para. 6)

31. More specifically, at paragraph 37 of that report, the Internal Justice Council highlighted the need for the independence of the judiciary and the difficulty of achieving it in the Organization, while advocating that the Secretary-General and the leadership refrain from conduct that diminishes the authority and independence of the Tribunals.

32. In its report dated 24 July 2017 (A/72/210) the Internal Justice Council made further similar observations and emphasized that judges must fulfil their adjudicatory role and function without fear, favour or prejudice.

33. The Internal Justice Council also noted the need for the emoluments of the judges not to be linked to those of staff members and made the recommendations set out below.

> The judges serving on the Tribunals are independent, impartial arbiters responsible for rendering justice on the basis of the facts and applicable law. They are not staff members of the United Nations and should not be linked with the staff in terms of their compensation and emoluments. With respect to their judicial decision-making, they enjoy full autonomy and are not subject to management oversight. The Council recommends that a review of all policies and procedures be carried out to ensure adherence to that basic principle of judicial independence and autonomy. Furthermore, the Council recommends that the Office of Human Resources Management submit for the consideration and approval of the General Assembly a revised compensation package for the

> Dispute Tribunal judges that negates the equivalency linkage to staff compensation, on a “no loss, no gain” basis. (A/72/210, para. 57)

34. The judges of the Tribunal concur with the views expressed and the recommendations made by the Internal Justice Council.[a]

35. In a formal setting, the independence of the judiciary is directly related to the separation of powers in respect of the arms of the governance structures of the United Nations. If there is no separation of powers properly recognized and supported, not only do the necessary checks and balances not function properly in respect of the matters within the jurisdiction of the Dispute Tribunal and the Appeals Tribunal, there can be no proper assertion of the rule of law or true provision of justice for staff or the Organization.

36. The judges of the Dispute Tribunal have serious concerns about the persisting lack of institutional autonomy and independence of the Tribunal which runs contrary to the provisions of General Assembly resolution 63/253. The Administration appears to operate upon an assumption that judicial independence is protected if it refrains from exerting pressure on the results in individual cases. Judicial independence is a much broader concept. In the case of the Tribunal, institutional aspects of autonomy and independence are structurally and practically absent, and the effect is that justice is impeded and is sometimes neither done nor seen to be done.

37. One of the most egregious manifestations of the denial of institutional independence was a statement on the official website of the Office of Administration of Justice in which it was asserted that the Tribunal is an “entity within the Office of Administration of Justice”. Following the intervention of Tribunal judges, that statement was removed. However, the perceptions have been shaped and are still visible, for example, in the manual of the Office of Internal Oversight Services, wherein the Tribunal is described as “an administrative body which hears and decides cases”.

38. The lack of recognition of judicial autonomy manifests itself in several aspects which are vital for the proper functioning of the Tribunal. Some of these include the set-up and the functions of the Office of Administration of Justice, the insecure status and conditions of service of judges, the denial of a role for judges in deciding the Tribunal’s budget, the issue of judges being shut out with regard to training needs and staffing, the denial of any role to judges for directly making recommendations for legislative amendments including legislation relating to the functioning of the Tribunal, and the blocking of any dialogue between judges and the General Assembly as a legislative body.

39. In all these areas, international standards of judicial independence are being breached. The Tribunal judges’ concerns were the subject of a letter to the President of the General Assembly in October 2016. No response to that letter was received.

40. Constituting a very serious problem is the fact that the Tribunal judges are being treated by the Administration as staff. This treatment has no basis in the governing laws and breaches the judges’ conditions of service. This approach sometimes hinders the discharge of the judicial function by leading to a conflict of interest.

41. During the reporting period, there have been two most serious examples of parties before the Tribunal being subjected to the potential loss of access to justice because of the judges being conflicted because they are considered as staff and do not have the requisite structural independence and functionality.

[a] See also A/71/158, paras. 38–63.

42. In May 2017, the Tribunal was to adjudicate several cases filed in respect of the changes to the salary scale of staff. As the judges are remunerated upon the basis of that scale, and not as part of an independent determination by law, the issue of a conflict of interest had to be considered. The Tribunal determined that the doctrine of necessity would have to be applied. That is, notwithstanding the direct conflict of interest, the judges of the Tribunal had to deal with the cases, as there was no other way for the parties to litigate the cases.[b]

43. Then, in September 2017, two judges were forced to recuse themselves from cases involving changes to the post adjustment in Geneva, as they, like the applicants before them, were subject to those same changes.

44. These situations should not be repeated, and the problem must be urgently addressed as these issues have a negative impact on the ability of the Tribunal to independently and properly carry out its mandate.

Uncertain status and conditions of service of judges

45. It is a fundamental international standard that the independence of the judiciary is linked to the way the status of judges, in a formal legal sense, is defined and administered. Paragraph 11 of the Basic Principles on the Independence of the Judiciary provides:

> "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be *adequately secured by law*" (emphasis added).

46. The Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, adopted by the Economic and Social Council and endorsed by the General Assembly, mandate "offering judges appropriate personal security, remuneration and emoluments" (procedure 5).

47. In more express terms, the draft Universal Declaration on the Independence of Justice, prepared under the auspices of the Economic and Social Council and recommended by the Commission on Human Rights as a tool for the implementation of the Basic Principles, provides that the terms and conditions of service, security and remuneration of judges shall be secured by law and shall not be altered to their disadvantage.

