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Administration of justice at the United Nations

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Report of the Internal Justice Council

Summary

The present report of the Internal Justice Council focuses on the judicial and operational efficiency of the internal justice system and draws on relevant resolutions of the General Assembly and extensive consultations with stakeholders. To further improve the performance of the system, the Council makes recommendations concerning key performance indicators of the United Nations Dispute Tribunal and its operational efficiency and transparency. The report also contains discussions on the need for the Office of Administration of Justice to consult with the Dispute Tribunal and the United Nations Appeals Tribunal on administrative and budgetary matters, and on the urgent need to increase funding for the Office of Staff Legal Assistance. The Council highlights its recommendations on the protection of applicants and witnesses from retaliation, referrals for accountability from the Tribunals, the standing of staff unions, and rescission or reinstatement as a remedy.

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I. Introduction

1. The General Assembly, in its resolution 61/261, established the internal system of administration of justice at 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.

2. Subsequently, in its resolution 62/228, the General Assembly established the Internal Justice Council to ensure independence, professionalism and accountability in the system of administration of justice and tasked the Council with providing its views to the Assembly on the implementation of the system of administration of justice.

3. The current membership of the third Internal Justice Council, whose terms of office expire on 12 November 2020, consists of five members: two distinguished external jurists, one nominated by staff and one by management, one representative nominated by the staff, one representative nominated by management and a distinguished jurist nominated by the four other members to be the Chair. The Secretary-General appoints the individuals so nominated to the Council. The current members of the Council are external jurists Samuel Estreicher (United States of America, nominated by management) and Carmen Artigas (Uruguay, nominated by staff). The representatives are Frank Eppert (United States, nominated by management) and Jamshid Gaziyev (Uzbekistan, nominated by staff). The Chair is Yvonne Mokgoro (South Africa).

4. In preparing the present report, the Council relied on relevant resolutions of the General Assembly and drew on the inputs received from and its interviews with the various stakeholders in the internal justice system.

5. The views of the United Nations Appeals Tribunal and of the United Nations Dispute Tribunal are contained in annexes I and II, respectively, to the present report, in line with paragraph 37 of resolution 74/258.

6. From 4 to 11 May 2020, the Council held its plenary sessions and meetings with stakeholders by videoconference, given the circumstances surrounding the coronavirus disease (COVID-19).[1] It had also offered stakeholders the possibility of providing written inputs for its consideration.

7. In view of 2020 being the tenth anniversary of the internal justice system and the final year of the current Council's terms of office, the report notes that this is an opportune time to provide recommendations on ways to further improve the performance of the system.

II. Overview

8. The Council notes that the internal justice system is critical to assurances given to staff that the administration of justice in the United Nations is an adequate

[1] The meetings were held with the First Vice-President of the Appeals Tribunal, the judges of the Dispute Tribunal, members of the registries, representatives of the Office of Administration of Justice, including the Executive Director, and the Office of Staff Legal Assistance, a number of staff unions and associations, the Office of Human Resources of the Department of Management Strategy, Policy and Compliance, the Human Resources Services Division of the Department of Operational Support, legal offices from the Secretariat and funds and programmes and the Management Evaluation Unit. All were invited to freely raise concerns and matters of interest.

substitute for resorting to national tribunals, which are unavailable to United Nations staff members.

9. Since its inception, the new internal justice system has responded to the expectations of the General Assembly fairly well, delivering justice to many staff members and helping the Organization to strengthen the rule of law across the institution. However, the Council is of the view that there are continuing challenges in the administration of justice, which the Council has previously reported and which continue to undermine the ability of the system to deliver reasonably prompt and effective justice.

10. The major recurring concerns relate to the performance of the Tribunals, in particular the specific systematic and operational shortcomings at the Dispute Tribunal that tend to preclude it from performing its mandate to its full potential. Other serious concerns are explained further in the report, including the effectively lacking remedy of rescission and of reinstatement in cases of unlawful termination; retaliation against complainants and their witnesses; the difficult matter of staff continuously representing themselves before the Tribunals; and the question of referrals to the Secretary-General for accountability.

11. In this overview, the Council will focus on the important challenge facing the Dispute Tribunal of ensuring prompt delivery of justice and efficient operation, including the persistent backlog of old cases, which predate the onset of the COVID-19 epidemic and are likely to persist thereafter if not adequately addressed.

12. The annual discussions with the judges of the Tribunals and regular consultations with stakeholders at the various United Nations duty stations, which in 2020 have been virtual meetings, have been invaluable for arriving at the Council's conclusions. A number of recommendations have been made in the annual reports of the Council over the term of its office, aimed at enhancing the managerial capacity and accountability of the Dispute Tribunal. Throughout their term, the judges and registries have consistently referred to the Tribunal's case backlog and stated that budgetary and human resource limitations were major causes of their administrative and operational difficulties. The Council has consistently brought those concerns to the attention of the Assembly. There is no doubt that the concerns have been given serious consideration, but they do not fully account for the systematic and operational difficulties that the Council has discerned.

13. The Council concludes that the Tribunals will continue to play a central role in providing United Nations staff members with access to justice, as envisaged by Member States. Going forward, the Council is of the view that addressing the judicial and operational shortcomings of the Tribunals and exploring potential areas for improvement should be a priority area for consideration by the General Assembly. The present report aims to facilitate such important discussions.

III. Recommendations

A. Judicial efficiency and accountability

14. Commitment to judicial independence, which is shared by all stakeholders, carries with it a concomitant obligation to ensure judicial accountability. Judges are accountable for timely delivery of quality judgments for all stakeholders in the internal justice system. It is clear that the Dispute Tribunal suffers from the absence of administrative and supervisory authority for ensuring the judges' timely and professional performance of their duties. Unlike many national judicial systems, the

United Nations system lacks a judicial council[2] or equivalent body to ensure, inter alia, that the judiciary and its registry operate efficiently and that individual judges are held to account in performing their duties and observing the code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, approved by the General Assembly in its resolution 66/106.

15. The Council's experience during its term has been that the United Nations Dispute Tribunal, as an institution, has not only underperformed during this period, but also, that underperformance has not been effectively acknowledged and sufficiently addressed by the judges. That has been manifest both in the persistent backlog of old cases and in the absence of internal rules or mechanism to monitor and improve the judicial and operational performance of the Tribunal. The Council also notes that the Tribunal assigns only 10 to 15 cases to a judge at any given time, without establishing deadlines for disposing of those cases and leaving all other cases unaddressed until the 10 to 15 cases have been resolved. More than half of the caseload therefore usually remains unassigned (62 per cent of cases were pending assignment as at 1 July 2020), effectively adding to the backlog of cases and perpetuating it for the future.

16. The Council has received the following statistics, which reinforce continued concerns from stakeholders about the backlog of cases.

17. The current caseload as at 1 July 2020 was 278 cases. The assumption of the Dispute Tribunal is that 15 per cent of cases are withdrawn by order, leaving 236 cases for judgment. On average, there are 300 new cases annually. There are three full-time and six half-time judges, resulting in a total capacity of six full-time judges per year.

Table 1
Backlog of old cases and new incoming cases

Target	*Number of judgments*	*Time required to clear the backlog of old cases (236)*	*New incoming cases pending the elimination of the backlog of old cases*
Current target set by the Dispute Tribunal	2 per judge per month (12 total)	19.6 months	300 cases per 12 months
Delivered in 2019	2.2 per judge per month (13.2 total)	17.9 months	300 cases per 12 months
Delivered between January and June 2020	3 per judge per month (18 total)	13.1 months	300 cases per 12 months
Target recommended by the Internal Justice Council	7 per judge per month (42 total)	5.6 months	300 cases per 12 months

18. As shown in table 1, the current target set by the Dispute Tribunal of two judgments per judge per month would eliminate the current backlog of cases in 19.6 months, compared with the increased delivery of three judgments per judge per month in the first half of 2020, which would result in the elimination of the backlog in 13.1

[2] An independent or autonomous institution distinct from executive or legislative powers that is responsible for the independent delivery of justice. Such institutions typically have the authority and responsibility for managing the judiciary's performance (see resolution of the General Assembly of the European Network of Councils for the Judiciary on "self-governance for the judiciary: balancing independence and accountability", Budapest, May 2008).

months. These figures do not take into account the receipt of new cases, which have usually exceeded 300 cases per year.