48. The status and remuneration of the Tribunal judges have been exposed to unilateral interpretations by the Office of Human Resources Management. There is a direct and real conflict of interest posed by the arrangement under which the same offices of the Secretariat that appear before the Tribunal are vested with power to determine the judges' conditions of service. Their interpretations exhibit a lack of understanding of the fact that judges are not international civil servants under the Secretary-General.

49. The Tribunal judges are not staff of the Secretariat or the Executive. They are elected officials of a subsidiary organ of the General Assembly and form part of the judicial branch of the United Nations governance structures. The General Assembly in its resolution 63/253 specified directly which aspects of the Staff Rules are to be applied to the Tribunal judges as part of their conditions of service. The conditions of service are unsatisfactorily expressed to include the matters set out in the annex to the resolution (see A/63/314).

[b] See *Lloret Alcaniz v. Secretary-General of the United Nations* (case UNDT/GVA/2017/020, order No. 113 (GVA/2017)).

50. The result is that the Secretariat has discretion as to what additional matters, if any, are to be included in the conditions of service of judges. The conditions of service should be comprehensive and complete in every respect, leaving no room for change or conjecture during the period of appointment. They should be respected as being the provisions of a resolution of the General Assembly and thus not subject to the Staff Regulations and Rules, unless so expressly provided.

51. This notwithstanding, the Staff Rules are applied improperly to the judges. For example, the General Assembly provided by resolution for the compensation of judges, including for part-time judges. In respect of part-time judges, it was expressly stated that they would have:

> Participation in the Pension Fund under supplementary articles A and B of the regulations of the fund; the pensionable remuneration level and rates of contribution would be set at those levels applicable to part-time staff members of the United Nations at the D-2 level (A/63/314, annex).

52. This condition, when placed in context, may be interpreted to mean that the half-time judges would be in receipt of a half pension after their seven years of service, as well as being covered for disability and the like. They had an amount equal to half the full-time judges' pension payment deducted from their emoluments. All other benefits provided to the half-time judges are half those provided to the full-time judges. The possible receipt of a pension upon retirement at the end of their elected term of seven years was never possible under the rules of the Pension Fund of the United Nations, as seven years' half time would represent only 3.5 years' full-time service of a staff member and thus a monthly pension would not be vested, given that vesting only occurs after five years' full-time service of a staff member.

53. At best this is ambiguous and appears to be inconsistent with the conditions expressly set by the General Assembly for judges who are not staff members and whose term is limited to seven half-time years, that is, three and a half full years. The Administration treated the retiring half-time judge as a staff member rather than as an official elected by the General Assembly who was expressly to be provided with a pension upon the conclusion of her term, even though that term would never reach the period equivalent to five full years, as required by the staff Pension Fund rules. It is unfortunate that the Secretary-General did not make it clear to the General Assembly and to those judges occupying the half-time posts that they would never be in receipt of a pension benefit.

54. Further, judges who were about to take office in July 2016 were issued "appointment letters" by the Office of Human Resources Management as if they were staff members. The letters purported to decrease the Tribunal judges' emoluments as if they were staff and to introduce a clause subordinating the judges to all present and future Staff Regulations and Rules, with some variations among the Secretariat offices.

55. It must be noted that the Tribunal judges are reflected in the Umoja computer system as staff members and are required to wear "staff" identification badges. Recently, pensionable remuneration of the Tribunal judges has been unilaterally decreased by the Administration. These administrative arrangements are inaccurate and inappropriate external manifestations of a status of international civil servants employed by the Secretariat and ascribed to judges, which undermines trust in judges' independence and impartiality.

56. A conflict of interest is inherent in the arrangement by which the Tribunal judges who, when subjected to the Staff Rules regime, as augmented, modified and interpreted by the Office of Human Resources Management, are exposed to the risk of disputing those rules and interpretations which are wrongfully made to apply to

them and taking positions which will then compromise their impartiality in all similar disputes coming before them.

57. It is important that, in accordance with the United Nations standards on the independence of the judiciary, the Tribunal judges' status, including remuneration, be sufficiently "secured by law", that is, in this case, the resolutions of the General Assembly. In respect of remuneration, it is not a matter of the judges requesting an increase in emoluments but that the emoluments paid must be properly determined and secured pursuant to international standards for the judiciary.

Other issues

Set-up and functions of the Office of Administration of Justice

Executive Director

58. In paragraph 28 of its resolution 61/261, the General Assembly resolved to establish the Office of Administration of Justice to coordinate the justice system.

59. The operations of the Office are governed by a Secretary-General's Bulletin (ST/SGB/2010/3), in which it is asserted that the Office of Administration of Justice is an "independent" office. Under section 2, it provides substantive, technical and administrative support to the Dispute Tribunal and the Appeals Tribunal through their Registries.

60. There are several significant structural lapses compromising the independence of the Office of Administration of Justice. The Office can be viewed as compromised by paragraphs 3.4 and 3.5 of ST/SGB/2010/3, which provide:

> 3.4 The Executive Director advises the Secretary-General on systemic issues relating to the administration of internal justice, including by recommending changes to regulations, rules and other administrative issuances that would improve the functioning of the system of administration of justice.
>
> 3.5 The Executive Director prepares reports of the Secretary-General to the General Assembly on issues relating to administration of justice; liaises, as appropriate, on those issues with other offices; and represents, as necessary, the Secretary-General at meetings of intergovernmental bodies, international organizations and other entities on issues of administration of justice.