19. While progress has been made in reducing the backlog of old cases, from 404 in 2018 to 278 as at 1 July 2020, the backlog remains a substantial problem given the expected receipt of 300 new cases per year. Historically, part of the problem has been that, while there is a President of the Dispute Tribunal, that role has in practice been largely representational, with the full-time judges taking turns to fill the office for a one-year term. In retrospect, it is clear that the judges have been reluctant to tackle the institution's ongoing inability to reduce its caseload. The Tribunal has not confronted its failure to move cases forward and dispense justice in a timely and meaningful way. Indeed, an attempt to do so in early 2019 by the then President of the Dispute Tribunal was unsuccessful and gave rise to considerable friction among the judges (see resolution 74/258, para. 26; and A/74/169, paras. 20–22).

20. The data on the ageing of pending cases of the Tribunal show that, of the 278 backlog cases, 37 are older than 401 to 500 days and, astonishingly, 66 are 501 to 1,000 days old. Furthermore, the Council was informed of a number of emblematic cases that highlight the lack of prioritization in addressing the backlog. For example, a recent case involving 269 United Nations Secretariat staff members based in Geneva,[3] who in October 2017 challenged the Administration's decision to implement a post adjustment multiplier resulting in a pay cut, was decided in June 2020, nearly 1,000 days after the case had been filed. The case suffered from numerous procedural delays and a change of the assigned judge. The delayed proceedings were then overshadowed by other developments, such as a judgment by the International Labour Organization (ILO) Administrative Tribunal in July 2019 upholding complaints filed by ILO staff members in Geneva that challenged the decision by ILO to apply the pay cut. The Council heard from staff unions that most staff members in Geneva felt that they had been denied justice in the case because of the long delay. The delay by the Dispute Tribunal in rendering its judgment affected thousands of staff members in Geneva, and numerous pleas by staff unions to the Dispute Tribunal for progress to be made in this critical case were left unanswered.

21. Following discussions with the stakeholders, the Council remains alarmed that, despite the growing concerns among staff about the inability to obtain transparency with regard to the status of their cases and the slow progress of their adjudication, the Tribunal does not seem to be convinced that changes are required in its mode of work to improve its performance and enhance the commitment of all judges to the central imperative to move cases forward. Given the number of cases that the Dispute Tribunal handles, the Council does not consider the establishment of a judicial council to be necessary for the internal justice system of the United Nations. However, the Council is firmly of the view that changes in the way that the system currently operates are sorely needed, including the imperative to ensure increased transparency and the increased accountability of individual judges and to establish clear key performance indicators for the Dispute Tribunal as a whole. Its recommendations in that respect are set forth below.

22. The Council has frequently exchanged views with the Dispute Tribunal, the Principal Registrar and the three Registrars over the past few years on the challenging backlog of cases and the judicial and support capacity that exists to move cases forward and adjudicate them. Taking into account the nature of the cases and the Council's understanding of available support capacity in terms of legal officers and assistants, the Council sought to ascertain from the judges themselves how many judgments per month a Dispute Tribunal judge could reasonably be expected to issue, taking into account the persistent backlog of old cases and the inevitable filing of new

[3] See UNDT/2020/106.

cases. Such a performance indicator was sought in order to not only understand when the current backlog might be eliminated but also help the Dispute Tribunal to manage its affairs in the future.

23. The Council understood from the Dispute Tribunal and the Registrars that the number of judgments per judge per month may not be the optimal or fairest measure of performance, since, for example, some cases get settled at the case management stage, prior to which considerable judicial and registry work has sometimes already been done. It was proposed that the number of cases disposed per month, not the number of judgments, was a better measure of performance, since some cases are closed by order. That, too, may be a problematic measure, in the Council's view, because it would include summary dispositions, many of which require only modest judicial effort, and would not adequately address the continuing backlog. In addition, consideration only of the number of cases might fail to reflect the fact that some related cases involve the judicial effort of essentially only one judgment.

24. In preparing the present report, the Council sought the separate views of the Dispute Tribunal President, the Principal Registrar and the Dispute Tribunal Registrars in New York, Geneva and Nairobi on the Council's recommendation that seven judgments per judge per month (excluding summary dispositions) should be established by the Dispute Tribunal as a key performance indicator. In reply, the Registrars indicated that it was for the bench to determine the setting of such a performance measure. The Dispute Tribunal President noted that in early 2020 it had established a target of four cases per month (two judgments plus two other dispositions). It was claimed that the proposed target of seven judgments per month was not viable, as no tribunal in an international organization has ever achieved that target. Moreover, management of the Dispute Tribunal is quite time- and resource-consuming because of the complexity of having nine judges, including six half-time ones.

25. While the Council was appreciative of those views, based on the information received, it is not convinced that a performance target of four cases per month is adequate to eliminate the case backlog, which has existed for years. The Dispute Tribunal itself has essentially indicated as much, although premising its ability to be more productive on the filling of the two legal officer vacancies at the Geneva Registry (the recruitment for which is frozen as part of the cash-flow measures in the United Nations Secretariat).

26. In suggesting the establishment of a target of seven judgments per month, the Council considered a number of factors. First, and perhaps foremost, is the need for the President of the Dispute Tribunal to be vested with the necessary managerial authority to ensure that the Tribunal and its registries are performing effectively and in a manner conducive to eliminating the current backlog and avoiding the risk of a continued backlog developing from the new incoming cases. Second, the judges enjoy a reasonable level of staff support in terms of legal officers and administrative staff. Third, the Dispute Tribunal also benefits from what the Council observes to be an experienced and dedicated group of registrars to assist the judges. Lastly, while acknowledging the difficulties inherent in making comparisons, the Council notes, by way of illustration, that the sole judge in the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) Dispute Tribunal, supported by one registrar, one legal officer and a consultant, issued 70 judgments in 2018, averaging 5.83 judgments per month.[4] While a performance indicator of seven judgments per judge per month may be considered ambitious, the Council notes that

[4] UNRWA Dispute Tribunal, Third Activity Report (1 January 2017–31 December 2018).

this target would eliminate the current backlog within an estimated period of 5.6 months (see table 1) and mitigate the risk of a new backlog developing.

Recommendation 1

The Council recommends that seven judgments per judge per month, exclusive of summary dispositions not requiring a hearing, be established as a key performance indicator for United Nations Dispute Tribunal judges.

27. In its report on the administration of justice at the United Nations (A/74/169, paras. 15–31), the Council made five particular recommendations (recommendations 9–13) geared towards improving the institutional performance of the Dispute Tribunal. The General Assembly requested the Secretary-General to examine recommendations 11, 12 and 13 and submit his views to the Assembly for consideration at its seventy-fifth session (resolution 74/258, para. 26). The Council highlights the importance of those recommendations in the context of the persistent challenge of the backlog of cases in the Dispute Tribunal.

28. Article 4 (7) of the statute of the Dispute Tribunal provides that its President "shall have the authority, inter alia, to monitor the timely delivery of judgments". For the purpose of the President exercising such authority, the Council recommended in recommendation 12 that the Dispute Tribunal promulgate terms of reference for its President to effectively direct the Tribunal's work. The Council learned that the Dispute Tribunal seemed to have followed that recommendation and had adopted a resolution on the role and the responsibilities of the President. The administrative functions conferred on the President included the deployment of judges to duty stations; the monitoring of progress made in the backlog elimination plan and the case disposal plan; and the monitoring of compliance with performance indicators set out in the code of conduct.

29. At the time of finalizing the present report, the Council had not received that resolution and, given that it is not available on the website of the Dispute Tribunal, the Council is unable to offer its observations. It is therefore left to the next Council and to the General Assembly to consider whether the Dispute Tribunal resolution provides sufficient authority to the President to appropriately direct the Tribunal's work and monitor its performance.

Recommendation 2

The Council recommends that article 1 (2) of the rules of procedure of the Dispute Tribunal be amended to provide that the President of the Tribunal sits for a two-year term and may be removed from office prior to the expiration of the term only for proven misconduct or failure to perform the responsibilities of the office, to be determined pursuant to the mechanism for addressing complaints regarding alleged misconduct or incapacity of the judges of the Dispute Tribunal and Appeals Tribunal.

30. The Council has learned that it is the practice of the Dispute Tribunal to assign no more than 10 to 15 cases to a judge at any given time. This leaves the majority of cases unassigned, some for longer than 400 days. The Council is of the view that the Tribunal should reconsider this practice, as it is not conducive to judicial efficiency and effective case management. Indeed, it is not clear whether the current practice includes a methodology for monitoring the disposal of cases within a reasonable period of time. Judges currently perform their duties unmindful of the number of cases that remain on the registry's overall docket, which, as at 1 July 2020, indicated that some 62 per cent of them had not been assigned to any judge.

Recommendation 3

The Council recommends that the Dispute Tribunal reconsider its practice of assigning no more than 10 to 15 cases to a judge at any given time and instead implement a practice of assigning all new cases as they come in, in order to expedite the disposal of cases.

B. Operational efficiency and transparency

31. In paragraph 24 of its resolution 73/276, the General Assembly requested the President of the Dispute Tribunal and the Principal Registrar of the Dispute Tribunal and the Appeals Tribunal to work together to develop and implement a case disposal plan with a real-time case-tracking dashboard, so that all stakeholders could see, without undue effort, where a particular case was in the judicial process. In its report on the administration of justice at the United Nations (A/73/218, para. 22), the Council noted that the establishment of such a dashboard would support operational professionalism and transparency, and that it should be publicly accessible. The Council has since learned that the dashboard project is a work in progress and has encountered some implementation issues.

32. The Council has been alerted by many stakeholders to the need for more transparency with regard to the status of their cases. The Council notes that some progress has been made in publishing the docket of cases to be handled by the half-time judges during their scheduled Dispute Tribunal deployments, which is issued in advance and placed on the website of the internal justice system. The Council observes that the same approach of publishing an advance docket of cases for the full-time Dispute Tribunal judges has not been employed yet.

Recommendation 4

To ensure more transparency and better planning for the parties, the Dispute Tribunal should promulgate publicly accessible dockets for pending cases of all Dispute Tribunal judges across its three locations in Geneva, Nairobi and New York, on a regular basis.

33. The Council learned that one of the measures adopted by the Organization to address the cash-flow problem was to put in place a hiring freeze within the Secretariat. As a result, the recruitment against two legal officer vacancies at the Geneva Registry was placed on hold earlier in 2020. That has reduced the legal capacity of the Dispute Tribunal and resulted in it needing to shift the capacity of legal officers based at the New York Registry to lend support to the registry operation in Geneva.

34. The Office of Staff Legal Assistance operation has also had its recruitment of at least three legal aid officers and one administrative support staff member placed on hold on account of the hiring freeze. As addressed elsewhere in the present report (see sect. III.F below), the situation of the Office of Staff Legal Assistance is such that it has no capacity to obtain support from other units of the United Nations. Essentially, an already resource-challenged situation for the Office has grown significantly worse.

35. With more than six vacancies in two key operational areas, the system's ability to move cases forward and reduce the case backlog as expeditiously as possible and to provide legal assistance to staff has diminished. Although no hard data exist, it is likely that the lack of legal assistance from the Office of Staff Legal Assistance has led to more staff members representing themselves, which also affects judicial efficiency.

Recommendation 5

The Council recommends that the General Assembly request the Secretary-General to consider granting exceptions to the recruitment freeze for the vacant legal officer posts in the Geneva Registry and the vacant posts in the Office of Staff Legal Assistance, so as to permit the Dispute Tribunal to fully address its backlog of cases and the Office of Staff Legal Assistance to better meet demand from staff for legal assistance.

36. The Council notes with satisfaction the publication of the digest of cases on the tenth anniversary of the internal justice system. The feedback from stakeholders has been positive, and the publication adds to the increased awareness among staff and management of the current jurisprudence of the Tribunals.

37. Several of the Council's interlocutors have noted the absence of a searchable database of Dispute Tribunal and Appeals Tribunal judgments to facilitate meaningful and organized research. In the Council's view, the availability of such a database would be a necessary addition to the system's professionalism. While the Office of Administration of Justice has noted its intention to make a searchable database available, it was not clear to the Council whether work on the database had in fact commenced and, if so, when the database might be completed. In any event, the Council recommends that the Office provide an update to the General Assembly on the status of the searchable database and its anticipated completion date.

Recommendation 6

The Council recommends that the Office of Administration of Justice take the action necessary to establish a searchable database of Dispute Tribunal and Appeals Tribunal decisions and inform the General Assembly of its progress.

38. The Council has learned that the Dispute Tribunal has adopted an amended version of its rules of procedure, which seemingly includes the proposals by the General Assembly and several other amendments intended to speed up proceedings. The rules of procedure, which are unavailable for review at the time of writing, will be transmitted to the Assembly. This is a positive development, as it will harmonize the work of the Tribunal and advance its overall efficacy. It will also ease the burden on self-representing applicants, whose cases are often dismissed because of non-compliance with procedural rules that are not readily accessible. A similar initiative to consider rules of evidence for the Tribunal, beyond what is currently set out in articles 17 and 18 of the rules of procedure, would also promote decisional consistency and coherence.

Recommendation 7

The Council welcomes the review by the Dispute Tribunal of its rules of procedure and recommends developing rules of evidence in due course.

39. The Dispute Tribunal has encouraged, in some cases, the joinder of similar claims. The Council recommends regularizing this practice and simplifying the processing of such claims for the sake of judicial efficiency. Such submissions should promote consistency in the application of rules and regulations and prevent unfair outcomes where staff in similar situations are treated differently because they had not previously filed a claim in the Tribunal. The joinder of similar submissions would also reduce the administrative burden on the system entailed by multiple applications raising similar issues. The Council also recommends that the Tribunal consider whether its rules of procedure need to be amended to facilitate the submission of joint claims and the subsequent prioritization of such claims.

Recommendation 8

The Council reiterates its prior recommendation that, in the interest of judicial efficiency, with regard to the joinder of similar claims before the Dispute Tribunal, the Tribunal should, in appropriate cases, encourage the joint submission of similar claims and the Registrars and the Office of Staff Legal Assistance should facilitate such applications.

40. There has been a downward trend in recent years of the Appeals Tribunal holding open hearings. According to the information received, the Council notes that there have been no open hearings over the past three years. The staff unions have made consistent complaints of a "distant" appeals bench, and the Appeals Tribunal has, in the past, acknowledged the issue. Bearing in mind the desirability of justice both being done and being seen to be done, the Council recommends that the Appeals Tribunal hold open hearings, particularly for cases of systemic importance or controversy. It observes that the technology exists to permit the holding of open hearings on a regular basis.

Recommendation 9

The Council recommends that the Appeals Tribunal regularly hold open hearings and sessions, in particular when dealing with cases of systemic importance.

C. Jurisdiction of the United Nations Appeals Tribunal over specialized agency applications

41. Article 2 (10) of the statute of the Appeals Tribunal provides that the Tribunal is competent to hear and pass judgment on an application filed against a specialized agency, and that a special agreement may only be concluded with a specialized agency if the agency utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law.

42. The Appeals Tribunal has drawn the Council's attention to the fact that not all specialized agencies with which the United Nations has entered into a special agreement meet the statutory requirements set out in article 2 (10). Some of the agencies work with joint appeals boards that do not decide on cases but make recommendations to the head of the specialized agency. It is the head of the agency who then decides on the case, even if the case involves a challenge to that person's decision in the joint appeals board. Furthermore, very often, the joint appeals boards do not undertake fact-finding investigations.

43. The Appeals Tribunal decided in 2019 that this practice is not in line with article 2 (10). The Council concurs with the Appeals Tribunal that, in such instances, there has been no neutral first instance process, as defined in article 2 (10), and that, accordingly, it cannot exercise its appeals tribunal function in such cases. Even though two specialized agencies joined the United Nations internal justice system and now use the Dispute Tribunal as a first instance court and one has its own dispute tribunal, the situation of many of the specialized agencies remains unchanged.

Recommendation 10

The Council recommends that the Secretary-General examine the issues and take the necessary remedial action, including by engaging directly with the specialized agencies.