61. These provisions clearly show that the Executive Director of the Office of Administration of Justice reports to and prepares reports for the Secretary-General, who is the only respondent before the Tribunal.[c] The Executive Director also represents the said respondent at meetings. Further, the performance appraisal for the Executive Director is through the Chef de Cabinet, also within the Executive Office of the Secretary-General. The Executive Director is not considered, in practical and structural terms, independent of the respondent.

62. It is further suggested that advising the Secretary-General on systemic issues and writing reports on his behalf cannot be combined with "providing substantive, technical and administrative support" to the Dispute Tribunal and the Appeals Tribunal. The provision of advice should be placed with the Executive Office of the Secretary-General or the Office of Legal Affairs. The Office of Administration of

[c] See Article 97 of the Charter of the United Nations, whereby the Secretary-General is "the Chief Administrative Officer of the Organization"; Article 101 of the Charter, which provides that "All staff shall be appointed by the Secretary-General under regulations established by the General Assembly"; and article 2.1 of the statute of the Dispute Tribunal, which provides for the Secretary-General to be the respondent in all matters coming before the Tribunal.

Justice should embrace the support function and be committed to acting in the interest of justice in priority over any other interests. The Executive Director cannot bona fide serve two masters whose interests are in conflict. Obviously, the Executive Director cannot give the judges substantive advice, either directly or through the Registries. The unsavoury practical consequences of this in-built conflict are numerous and are present throughout the administrative hierarchy of the Office.

63. To remove any doubt about the actual lack of structural and practical independence of the Office of Administration of Justice arising from its being located within the Secretariat, ST/SGB/2015/3, on the organization of the Secretariat, provides in its paragraph 3.2 that the Office is part of the Secretariat.

Office of Administration of Justice

64. Section 5 of ST/SGB/2015/3 further provides for reporting and the provision of advice to the Secretary-General and the carrying out of tasks as may be designated by the Secretary-General, the respondent. This is entirely inconsistent with the independence of the Office of Administration of Justice asserted in section 2 of ST/SGB/2010/3 and, as such, ST/SGB/2015/3 confirms that the Office is not independent, but under the direct control of the Secretary-General.

65. The Executive Director of the Office of Administration of Justice is also conflicted by being the first reporting officer for the head of the Office of Staff Legal Assistance, and the second reporting officer for the staff of that Office. Upon the retirement of the former Executive Director in February 2017, it was noted that she had to remain in post as it was not possible for the Principal Registrar to act as officer-in-charge of the Office of Administration of Justice because of the conflict, which had been recognized for the first time.

66. Given the role of the Principal Registrar in the administration of the Dispute Tribunal and the Appeals Tribunal, the holder of that post could not also act as the officer-in-charge of the Office of Staff Legal Assistance, as it is a party appearing before the two Tribunals. There is an inherent conflict for the Office of Administration of Justice to be involved in the direct administration of the Dispute Tribunal, the Appeals Tribunal and of course the Office of Staff Legal Assistance, which is a party habitually appearing before the Tribunals (see ST/SGB/2010/3, sect. 7).

67. The structural conflict for the Executive Director was further demonstrated when evidence was given before the Tribunal in a case in which it was disclosed to the Tribunal that the former Executive Director demanded and was given access to copies of case notes made by a legal officer of the Office of Staff Legal Assistance in cases the officer was handling. It was said that such notes were needed to manage the staff member. In so doing the confidentiality of the conduct of cases was seriously breached.

68. Evidence in the same case disclosed that the former head of the Office of Staff Legal Assistance had copied the Executive Director in when sending emails concerning a case being conducted by the staff member of the Office. The confidentiality of the lawyer and client relationship was most seriously breached. The structural issues need the most serious and urgent review and rectification, which can be achieved through a restructuring to recognize the proper and independent role of the Office of Administration of Justice. It is suggested that an examination of the modalities used to ensure independence at the International Civil Service Commission could be helpful if adopted to ensure the independence of the Office of Administration of Justice.

69. Unfortunately, the judges have had several serious disagreements with the current Executive Director of the Office of Administration of Justice. These have

arisen mainly from the unnecessarily combative stance of the Executive Director, who in a correspondence of 1 November 2017 to the then President of the Tribunal asserted that:

(a) The Office of Administration of Justice serves as a buffer between the Dispute Tribunal and the Administration and managers and acts as the guardian of judicial independence, and demanded that all correspondence between the Tribunal judges and management pass through her office;

(b) The Office of Administration of Justice will ensure that the Tribunal is isolated from the Administration to be effective and credible and that all correspondence from the judges to the Administration and from the Administration should pass through the Office of Administration of Justice and that the Administration would be notified to this effect;

(c) The judges should not take part in conferences and that to do so would be in breach of their code of conduct;

(d) The judges should not be involved in outreach or stakeholder meetings.

70. Most of the judges examined the functions of the Executive Director as provided in section 3 of ST/SGB/2010/3 and found no capacity of the Executive Director to make such claims and assertions and advised her accordingly. The judges are not answerable to the Executive Director and it is not part of the functions of the Executive Director to presume to provide any guidance on the conduct of the judges. The Executive Director is not responsible for the management of the judges.

Principal Registrar

71. As the Principal Registrar is within the Office of Administration of Justice, this position should also be independent. At a meeting of the judges with the Secretary-General in May 2017, the judges noted that the Principal Registrar was in attendance and was advising the Secretary-General in respect of matters of concern raised by the judges. The judges are firmly of the view that it was inappropriate for the Principal Registrar to advise the Secretary-General in these circumstances, especially when it is asserted that the Office of Administration of Justice is independent.