D. Transparency and consultation with the United Nations Appeals Tribunal and the United Nations Dispute Tribunal on budgetary matters

44. The Council was informed by the Appeals Tribunal that, as of the 2018–2019 period, the Office of Administration of Justice began "interfering" in the way that the Tribunal manages its work and, more specifically, imposing restrictions with regard to the venue and number of sessions. Despite the authority vested in the President of the Tribunal under article 4 of its statute to hold sessions depending on its caseload, the Office of Administration of Justice appeared to decline supporting and funding any Tribunal sessions that will not be held at United Nations Headquarters in New York and asserted that the available budget provides for only two Appeals Tribunal sessions per year. This is notwithstanding the Tribunal's determination that three sessions were necessary to expeditiously address a growing caseload.

45. The concern expressed by the Appeals Tribunal exemplifies the brewing operational tension that exists between an independent judiciary that determines its needs and an executive branch administrator who can, in effect, use the power of the purse to challenge and overrule those determinations. In 2020, a further example has been received from the Dispute Tribunal, which informed the Council that some of the new half-time judges have expressed concern that their professional assessment concerning how long they should be deployed and whether they need to be physically on site to better discharge their duties is overridden de facto by the Office of Administration of Justice rather than through decisions made by the Tribunal. Furthermore, they claimed that avoiding payment of daily subsistence allowance to judges while they were on site, rather than judicial needs, was the determinative factor for the Office of Administration of Justice.

46. The Council is not in a position to assess whether quality of justice and the efficient delivery of justice are being put in jeopardy as a consequence. The Council is aware that the United Nations is currently experiencing a financial cash-flow crisis because of extensive delays in receiving assessed contributions from Member States. While the lack of funds will undoubtedly necessitate adjustments in planned activities, the Council does not consider that the current, and hopefully temporary, cash-flow problem is the only issue. In that connection, it recalls having several times recommended that the Executive Director of the Office of Administration of Justice consult with the Presidents of the two Tribunals about their budgets (see A/73/218, recommendation 13; and A/72/210, paras. 62–63). Given that both Tribunals have expressed concerns about the interference of the Office of Administration of Justice, it seems that any consultations that may have taken place did not result in sufficient understanding and buy-in on the part of the Tribunals about budget availability to meet judicially determined needs. Indeed, the Appeals Tribunal President informed the Council that the judges do not have and were not given any further insight into the budget.

47. According to the Secretary-General's bulletin on the organization and terms of reference of the Office of Administration of Justice (ST/SGB/2010/3), the Office's mandate includes the provision of substantive, technical and administrative support to the judiciary. In the Council's view, such support includes ensuring adequate budgetary insight and transparency on budgetary matters to the judiciary in order for it to meet its determined needs. Professional interaction with an independent judiciary requires adequate consultation on matters affecting the ability of the judges to perform their judicial duties.

Recommendation 11

The Council recommends that the Secretary-General make explicit in the terms of reference of the Office of Administration of Justice the need for regular consultations with the United Nations Dispute Tribunal and the United Nations Appeals Tribunal on administrative and budgetary matters. The Council further recommends that the Executive Director of the Office of Administration of Justice regularly consult with the Presidents of the Appeals Tribunal and the Dispute Tribunal to ensure the necessary transparency and the understanding of the judges about budgetary matters relevant to the judiciary's determined needs.

E. Referrals for accountability from the Tribunals

48. This Council has previously recommended that the Secretary-General or the executive heads of the separately administered funds and programmes publicize, in an anonymized fashion, decisions taken on referrals for accountability received from the Dispute Tribunal or the Appeals Tribunal (e.g. A/74/169, paras. 13–14 and recommendation 8). The Council remains convinced that some form of publication of decisions made on accountability referrals is advisable, even where, following consideration of a referral, no action is considered necessary. Publicizing the decisions meets the expectation of the General Assembly that the Secretary-General and executive heads take the need for real and effective accountability seriously (see resolutions 61/261, 63/253 and 68/264). It would also serve to address staff concerns that, in the absence of any information on referral decisions, management enjoys impunity for wrongful or incorrect actions that the judiciary considered serious enough to warrant a referral.

49. The Council has previously recommended that the annual information circular entitled "Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour" include a summary of decisions taken on referrals. In commenting on that suggestion, the Department of Management Strategy, Policy and Compliance essentially expressed the view that, in the absence of a decision to take disciplinary action in a referral case, the circular was not applicable. The Department also expressed concern that, given the relatively low number of referral cases, anonymity could not be guaranteed if information about outcomes was provided on a regular basis.

50. The Council notes that the concerns raised about the suggested use of the circular could be addressed by expanding the scope of information to be included therein. The Council concedes that anonymity may not be preserved in every instance. Even if due diligence is ensured in the investigation process, it is possible that a referral by the Tribunal in a case could be linked to a publicized disciplinary action in a manner that would not protect the anonymity of the person. However, the Council considers that the risk is offset by the more important objective of promoting accountability in the system and negating any impression that senior staff, in particular, enjoy impunity for wrongful decisions.

Recommendation 12

The Council recommends that the General Assembly request the Secretary-General to further examine the issue of publishing the results of actions taken in response to the referrals of accountability by the Tribunals, with a view to developing an approach that allows for the publication of actions taken on such referrals, especially sanctions imposed following requisite investigation, and including "no action" determinations.

F. Underresourcing of the Office of Staff Legal Assistance and the situation of staff in the field

51. The Council refers to Article 17 of the Charter of the United Nations on the obligation of Member States to bear the expenses of the Organization and regrets the continued lack of adequate funding for the Office of Staff Legal Assistance. It expresses alarm about the impact of the recently announced recruitment freeze on the Office's operation because of several vacant posts in the Office that have been left unfilled.

52. The Council is of the view that the underfunding of the Office has a significant impact on staff at large, including field staff. Although serving on the operational front lines, field staff members do not benefit from the presence of the system of administration of justice in their locations. Difficult field conditions, often coupled with language or other barriers faced by local staff, make it more difficult to understand how the system works or how to navigate it. These conditions also heighten the problem of staff self-representation before the Tribunals.

53. Applicants have a right to represent themselves, but often it is not in their best interests to do so. Self-represented applicants, which made up nearly 40 per cent of all applicants in 2019, also pose a continuing challenge to the administration of the United Nations system of internal justice. It is a common concern of judges and practitioners alike that self-representation is not conducive to judicial efficiency. While the availability of a toolkit for self-representing applicants on the website of the Office of Administration of Justice is useful, it should not be viewed as an alternative to field staff seeking and receiving legal assistance from the Office of Staff Legal Assistance.

54. While no reliable systemic data exist on who self-represents or why, the Council has received consistent comments from various interlocutors that staff in the field self-represent largely because there is little alternative. Engaging a private counsel is expensive and such a counsel may simply not be readily available. The Office of Staff Legal Assistance does its best but lacks the necessary resources and presence in the field to fully handle the demand for legal assistance. This point has been made to the Council by the Office itself, and its validity has been corroborated in separate comments received from field staff unions that the Office is overwhelmed and that field staff therefore end up representing themselves. Indeed, in 2019, 47 per cent – nearly half – of applications received by the Dispute Tribunal in Nairobi were from self-represented staff.

55. The fact that field staff are compelled to represent themselves has an impact not only on judicial efficiency but also on the system in two other ways that are worth noting. First, most applications by field staff are handled by the Nairobi Registry, which reports being significantly burdened by having to provide assistance to applicants in navigating, understanding and complying with the system's formal requirements. It is time-consuming and a role that would normally be handled quite well by the Office of Staff Legal Assistance, if it had the resources. Second, there is generally no "equality of arms" in judicial proceedings for field staff representing themselves before the Tribunals.

Recommendation 13

The Council recommends that the General Assembly approve the allocation of additional resources to the Office of Staff Legal Assistance, in particular to its Nairobi and Addis Ababa offices, to allow it to increase the availability of legal assistance to staff in the field.

Recommendation 14

To help address the lack of availability of legal assistance for field and other staff, the Office of Administration of Justice, the Office of the United Nations Ombudsman and Mediation Services and staff unions should help train volunteer advocates, including retirees, to represent applicants whom the Office of Staff Legal Assistance is unable, or has declined, to assist. Staff who engage in such training and representation should be recognized and given appropriate release time.

Recommendation 15

The Council recommends that the Office of Administration of Justice conduct regular surveys among staff with a view to understanding why staff continue opting for self-representation and identify ways to encourage them to seek support from the Office of Staff Legal Assistance.

G. Protection from retaliation

56. The Council is concerned about the protection of staff applicants and witnesses before the Tribunals from retaliation. Although such retaliation constitutes misconduct under staff rule 1.2 (g), instances of retaliation have reportedly continued and there is fear among staff members of potential retaliation if they are called as witnesses or file a case with the Tribunals. Seeking legal redress is perceived by many staff as a risky undertaking for their careers. That is especially the case because of the absence of an explicit mechanism to ensure protection from such retaliation, the high threshold required for staff to challenge anew at the Dispute Tribunal that a retaliatory decision was improperly motivated, and the lacking rescission remedy for staff members who are wrongfully terminated (see sect. III.I below).

57. In 2019, the Secretary-General informed the General Assembly in his report on the administration of justice at the United Nations (A/74/172) that heads of offices of the Secretariat would be given clear responsibility for preventing, monitoring and protecting staff members from retaliation under provisions of the then-to-be-revised Secretary-General's bulletin on the prohibition of discrimination, harassment, including sexual harassment, and abuse of authority (ST/SGB/2008/5). The revised Secretary-General's bulletin was promulgated in September 2019 (ST/SGB/2019/8). The new bulletin includes, in the section on prevention, an obligation for the heads of entities to monitor whether retaliatory measures are being taken against staff members of their entity who have appeared or will appear as a witness before the Tribunals.

58. The Council regrets that the revised Secretary-General's bulletin has not sufficiently addressed the gaps in the protection framework for retaliation against litigants and witnesses.[5] The revision does not include explicit provisions that such retaliation constitutes misconduct and is subject to disciplinary measures. It also fails to include retaliation within the scope of the bulletin as a basis for intervention and support in specific cases. Furthermore, it is still not clear that there is a mechanism in place to ensure protection against such retaliation, which falls outside the scope of the Ethics Office for protection against retaliation.

[5] See ST/SGB/2017/2/Rev.1. Retaliation against litigants and witnesses of the internal justice system is not considered a protected activity under the legal framework for protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations, under which, protection is provided to staff by the Ethics Office.

59. With regard to witnesses, the Council also notes that, under article 6 (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 from harassment and bullying during Tribunal proceedings. When the Tribunals have reason to believe that their witnesses are at risk of retaliation, they have the authority to issue orders for witness protection. Failure to comply with such orders prompts the instigation of contempt proceedings against the responsible manager and engages the Secretary-General's responsibility to ensure the implementation of the orders. The Council remains of the view that one of the most effective approaches, and one that has the best potential to mitigate any climate of fear, is to expressly empower the Tribunals to issue protective orders, should a judge find that retaliation has occurred or is reasonably likely to occur.

Recommendation 16

The Council recommends that the General Assembly, in furtherance of paragraph 12 of resolution 74/258, revise the statutes of the Dispute Tribunal and the Appeals Tribunal to grant them explicit authority to issue orders to protect staff found to be at risk of retaliation for acting as a party or witness in the internal justice system.

Recommendation 17

The Council further recommends that the enforcement of orders of protection be referred to the Chef de Cabinet of the Secretary-General for appropriate follow-up, including the adoption of protective measures and the issuance of sanctions. In appropriate cases, the presumption of regularity should be reversed, with the burden placed on the respondent to prove the absence of retaliation.

Recommendation 18

The Council recommends revising the Secretary-General's bulletin addressing discrimination, harassment, including sexual harassment, and abuse of authority (ST/SGB/2019/8), with a view to making it explicit that retaliation against applicants and witnesses constitutes misconduct and that the entire scope of the bulletin covers cases of such retaliation.

H. Standing of staff unions

60. Staff unions play an important role in protecting the interests of staff members, and the Redesign Panel on the United Nations system of administration of justice has suggested that staff unions have *jus standi* before the Tribunals.[6] As noted in the Council's report on the administration of justice at the United Nations (A/73/218, paras. 33–34), staff unions have repeatedly expressed 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 the rights of association of their members, as provided for in staff rule 8.1 (g).

61. The Council finds merit in this expressed concern and reiterates its prior recommendation (A/73/218, recommendation 16) that the General Assembly amend the statute of the Dispute Tribunal to provide staff unions with the standing to file applications in the Dispute Tribunal regarding their institutional interests. The text of the suggested amendment, providing for the addition of a new subsection (d), reads

[6] A/61/205, para. 160.

as follows: “(d) In addition, staff 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 rights of association”.

Recommendation 19

The Council recommends that the General Assembly amend the statute of the Dispute Tribunal to recognize staff unions as having the legal standing to file applications in the Dispute Tribunal regarding their institutional interests, such as claims of interference with the exercise of the rights of association of their members.

I. Rescission or reinstatement as a remedy

62. Under the statute of the Dispute Tribunal, when staff are found to have been unlawfully terminated, the respondent is given the choice of reinstatement or rescission, or payment in lieu thereof of an amount not normally exceeding two years of base salary. The respondent has uniformly opted for the payment of compensation.

63. The Council has repeatedly expressed the view that the “no rescission, no reinstatement” approach does not serve justice in every instance (see A/72/210, para. 83; A/73/218, paras. 31–32; and A/74/169, paras. 32–33). The chronic backlog of cases and the delays in delivering judgments, often two or more years after the submission of an application, inflict further harm on applicants found to have been unlawfully terminated.

64. Depending on the circumstances involved in specific cases, including the difficulty of finding comparable alternative employment and whether delays in adjudication were attributable to systemic inefficiencies, the Dispute Tribunal should consider whether justice requires an award of compensation in excess of the two years of net base salary which is provided for in normal situations, in accordance with article 10 (5) (b) of the statute of the Dispute Tribunal. Where reinstatement or rescission has been rendered infeasible by the operational difficulties of the United Nations, the normal situation referred to in the statute is not applicable and a higher award should be seriously considered.

65. The Council reiterates its recommendation (A/74/169, recommendation 18) that the statute of the Dispute Tribunal be amended to provide that, prior to opting for payment of compensation in lieu of rescission or reinstatement, the respondent should provide satisfactory evidence to the Tribunal that rescission or specific performance is not feasible owing to compelling operational, administrative or budgetary reasons.

Recommendation 20

The Council recommends that the General Assembly amend article 10 (5) of the statute of the United Nations Dispute Tribunal to provide that, prior to opting for the payment of compensation in lieu of rescission or reinstatement, the respondent shall provide satisfactory evidence to the Tribunal that rescission or reinstatement in such cases is not feasible owing to compelling operational, administrative or budgetary reasons.

IV. Acknowledgements

66. 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.

67. The Council is also indebted to the Office of Administration of Justice for its support.

(*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, 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.

2. As at 1 July 2020, the Appeals Tribunal was composed of seven judges, namely (in alphabetical order):

Graeme Colgan (New Zealand)
Martha Halfeld (Brazil)
Sabine Knierim (Germany)
John Murphy (South Africa)
Jean-François Neven (Belgium)
Dimitrios Raikos (Greece)
Kanwaldeep Sandhu (Canada)

3. Between July 2019 and June 2020, the Appeals Tribunal held three two-week sessions. The 2019 fall session was held in New York and the 2020 spring and summer sessions were held remotely because of the coronavirus disease (COVID-19) pandemic.

4. The Appeals Tribunal functions well and implements 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.

5. The Appeals Tribunal is assisted by a small complement of registry staff, legal officers and administrators who, apart from other duties within the Office of Administration of Justice, offer administrative support, preparatory work, legal research, the drafting of briefing notes and the finalization and publication of judgments. While the system functioned well up to and including the 2019 fall session, the Tribunal was hit hard by the pandemic. Owing to long-term illnesses and the difficulties of home offices in households with infants, the briefing notes for the 2020 spring session came very late, and for the preparation of the cases for the 2020 summer session, the judges received neither briefing notes nor any other legal support.