72. The request should not have been made for the Office of Administration of Justice to be present and, equally, should not have been accepted, if independence was truly believed to exist in the Office. It may be that the reporting lines through the Chef de Cabinet precluded the Executive Director and the Principal Registrar from declining the invitation to attend the meeting. If this be the case, it further discloses issues of concern in respect of independence.

73. Section 4 of ST/SGB/2010/3 provides that the Principal Registrar is accountable to the Executive Director and is responsible for overseeing the activities of the Registries of the Dispute Tribunal and the Appeals Tribunal:

4.3 The core functions of the Principal Registrar are:

(a) Coordinating the substantive, technical and administrative support to the judges of the two Tribunals in the adjudication of cases, including distribution of cases, in particular by monitoring and enforcing compliance with the rules of procedure of the Tribunals by the parties;

(b) Coordinating and monitoring the maintenance of the Tribunals' registers and the publication and dissemination of the decisions, rulings and judgements rendered by the Tribunals;

(c) Coordinating and monitoring the maintenance of the Tribunals' case law and jurisprudence databanks and reporting on the work of the Tribunals,

through the Secretary-General, to the General Assembly and other bodies, as may be mandated;

(d) In consultation with the Executive Director, ensuring optimal use of the human and financial resources allocated to the Tribunals; analysing the implications of emerging issues in the Tribunals; and making recommendations on possible strategies and measures;

(e) Advising the Executive Director on administrative, human resources and logistical matters related to the Registries' operational activities and coordinating the preparation of reports on the administration of justice and their presentation to intergovernmental bodies, such as the General Assembly and its committees and the Advisory Committee on Administrative and Budgetary Questions, as appropriate;

(f) Representing, as required, the Executive Director at meetings of intergovernmental bodies, at meetings with United Nations and non-United Nations officials and at international, regional or national meetings.

74. Paragraph 4.3, specifically, purports to give judicial power to the Principal Registrar. This provision is demonstrative of a structural and systemic error. The Principal Registrar has no ability, entitlement or power to "enforce compliance with the rules of procedure of the Tribunals by the parties". This is clearly an exclusive function of the judges of both the Dispute Tribunal and the Appeals Tribunal. There are no rules of procedure making provision for such a function to be exercised, and the Secretary-General cannot donate judicial power.

75. There is a real issue with the Principal Registrar holding the position of Principal Registrar in both the first instance tribunal, the Dispute Tribunal, and the appellate tribunal, the Appeals Tribunal. A clear conflict would arise should there be a need for the Principal Registrar to access confidential information of either Tribunal. There must be distance in respect of such information to ensure that reporting officers cannot be the subject of any allegation that they may have influenced an outcome of a case at first instance or on appeal. The conflict here is amplified by the fact that the Principal Registrar effectively acts as the deputy of the Executive Director in the performance of the duties under paragraphs 3.4 and 3.5 of ST/SGB/2010/3. Further, the holder of the post of Principal Registrar is ultimately responsible to the Secretary-General, the respondent.

76. Conflict is also present regarding "coordinating the substantive support […] in adjudication of cases", since serving both Tribunals is incompatible with giving the judges substantive advice. In respect of issues of coordinating hearings, in November 2017, matters in respect of the proposed timing and location of hearings away from a seat of the Tribunal were disclosed to the Office of Administration of Justice for the purposes of coordination and led to unauthorized disclosure of this confidential information to a senior manager at the proposed location of the hearing. The Tribunal had to cancel several of the scheduled hearings. To ensure confidentiality of sub judice matters, the judges are of the view that anyone not located within the chambers of the Tribunal as staff assigned to the Tribunal ought not to be involved, notwithstanding reporting lines.

77. The judges of the Tribunal are concerned at the failure on the part of the Office of Administration of Justice to consider the need to avoid the risk of actual or perceived conflict when staff of the Management Evaluation Unit of the Department of Management who have been involved in review of cases that come before the Tribunal, or former staff of the Office of Legal Affairs who have acted as counsel for the respondent before the Tribunal are then seconded to undertake work in the

Registries of the Tribunal. This means that the Tribunal is regarded as being the same as any other work unit in the United Nations, which it is not.

78. In November 2017, pursuant to article 21.3 (c) of the Tribunal's rules of procedure, the judges of the Tribunal issued judicial directions to better define and delineate the role of the staff within the chambers of the Tribunal and their separation from the executive branch of governance. The staff of the Tribunal should not work on any document to be provided to the executive branch as that compromises their positions and the independence of the Tribunal. This often happened in the past when they were asked by the holders of the posts of Executive Director and Principal Registrar to work on reports and other documents for the Secretary-General, such as the reply of the Secretary-General to the report of the Interim Independent Assessment Panel.

79. The said reply to the Panel's report was the formal response to the General Assembly from the Secretary-General as chief administrative officer of the United Nations[d] and thus head of the executive branch. The Office of Administration of Justice was directed by the Secretary-General to draw up the reply. Because the Tribunal's staff report either directly or indirectly to the Executive Director and the Principal Registrar, they are made to work on such documents when directed to do so. The judicial directions seek to clarify the proper role of the staff of the Tribunal.

80. In structural and thus practical terms, the independence of the Office of Administration of Justice is, in fact, a fiction. It may be that its independence can be achieved only by the Office reporting directly to the General Assembly. The position of the Executive Director of the Office should be considered for a defined term of office with a ban on holding further functions within the Organization for a period of five years.