6. The situation of the specialized agencies has become a major concern to the judges. Under article 2 (10) of the statute of the Appeals Tribunal, the Tribunal is competent to hear and pass judgment on an application filed against a specialized agency. Article 2 (10) further provides that such special agreements may only be concluded if the agency utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. This provision contemplates and takes into consideration the character of the internal justice system as a two-tier system, with a first instance Dispute Tribunal and a second instance Appeals Tribunal. Consequently, under the statute of the Appeals Tribunal, that Tribunal's powers are limited, as it cannot hear witnesses or receive any other form of non-written evidence (article 2 (5)). If the documentary evidence before the Tribunal is not sufficient, it is required to remand a case to the first instance.

7. In the past, several such agreements were concluded between the Secretary-General and various specialized agencies, stipulating that the agency in question utilizes a neutral first instance process that includes a written record and a written

decision providing reasons, fact and law. However, most agencies have established appeals boards which, unlike the Dispute Tribunal, do not have the power to issue a decision, but instead issue only a recommendation to the Secretary-General of the specialized agency, who may or may not follow that recommendation, and issues a final administrative decision, which can then be appealed by the staff member before the Appeals Tribunal. The agreements even provide that the Secretary-General of the specialized agency and the staff member can agree to submit an application directly to the Appeals Tribunal. Very often, the appeals boards do not undertake fact-finding investigations.

8. The Appeals Tribunal decided at its 2019 fall session that the practice under the agreements is not in accordance with article 2 (10) of its statute, which requires a neutral first instance process, including a first instance decision. The judges acknowledge that, since then, one specialized agency has joined the United Nations internal justice system and now uses the Dispute Tribunal for first instance processes, and that another specialized agency has enabled its Appeals Board to issue decisions. However, the situation of the majority of the specialized agencies remains unchanged.

9. Other important issues include recent attempts by the Office of Administration of Justice to get involved in judicial matters and the inadequate funding of the Appeals Tribunal.

10. Starting in the 2018–2019 period, the Administration has begun to get involved in the way that the Appeals Tribunal manages its proceedings. Most notably, the Office of Administration of Justice imposes restrictions on the number of sessions. While under article 4 of the statute of the Appeals Tribunal, the number of sessions depends on the caseload and the decision lies solely at the discretion of the President, the Office of Administration of Justice now requests that the Appeals Tribunal hold only two sessions per year, even though addressing the number of appeals, as in previous years, clearly requires the holding of three sessions.

11. Since its establishment in 2009, the Appeals Tribunal has always made it a top priority to decide cases as quickly as possible and deliver judgments in a timely manner, in accordance with resolution 74/258. Given the caseload of the Appeals Tribunal, that is possible only if the Tribunal can continue to hold three sessions per year.

12. The General Assembly, in its resolution 74/258, with regard to judicial efficiency, requested the Tribunals to amend their rules of procedure to ensure that the first judicial action in a case is taken no later than 90 days from the date on which an application is filed. Processes and case management before the Dispute Tribunal and the Appeals Tribunal differ substantially. At the Appeals Tribunal, the first judicial action is usually the decision of its President to assign a case to a panel of judges (thus enabling the drafting judge to prepare the case for deliberation and decision), and to put it on the docket for the next session. An obligation of the President to assign all appeals to a panel and to put them on the docket for the next session within 90 days of their filing might be in conflict with article 4 (2) of the statute of the Appeals Tribunal, which provides that the President may fix a date for an ordinary session only if there are a sufficient number of cases, and article 4 (3), which allows for the convocation of extraordinary sessions as required by the caseload. Implementation of the requested amendment would require the President of the Appeals Tribunal to put appeals on the docket for a session within 90 days of their filing, even if there are only a small number of appeals. In practice, it would follow that the Appeals Tribunal would need to hold four instead of three sessions per year.

Annex II

Views of the United Nations Dispute Tribunal

Introduction

1. The report of the judges of the United Nations Dispute Tribunal provides a summary of the Tribunal's achievements in 2019 and identifies current and future challenges. In the report, some achievements from early 2020 in implementing resolution 74/258 are also mentioned.

2. Following the establishment of the Dispute Tribunal by the Assembly, in its resolution 63/253, and the appointment and swearing in of its judges, the Tribunal commenced operations on 1 July 2009 at its three locations of Geneva, Nairobi and New York.

3. As the first instance Tribunal that deals with cases brought by United Nations staff members challenging administrative decisions which negatively affect their conditions of service, the Tribunal has referred appropriate cases to the Office of the United Nations Ombudsman and Mediation Services.

4. In the matters that it adjudicates, the Tribunal interprets and applies the relevant legal framework, as well as relevant international human rights norms. It renders reasoned judicial decisions. The Tribunal's decisions encompass all aspects of international administrative law, including the judicial review of administrative decisions in matters such as disciplinary cases, the observance of due process and the proportionality of imposed sanctions.

5. The Tribunal experienced a radical change in its structure following the adoption of resolution 73/276.

6. It also went through a brief crisis in early 2019, which it fully overcame in the second half of that year, and it has since significantly increased its productivity. However, the Tribunal now faces new challenges, notably because of its new structure and the decrease in its workforce, combined with the structural challenges which have existed since its establishment.

7. Some of the challenges that the Tribunal faced in 2019 stem from the very structure of the Office of Administration of Justice and the inevitable tension between the principle of the independence of judges and some interference by the Executive Director and the Principal Registrar in the action of the Tribunal, as well as from the structural ambiguity between the authority of the judges and that of the Executive Director and the Principal Registrar over the registry staff.

8. In addition, the unexpected departure at the end of 2018 of Alessandra Greceanu (Romania), an ad litem judge based in New York, and the uncertainty during the initial months of 2019 about the departure dates of the two other ad litem judges contributed to the deleterious atmosphere in the Tribunal at the start of 2019.

9. Moreover, the significant reduction in the judicial capacity between 2018 and 2019 and the sudden change in the structure of the court, with six half-time judges forming a majority and a reduction to three full-time judges, have posed another major challenge.

10. Despite all these challenges, the Tribunal increased its productivity and reduced its backlog in 2019 and, if it is trusted, could reach even more ambitious targets. However, the regular imposition of reforms, in particular artificial procedural deadlines, risks being counterproductive.

11. It therefore remains essential, for the future of the Tribunal and the internal justice system of the United Nations, that, as previous judges mentioned in their reports, 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 respected.

President of the Dispute Tribunal

12. In accordance with article 1 of the rules of procedure of the Tribunal, at the plenary session in 2018, Judge Teresa Maria Bravo was elected President for a period of one year, from 1 January to 31 December 2019.

13. The judges were critical of some of Judge Bravo's decisions taken to implement resolution 73/276, in which the General Assembly requested the President of the Dispute Tribunal to develop and implement a case disposal plan to address the backlog that had developed. They considered Judge Bravo's initiatives to have been taken without consultation.

14. The judges therefore requested that Judge Bravo resign as President, since they considered that she no longer had their confidence as President. Despite Judge Bravo's refusal to resign, on 6 April 2019, all the other judges decided to remove her as President and to elect Judge Nkemdilim Amelia Izuako as the new President.

15. Judge Bravo attempted to continue exercising the presidency. There followed a period of three months during which an acrimonious environment developed among the judges and doubt persisted as to who was the President, given that article 1 (2) of the Tribunal's rules of procedure did not provide for the removal of the President prior to the expiration of his or her term, except if "unable to act".

16. This period was termed a dual presidency in resolution 74/258.

17. On 1 July 2019, the terms of Judge Memooda Ebrahim-Carstens and Judge Goolam Meeran ended and Judge Joëlle Adda and Judge Francesco Buffa took office.

18. On 10 July 2019, the General Assembly elected four new half-time judges under paragraph 32 of its resolution 73/276. Consequently, the mandate of the final two ad litem judges, Judge Rowan Downing and Judge Izuako, ended.

19. With a partly renewed Tribunal, Judge Bravo's term as President was no longer contested.

20. In October 2019, during the Tribunal's plenary session, Judge Adda was elected as President for a period of one year, theoretically commencing on 1 January 2020.