81. The staff of the Tribunal's Registries are hired by the Office of Administration of Justice. They are required to subscribe to the oath of office taken by United Nations staff members but are not obliged to take any oath to keep communications with an assigned judge confidential, to be independent and to work for the ends of justice at the Tribunal. The judges have no role in the selection or any meaningful role in performance assessment of the staff of the Tribunal.

82. The reporting lines for staff members in the Tribunal Registries, except for the Dispute Tribunal Registrars, go through the Principal Registrar as second reporting officer. The reporting line for the Registrars is to the Principal Registrar and then to the Executive Director who in turn reports to the Secretary-General through the Chef de Cabinet.

83. To ensure that registry staff members render proper "substantive support", the Tribunal judges stress that the status of Tribunal staff must be such that they are independent of the Secretary-General, who is the only respondent before the Tribunal they work in. It has been recommended above that the approach taken in 1974 to guarantee the independence of the International Civil Service Commission and that of its staff be applied to the Office of Administration of Justice. Article 20.2 of that Commission's statute provides in relevant part that staff of the Commission are responsible to the Chairman and shall be removable only after consultation with him or her.

84. The Tribunal judges are concerned that the Office of Administration of Justice manifests a bureaucratic culture as opposed to a judicial one. The five most senior positions in the Office are largely consumed on management. Even so, legal officers and legal assistants are tasked with administrative functions, such as collecting

[d] See Article 101 of the Charter of the United Nations.

statistics. This needs to be addressed, together with consideration of the substantive work of the Office, including advising and representing the Secretary-General.

85. The concern of the Tribunal judges arises from the fact that, under the current state of affairs, the Tribunal staff members who are recruited and supervised by the Office of Administration of Justice are asked by their managers to undertake administrative duties and tasks, thereby creating a conflict with their support to the judges in judicial work. It needs be emphasized that independent and professionalized judges alone do not make an independent judiciary. The staff of the Tribunal must work in confidentiality and exclusively with the judges and at the judges' direction to ensure the independence of the judicial process and the judicial institution.

86. Regarding a further perception of the Tribunal as being part of the Office of Administration of Justice, there have been instances in which senior managers and litigants alike have inappropriately resorted to reporting their grievances about certain decisions, directives and resolutions of the body of Tribunal judges, and the decisions of individual judges, to the Executive Director and/or the Principal Registrar.

Location of the New York courtroom

87. The location of the Dispute Tribunal courtroom in New York remains a matter of serious concern. Because the courtroom is in a building outside the Secretariat which has its own separate security, it is extremely difficult for staff members and members of the missions of Member States to access it. This inhibits transparency and reinforces the impression that the Tribunal has been purposefully relocated out of sight.

88. The Dispute Tribunal in New York was initially in the main Secretariat building. During the substantial renovations of the Secretariat building it was relocated to rented premises. The judges were not consulted about the decision to not return the Tribunal to the Secretariat building. The current premises effectively inhibit the attendance of staff members or delegates at hearings whereas, when the Tribunal was located in the Secretariat, there was a significant interest shown by staff as well as delegates. In July 2015, the Tribunal judges unanimously decided that the New York seat of the registry should be in the main Secretariat building and for reasons of transparency the Tribunal courtroom should also be there.

89. The judges also agree that it is unacceptable for the offices of the Office of Administration of Justice to be in the chambers of the Tribunal and that urgent steps should be taken for a physical separation of the Office from the Tribunal chambers pending the relocation and return of the Tribunal to the main Secretariat building. The sharing of premises has given rise to the impression that the judges are subservient and accountable to the Administration through the Executive Director. In 2015 the Executive Director was requested to implement the resolution or to examine its feasibility.

90. Although there was space for the offices of the Office of Administration of Justice to relocate, the Executive Director declined to move. When a new Executive Director was appointed in 2017, she also declined to consider the removal of the offices from the chambers of the judges. The judges are concerned that there is a continuing lack of understanding of the issues involved.

91. The Internal Justice Council expressed strong views on this matter in its previous report (A/72/210) and recommended that the General Assembly request the Secretary-General to consider relocating the Tribunals to facilitate access by non-staff members to hearings and to physically separate the Tribunals from the Office of Administration of Justice.

Denial of a role in advising on issues relevant for the functioning of the Tribunal

Budget

92. One of the issues relevant for the functioning of the Tribunals is the budget. Discussions with the Executive Director show that the budgets for the Dispute Tribunal, the Appeals Tribunal and the Office of Staff Legal Assistance are to some extent mixed. This is true at least in respect of travel and training. It is inappropriate for any budget of the Tribunals to be mixed in anyway whatsoever with that of one of the parties appearing before them or any other office. It is also noted that, contrary to the recognized international standards of judicial autonomy, and the request of the judges, there has been no consultation by the Office of Administration of Justice with the judges of the Dispute Tribunal concerning the budget for the years 2018 and 2019.

93. This approach is wrong, as those framing the budget have no knowledge whatsoever of the requested needs of the judges or, most importantly, areas where the judges consider that funds can be saved. The need to consult was also highlighted by the Internal Justice Council in its previous report (A/72/210) and it was recommended that all units administered by the Office of Administration of Justice be consulted on their resource needs for preparation of budgets.

94. The judges demand that in the future the Office of Administration of Justice consult them in respect of budgetary issues and that the Fifth Committee of the General Assembly and expect that the Advisory Committee on Administrative and Budgetary Questions will understand the need for a separation of budgets of the Tribunal from budgets of those who appear before it. As at the time of writing of this report, the provisions made for budget items and contents of the budget remain opaque for the judges.

Training

95. Decisions on spending for training were made without sufficient consultation with the judges. Basing its decisions on information and belief, the Office of Administration of Justice disbursed funds for the unnecessary participation of the bureaucrats within that Office in training which was judicial in nature and in training in mediation which is not relevant for their duties at the Office.

96. The training of the staff of the Tribunal lacked planning and coordination. When reasonable requests were made by staff to attend specific training, the approval came too late to allow them to register, although they had made the requests well in advance. Other training sessions appeared to be organized from New York in great haste, with effectively only three hours being allowed for confirming responses from the other registries.

Consultation on amendments

97. The Tribunal judges are not consulted on the drafting of rules and regulations that either define their operation or are otherwise to be applied by them. This is unfortunate considering the concentration of first-hand knowledge and expertise that the judges represent. It is not unusual for judges to be consulted by a legislative body, through its committees, in respect of issues of law reform, legislation and regulation, and related issues.

Lack of communication with the General Assembly

98. The Tribunal judges do not report directly to the General Assembly, but rather through the Internal Justice Council. This is an arrangement which appears to lack direct authorization and guarantee. It developed as a practice of the Internal Justice

Council, and no more. The President of the Dispute Tribunal, on behalf of all the judges, should report directly to the General Assembly through the Sixth Committee and be available for comment to the General Assembly, as is the case with the other courts and tribunals associated with the United Nations.[e]

Dispute resolution mechanism for the judges

99. Because of the current structure, there are several issues in dispute between the executive branch and the judges of the Tribunal concerning their conditions of service and the application thereof. This includes the pension issue for half-time judges. The judges are placed in an embarrassing position where the matters cannot be resolved since the executive branch, on the advice of the Office of Legal Affairs, may well take a position which the judges find untenable. This is indicative of the need for the institution of a dispute resolution mechanism for the judges. It is suggested that resort could be had to the International Labour Organization Administrative Tribunal.

Ad litem judges

100. The position of the General Assembly in respect of the regularization of the ad litem judges is well understood. It is indeed hoped that, as the internal justice system matures, the need for ad litem judges may well cease. In the interim, however, it is suggested that the one-year term of renewal leads to uncertainty and insecurity and is contrary to the notions of judicial independence and that such ad litem appointments be made for two years. A two-year review cycle, in line with the budget period of the United Nations, would be more appropriate.

Referrals for accountability and the principle of the rule of law

101. During the period from 1 January to 31 December 2017, the Tribunal referred two cases to the Secretary-General pursuant to article 10.8 of the Tribunal's statute.[f] The cases resulted from an examination of matters involving a breach of the Staff Regulations and Rules in both fundamental and possibly corrupt ways. The case of *Valentine*[g] involved a staff member obtaining a position when she was not eligible for consideration, having been added to the list of candidates through improper means and after the time for applications had expired. The judges do not know what has occurred in respect of the referrals, nor would it be appropriate for them to be involved in the process beyond the referral for accountability.

102. The judges have, however, been advised in a subsequent case that the person who was invalidly selected for the post appears to have been confirmed in the post. If this is true, it flies in the face of the universal principle of the rule of law and taints the Organization. The Tribunal's statute provides no details of how a referral is considered, nor any direction in respect of the need to ensure that the enforcement of the laws of the United Nations, as represented by the Staff Regulations and Rules, are not subject to the exercise of a perceived managerial discretion.

103. In *Dalgamouni*,[h] the continuing impunity and bad faith exhibited in the series of unlawful actions of the then Chief of the Regional Service Centre in Entebbe, Uganda, despite multiple adverse findings of the Tribunal, judicial orders and an investigation report were underscored. Despite the Tribunal's referring the Chief of

[e] See the report of the Interim Independent Assessment Panel (A/71/62/Rev.1, para. 183); and the report of the Internal Justice Council (A/71/158, paras. 64 and 65).

[f] Art. 10.8 reads: "The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability."

[g] UNDT/2017/004.

[h] UNDT/2016/094.

the Centre for accountability to the Secretary-General in June 2016, she was promoted barely a year later to the position of Deputy Director of Mission Support at the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo. The situation elicited unflattering comments about the Organization in the international media.

104. The principle of the rule of law is such that any identified breach of the law should be the subject of investigation. There is no discretion to waive compliance with the laws of the United Nations and thus authorize an illegal practice. It is suggested that the Internal Justice Council may be an appropriate body to ensure that referrals to the Secretary-General or those otherwise delegated under article 10.8 of the Tribunal's statute are properly considered.

Disclosure of information

105. The judges are concerned that those representing the respondent in cases before the Tribunal, or those instructing such counsel, do not disclose all relevant documents to applicants and the Tribunal. It has become apparent in some cases that managers have also failed to disclose all relevant documents when a management evaluation of a decision is undertaken. This may have caused cases being continued before the Tribunal which should have been resolved at an earlier time if full disclosure had been made. This must represent a cost to all parties and to the Tribunal, as well as constituting an ethical breach of duty to the Tribunal and the Organization.

Forms of relief

106. Article 10.5 of the statute of the Tribunal limits the Tribunal in respect of the final relief it may grant. Even where it finds that an administrative decision is unlawful, it may only order rescission or specific performance while also setting an amount of compensation that the respondent may elect to pay as an alternative to the order of rescission or specific performance.