21. Following the resignation of Judge Bravo on 4 November 2019, Judge Adda immediately took office as President.

Composition of the Tribunal

Judges

22. During the reporting period, the Tribunal saw a significant change in its composition, and also in its structure.

23. At the beginning of the reporting period under review, 1 January 2019, the Tribunal was composed of the following judges (five full-time and two half-time):

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

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

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

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

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

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

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

24. As at 1 July 2019:

(a) Joëlle Adda (France), based in New York, became a full-time judge, replacing Judge Ebrahim-Carstens;

(b) Francesco Buffa (Italy) became a half-time judge, replacing Judge Meeran.

25. As at 10 July 2019, the Tribunal was composed of nine judges, but bore a completely different composition, with six half-time judges and only three full-time judges, as follows:

(a) Joëlle Adda (France) full-time, based in New York;

(b) Francis Belle (Barbados), half-time;

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

(d) Francesco Buffa (Italy), half-time;

(e) Eleanor Donaldson-Honeywell (Trinidad and Tobago), half-time;

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

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

(h) Rachel Sikwese (Malawi), half-time;

(i) Margaret Tibulya (Uganda), half-time;

Registrars

(j) Abena Kwakye-Berko, based in Nairobi;

(k) René Vargas, based in Geneva;

(l) Nerea Suero Fontecha, based in New York.

Deployment of half-time judges

26. During the first half of 2019, Judge Hunter served a six-month deployment in New York.

27. During the second quarter of 2019, Judge Meeran served a three-month deployment in New York.

28. During the fourth quarter of 2019, Judge Buffa was deployed in Geneva and Judge Belle in New York, and Judges Sikwese and Tibulya both served a three-month deployment in Nairobi.

Challenges faced by the Tribunal in 2019

29. With the new structure, the judicial capacity has been considerably reduced. During its first nine years, the composition of the Tribunal consisted of three full-time permanent judges, three full-time ad litem judges and two half-time judges, the equivalent of seven full-time judges. An ad litem judge position was abolished at the end of 2018, and, as from mid-2019, the structure of the Tribunal changed to just three full-time judges and six half-time judges, which is the equivalent of six full-time

judges. The Tribunal has therefore permanently lost one seventh of its judicial capacity. In addition, since the new half-time judges appointed in July 2019 could not be deployed before October 2019, the total judicial capacity in 2019 was on average 5.75 full-time judges, as shown below:

First quarter: five full-time judges and one half-time judge (total of 6)

Second quarter: five full-time judges and two half-time judges (total of 7)

Third quarter: three full-time judges

Fourth quarter: three full-time judges and four half-time judges (total of 7)

30. The average judicial capacity of 5.75 in 2019 represents a decrease of 22 per cent compared with 2018.

31. The structure of the Tribunal has radically changed. With six half-time judges, including five appointed in July 2019, it was necessary not only to integrate them, as with any partial renewal of the Tribunal, but also to take into account the fact that, with the new structure, the majority of judges would be available for only six months a year. Moreover, since most half-time judges have another job in their own country, it is sometimes difficult for some of them to make their timetables compatible.

32. In addition, the Registrars must take into account the short duration of deployments when assigning cases to half-time judges and try to select cases that appear to be disposable in the short period of their assignment. In principle, this excludes complex cases, including most disciplinary cases, which would likely require lengthier litigation or case management. Moreover, the need for the half-time judges to dispose of the cases assigned to them in the period of their deployment has an impact on the assistance provided to the half-time judges. Because the cases must be disposed of by a certain date, at the end of their respective deployments, assistance to half-time judges always takes priority over assistance to the full-time judges, who are not held to a specific disposal date. Furthermore, given that the deployment on site is restricted to the dates on which the judge must hold case management conferences or hearings and that those dates often have to be changed because of the unavailability of the parties, this has created an additional burden for the Registrars to assist half-time judges and an unpleasant uncertainty for the judges because they cannot book their accommodation at the duty station in advance.

Integration of the half-time judges and the plenary session of fall 2019

33. The induction programme for the six new judges, which was originally planned by the then President, Judge Bravo, for early July 2019, was postponed and eventually held at the end of September 2019, just before the plenary session.

34. The induction was successful and included a presentation on the internal justice system and its institutional framework and some presentations on jurisprudence.

35. During the plenary session, which was held in New York from 30 September to 4 October 2019, apart from discussing substantive questions of jurisprudence, the judges intended to implement the mandate of the General Assembly, as expressed in its resolution 73/276, in particular paragraph 24.

36. To that end, the judges confirmed that priority should be given to the disposal of older cases. The judges also set a target of disposing of at least four cases per judge per month.

37. Since the judges identified several legal issues impeding speedy proceedings, all judges decided to establish a committee of judges, chaired by Judge Klonowiecka-Milart, to prepare a draft review of the rules of procedure which would be submitted at the next plenary session.

38. The judges also unanimously agreed that withdrawals should be disposed through orders rather than judgments.

39. Given the statement in paragraph 25 of the Council's previous report that "among the deficiencies [of the Dispute Tribunal] is the lack of clear terms of reference for the President of the Dispute Tribunal to direct the Tribunal's work and a process for holding judges accountable for poor performance and non-compliance with announced efficiency measures", the judges agreed to a resolution on the role and the responsibilities of the President.

40. Of the administrative functions conferred on the President, the following are of particular relevance to the present report:

- Deployment of judges to duty stations and the receipt of notifications from deployed judges about their absence from office to take leave, or if they are expected to be on duty in the office at a particular time but are telecommuting
- Monitoring of progress made in the backlog elimination plan and the case disposal plan
- Monitoring of compliance with performance indicators (currently limited to the three-month period within which judgments are to be completed by judges)

41. The resolution also specified that the ethical functions of the President shall include consultations with the judges of the Tribunal on issues affecting its work.

42. In order to prevent a situation like the one described in the Council's previous report (A/74/169, para. 24), all judges also committed not to resort to the formal complaints mechanism to settle disputes among themselves unless they had made serious efforts to settle matters during the plenary session by, for example, seeking mediation.

43. The judges elected Judge Adda as President for 2020.

44. The plenary session contributed to establishing good relations among the judges and preparing the newly formed Tribunal to face its new challenges.

Judicial statistics of the Tribunal

45. During the reporting period, the Tribunal registered a total of 308 new cases, of which 76 were applications for suspension of action under article 2 (2) of the statute of the Tribunal and 232 were applications on the merits (this figure does not include transfers between the Registries).

46. A breakdown by duty station indicates that, during the reporting period, 67 new cases were received by the Registry in Geneva, 158 cases in Nairobi and 83 in New York. Of those cases, Geneva received 8 applications for suspension of action, Nairobi received 48 and New York received 20.

47. The Tribunal disposed of 389 cases, compared with 268 cases in 2017 and 317 cases in 2018, an increase of almost 23 per cent, and rendered 188 judgments. The number of judgments does not correspond to the number of cases disposed of because some of the cases have been closed by order. Moreover, there were several instances in which a single judgment disposed of two or more cases concerning similar issues.

48. The total number of orders is not relevant for measuring the Tribunal's productivity. The only orders that are relevant for that purpose are those disposing of

a case (suspension of action applications or withdrawals). Of the cases disposed of by order, there were 76 applications for suspension of action and 26 withdrawals.[7]

49. Geneva disposed of 136 cases, Nairobi of 134 cases and New York of 119 cases.

50. As a result of these high disposal levels in 2019, there are only 323 cases still pending at the end of 2019, compared with the 404 pending at the end of 2018. That constitutes a 25 per cent decrease in the Tribunal's total caseload.

51. However, a significant imbalance persists between duty stations, with Nairobi receiving as many applications as the other two Registries combined. As a result, despite all the efforts made to address this disparity, including the transfer of cases, at the end of the reporting period, Nairobi still had 137 pending cases, while Geneva had 94 and New York had 92.

52. In sum, 389 cases were disposed of by 5.75 judges over the reporting period, at an average of 67.6 case disposals per judge, which makes 2019 the second best year for productivity in the history of the Tribunal, only surpassed by 2015.

53. While certain specificities of the cases handled in 2019 explain this record,[8] this success was achieved thanks to the extraordinary mobilization of judges and registries, despite tensions at the start of 2019 and the new challenges faced by renewing two thirds of the Tribunal and having mainly half-time judges.