107. In more than eight years of the Tribunal's existence, no staff member who was found to have been wrongfully denied appointment or promotion or separated has ever been reinstated. It has become a matter of practice within the Organization that, in every case, compensation is paid in lieu of an order of rescission or specific performance.

108. In this regard, the body of Tribunal judges considers that it is again appropriate to draw the attention of the General Assembly to the observations of a three-judge bench in the case of *Nakhlawi v. Secretary-General of the United Nations*.[i]

109. In that case, the Tribunal expressed the view that the policy behind the Tribunal's statute and the whole system of justice is put at risk by the attitude of management to systematically opt for payment in lieu of rescission under article 10.5 (a). It cited the decision in *Valimaki-Erk*[j] and called on the General Assembly to consider whether the underlying policy objective is frustrated by this unwritten policy implemented by senior managers.

110. It is noteworthy that the Internal Justice Council in its previous report observed in respect of the matters raised in the *Valimaki-Erk* case that it appears that management adheres to the rigid policy of "no rescission" and opts to pay compensation and that this posture does not serve justice in every instance.

[i] UNDT/2016/204.

[j] 2012-UNAT-276.

111. It is also worthy of mention that the Staff Regulations of the Council of Europe[k] provide that, when the Administrative Tribunal upholds a staff member's appeal and annuls the Council's decision, the Council is obliged to reintegrate the staff member unless, by a reasoned opinion, it can be successfully demonstrated that reintegration is not possible. It is only in such situation that the Tribunal may fix a sum to be paid as compensation.

112. The judges also observe that both the Administration and the staff of the United Nations may find matters in respect of which it would be appropriate to have the Dispute Tribunal or the Appeals Tribunal consider specific issues of interpretation of a law before it is applied.

The nature of the legal systems to be applied

113. The judges express their general concern about the basis of the laws and their application. It has become apparent that a common-law approach is being favoured over that of the civil law or a hybrid system in respect of the drawing of administrative issuances and in respect of the Tribunal and the use of jurisprudence. In respect of administrative issuances, for example, it is noted that ST/AI/2017/1 provides in paragraph 9.1 (a) that the applicable standard of proof required is "clear and convincing" evidence. This standard of proof is used only exceptionally within some jurisdictions in the United States of America and in no other common-law country. The application of a legal notion exceptionally applied only in parts of one Member State would seem inappropriate for the United Nations.

114. The common-law approach of being bound to jurisprudence in the first instance Tribunal will eventually render the Tribunal inaccessible to the self-represented staff member. Unless the self-represented staff member is a lawyer, it becomes too difficult for him or her to effectively represent him/herself unless he or she has a comprehensive knowledge of the jurisprudence and its application. The judges note that this is a matter already causing some difficulty for self-represented parties after only nine years of development of jurisprudence. This can only become more burdensome for self-represented parties as time goes on.

Drafting of the laws and regulations of the United Nations

115. The judges wish to express their concern in respect of the standard of drafting of the administrative issuances of the United Nations. There are many cases coming before the Tribunal where confusion is caused by the use of the auxiliary verbs: will, shall, would, should, can, could, may, might, must and ought. The almost constant use of the verb "should" leads managers to believe that they have discretion, when indeed they may not have such discretion. The clarity in the administrative issuances is important for all to ensure certainty of action. Stating in these laws and regulations that the use of the auxiliary verb "may" indicates the use of discretion, and "shall" or "must" discloses an obligation, would lead to proper clarification.

The need for consent before holding/convening a three-judge panel

116. The judges of the Dispute Tribunal note that it is provided in article 10.9 of the statute that, before a matter is heard by a panel of three judges, the President of the Appeals Tribunal may provide authorization.

117. Moreover, Appeals Tribunal judges are concerned that such a procedure may unnecessarily complicate procedures and place the President of the Appeals Tribunal in a position where a recusal may be necessary in the event of an appeal concerning any matter which is the subject of such a request, as the President of the Dispute

[k] Articles 60.6 and 60.7.

Tribunal would have informed the President of the Appeals Tribunal of the details of the complexity or importance of the case. It is suggested that the consideration by the President of the Dispute Tribunal should be sufficient to authorize the convening of such a panel.

Initiatives introduced by the Tribunal

118. The Tribunal in Geneva has commenced a pilot monthly dialogue meeting with counsel from the Office of Staff Legal Assistance and the respondent, together with the staff of the Registry, to discuss systemic issues and procedures. The tone of the meeting is such as to encourage an active participation by all participants with a view to increasing the understanding of all participants of the hybrid nature of the Tribunal, which is composed of judges from different legal cultures. A copy of the areas of general discussion is available on request.

119. In May 2017, a digest of cases was completed for internal use by the Tribunal. This is a detailed document referring to the cases of both the Dispute Tribunal and the Appeals Tribunal. It is hoped that it will be expanded to include relevant cases of the International Labour Organization Administrative Tribunal, recognizing the observations of the Redesign Panel in respect of the need to have some harmonization across the United Nations system. The digest is entirely computer-based and will be accessible to all staff.

120. The judges have commenced the writing of a bench book and hope to have it completed soon.

Meetings

Internal meetings

121. The judges continue to hold regular meetings via videoconference. The half-time judges, notwithstanding that they may not be deployed, still attend, with Judge Meeran participating by telephone from the United Kingdom and Judge Hunter participating from chambers in New York, where he resides. These meetings are invaluable and the judges deal with issues as they arise and in a timely manner.

Meeting of the judges with the Internal Justice Council

122. The judges of the Tribunal met with the Internal Justice Council in May 2017 during their plenary meeting held in New York. Issues pertinent to the Tribunal and the internal justice system were discussed.

Meeting of the Tribunal with stakeholders and practitioners

123. Meetings with the Tribunal's stakeholders continue to be held on a regular basis at each seat of the Tribunal. The invitees include counsel appearing before the Tribunal, Staff Union representatives and management representatives. They provide useful interchange of ideas in an appropriate environment where Tribunal users and the judges of the Tribunal are free to make observations and comments. The feedback assists the Tribunal in its work.

124. In Nairobi, judges participated in a symposium organized by the Ombudsman and spoke on the complementarity of the formal and informal systems in the internal justice system and the Tribunal's efforts to encourage mediation of cases as a first step. The judges also addressed the need for mediators to strengthen mediation agreements to protect staff members from being retaliated against after entering such agreements.

125. During the plenary meeting in May 2017, the Tribunal judges held meetings with the Chair and Deputy Chair of the Advisory Committee on Administrative and Budgetary Questions, the Chair of the Fifth Committee, the Secretary-General and several senior administrative officials of the Organization.

Adequate representation of applicants before the Tribunals

126. Unrepresented litigants have a negative impact on the Tribunal's workload. These litigants often do not understand the legal process and tend to file numerous irrelevant documents and submissions, swamp the Registries with unnecessary or inappropriate queries and requests, and generally bog down the system causing delays in proceedings.

127. Almost as important as lack of legal representation of litigants is the amateurish and often damaging representation by individuals who have no legal training. These individuals also do not understand the legal process and file confused and inarticulate processes that disclose no cause of action. There is a serious need to professionalize legal representation.

128. The right to representation, guaranteed by the Universal Declaration of Human Rights, and enshrined in the principle of equality of arms, is an essential element of the new system of administration of justice, and the role of the Office of Staff Legal Assistance should continue to be not only that of assisting staff members in processing claims but also that of representing applicants before the Tribunals.

Application of the rule of law within the United Nations

129. An apparent fundamental lack of knowledge of or concern for the principle of the rule of law results in actions being taken notwithstanding decisions as to the clear illegality of such action. It is crucial that when the Tribunal identifies a base illegality, even though staff members may have been referred to the Secretary-General, the illegality must be addressed as a matter of principle of the rule of law with possibly separate disciplinary consequences.

Retaliation against staff members for appearing before the Tribunal

130. There are clear instances of retaliation against staff members who bring actions before the Tribunal or who appear as witnesses against managers. The result is that staff members who may have genuine grievances to be litigated or those wishing to testify in their favour are discouraged from commencing applications or testifying. There is a need to treat any appearance before the Tribunal by a staff member whether as an applicant or as a witness as "protected activity".

131. The Ethics Office refuses to offer protection to staff members who were applicants before the Tribunal even when the Tribunal made such orders and there were reasons to believe that they were in danger of being retaliated against. The excuse proffered by the Ethics Office was that relevant legislation enjoined them to offer protection to whistle-blowers only.[1]

Access to justice

132. Outreach has not been conducted by the Office of Administration of Justice as it should have been. Apparently, only one outreach session has been held in the missions in South America since the inception of the new internal justice system. There are no cases coming from missions in South America and few from Asia and South-East Asia. The absence of outreach may explain why there are no cases from

[1] See *Nartey v. Secretary-General of the United Nations* (UNDT/2014/051).

that region. Bangkok had only one outreach. The staff member from the Geneva Registry who undertook it did so bearing the expense of her travel while on holiday. She was joined by a staff member of the Office of Staff Legal Assistance.

133. It is important that such outreaches are undertaken by those working in the internal justice system and not those merely administering it. It is essential that staff members be empowered through knowledge so that they may have access to justice not only for themselves but also in the interests of the Organization.

134. Sometimes, there is lack of candour on the part of the respondent in providing all relevant material to the Tribunal and to applicants even in cases in which the Tribunal by its own motion makes an order for production of documents. In the case of *Maiga*,[m] the Tribunal found that counsel for the respondent sought deliberately to mislead it by presenting her case as if the investigation report of the Office of Administration of Justice did not exist and, when ordered to produce it, made false submissions regarding the investigation findings while also omitting the annexes to the said report.

Recruitment delays

135. Delays in recruitment have been significant and detrimental to the work of the Tribunal. It was impossible to rebalance in a proper manner the imbalance in the number of cases distributed between the seats of the Tribunal because it took more than nine months from the date of resignations to recruit a P-3 legal officer and a P-5 Registrar for the New York Registry. The provision of a consultant in the P-3 position, while providing some assistance for a short while, did not address the fact that the P-4 legal officer had acted as officer-in-charge for the whole of the period and was rendered ineffective as a P-4 legal officer. His position was not back-filled for reasons unexplained.

Readiness of the judges

136. The Tribunal judges are available to discuss issues with the General Assembly and the Administration of the United Nations with a view to resolving issues mentioned in this report. During the plenary meeting in May 2017, judges met with senior Secretariat officials who showed willingness to consider some of the issues raised in this report. The Tribunal judges believe that issues will be better understood and, it is hoped, addressed soon.

A note of acknowledgment

137. The judges of the Dispute Tribunal wish to again record their appreciation of the work and dedication of the Registry staff of the Tribunal.

[m] UNDT/2015/048.