54. With regard to compliance with article 7 (b) of the code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, which provides for a three-month deadline for the delivery of a judgment from the end of hearings or the close of pleadings for the case, it is necessary to take into account that, owing to the departure of one judge at the end of 2018 and of three other judges in 2019, most of the cases had to be reassigned to new judges. It should be noted that almost all judgments rendered in the second half of 2019, under cases that had been reassigned to a new judge, met that deadline as of the date of reassignment.

55. With regard to the backlog, according to the Council's previous report (A/74/169, table 1), as at 31 December 2018, 205 cases older than 401 days were pending.

56. On 31 December 2019, the number of pending cases exceeding 401 days was 104.

57. The backlog had therefore been halved.

Other measures taken in 2019 and early 2020 to reduce the backlog and increase productivity

58. As requested by the General Assembly in paragraph 24 of its resolution 73/276, the President of the Dispute Tribunal and the Principal Registrar have worked together to develop and implement a case disposal plan with a real-time case-tracking dashboard and performance indicators on the disposal of caseloads.

59. A bimonthly review of the dashboard showing the pending caseload indicates that one of the challenges faced by the Tribunal in disposing of its backlog is the imbalance among duty stations. The number of applications registered in Nairobi is much higher than in the other duty stations, and that seat of the Tribunal receives a higher number of disciplinary cases, which are more time-consuming.

[7] A total of 29 withdrawals were disposed of by judgments before the plenary session and 26 cases by orders after it.

[8] There were 80 applications related to a challenge to the result of the comprehensive salary scale survey for local staff in India.

60. In order to alleviate the caseload in Nairobi, 20 cases were therefore transferred to the New York Registry and 12 to the Geneva Registry in 2019.[9]

61. However, transferring cases is an imperfect solution because of the difficulty of organizing case management conferences and hearings in another seat of the Tribunal given the time difference between the seat of the Tribunal where the case is handled following the transfer and the location of the parties.

62. To address that problem, the President, in consultation with the Principal Registrar, decided to deploy two half-time judges in Nairobi for the last quarter of 2019 and the second and third quarters of 2020 in order to strengthen the judicial capacity in that seat of the Tribunal.

63. In addition, all the judges decided to address the backlog (cases older than 401 days) by requesting that the Registrars assign cases to the judges in the chronological order in which the cases had been filed, unless efficient docket management would require the occasional assignment of more recent cases. However, that rule is more complicated to apply with six half-time judges who are expected to dispose of their assigned cases during their deployment period. In general, the older cases are more complex and their disposal requires more time.

64. Cases which justify a departure from the chronological order are typically applications for suspension of action, requests for interim measures, applications which are manifestly non-receivable and withdrawals.

65. Of the 389 cases disposed of in 2019, 205 were over 401 days old. While 120 disposed cases were more recent than 100 days, of those, 76 were applications for suspension of action, 28 were receivability judgments, 10 were withdrawal orders, 4 were judgments on the merits and 2 were revision judgments.

66. Those statistics show that all the judges have focused on the oldest and most urgent cases.

67. In order to handle emergencies, the judges have established a system involving a duty judge. The duty judge handles preliminary matters arising in cases pending assignment at the seat of the Tribunal where he or she is serving. The term “duty judge” also refers to a judge who handles emergency matters arising in another seat of the Tribunal when no judge is available at that location.

68. In paragraph 27 of its resolution 74/258, the General Assembly urged the Dispute Tribunal to review and amend its rules of procedure subject to the approval of the Assembly, with a view to streamlining and harmonizing its approach to case management, including by ensuring that the first judicial action in a case is taken no later than 90 days from the date on which an application is filed. To implement that mandate, at its plenary session held online in May 2020, the Tribunal adopted a draft amended version of its rules of procedure, which was submitted to the stakeholders and finally adopted in June 2020 and transmitted to the Assembly. The new rule proposed by the Assembly, as well as several other amendments intended to speed up the proceedings, were included in the review.

69. During its 2020 plenary session, the judges also adopted their new judicial directions, which, following an exchange with the Registries, will be published online, in accordance with the request made by the General Assembly in paragraph 31 of its resolution 74/258. The judicial directions involve organizing the work of the Registries to ensure that efficient assistance is provided to the Tribunal in handling cases rapidly.

[9] Twelve cases were also transferred from Geneva to Nairobi, but the reason was to avoid conflicts of interest.

70. While in the second quarter of 2020, the lockdown during the coronavirus disease (COVID-19) pandemic caused a slowdown in the number of disposed cases because of the temporary difficulty of holding hearings at a distance, the technical issue has been resolved and the Tribunal can resume its path towards improvement.

Remaining challenges

Shortage of support staff

71. Although the General Assembly, in paragraph 6 of its resolution 73/276, stressed the importance of the justice system being adequately resourced, the Geneva Registry suffered from a significant shortage of legal officers. In Geneva, the P-4 legal officer left in February 2019. On the same date, a P-3 legal officer was appointed to the Geneva Registry, but the other P-3 legal officer resigned in October 2019. Since that date, only one P-3 legal officer, who was appointed in February 2019, remains in the Geneva Registry. That legal officer was promoted to the P-4 level in March 2020. The recruitment of at least one P-3 legal officer has been pending for almost a year. As a result, the Geneva Registry is currently composed of the Registrar (P-5), one legal officer (P-4), two legal assistants (G-6) and one staff assistant (G-4). The shortage of legal support staff has affected the New York Registry, which had to provide assistance to the judges in Geneva. This situation will probably have a significant negative effect on the productivity of the Tribunal in 2020. The judges therefore respectfully request that an exception be granted to the freeze on the recruitment of Secretariat staff to allow for the recruitment of at least one legal officer for the Geneva Registry.

Administrative independence of the Tribunal

72. The judges reiterate that, by virtue of the doctrine of the separation of powers and the independence of the judiciary, as enshrined in the legal framework of the internal justice system, the Dispute Tribunal is a separate and independent entity. As such, it must remain free from interference by the executive branch and enjoy administrative independence. That implies that the Office of Administration of Justice may not impose its authority and working methods on the Registries in matters that concern assistance provided by registry staff to judges on judicial matters.

Challenges faced by the President of the Tribunal

73. The events described in paragraphs 12 to 19 of the present annex have considerably weakened the function of the President. They showed how difficult it is for the President, who is simply a judge elected for one year in a rotational system, to implement decisions with which the other judges may disagree.

74. It is inevitable that the President can be elected only from among full-time judges because it is necessarily a permanent function. The reduction in the number of full-time judges to only three implies that each full-time judge will encumber that function too frequently.

75. Under the statute of the Dispute Tribunal, the President “shall have the authority, inter alia, to monitor the timely delivery of judgments”. As the statistics show, at the end of 2019 and the beginning of 2020, all the judges showed goodwill and efficiency in the handling of their dockets.

76. The challenges faced by the presidency increased with the new structure of the Tribunal. That function has become even more time-consuming with six half-time judges because the President needs to consult regularly with all the judges by organizing regular meetings to bring them all together. That is proving to be difficult, as half-time judges generally have another job in their own country when not

deployed, which means that they are not readily available for meetings or working groups or to adjudicate complaints under the mechanism. However, even when not deployed, they remain judges of the Tribunal and, while unpaid, still have the right to vote on any decision.

77. In sum, this function is challenging and has an impact on the time devoted to the processing of the cases assigned to the judge encumbering the presidency. It could be envisaged that the President of the Dispute Tribunal should be remunerated for that additional task, as with the President of the United Nations Appeals Tribunal.

Facing the future with trust

78. In its previous report (A/74/169), the Council noted that "in order for the internal system of administration of justice to produce fair and efficient results for staff and management, and be so perceived by all stakeholders, the judges of the Tribunals must enjoy judicial independence and be accountable for the timeliness and quality of justice that they deliver". In 2019 and early 2020, the Tribunal demonstrated its accountability by improving its productivity and reducing the caseload as much as possible. That was achieved by building trust among the judges and solidarity between the different duty stations. That was demonstrated, in particular, by the assistance provided to the Nairobi duty station, which deals with many more applications than the other duty stations, as well as by the respect for the flexibility needed to adapt to the kinds of cases and constraints specific to each duty station.

79. However, as the independence of the judges and the separation of powers are the most critical elements insisted on by the General Assembly in paragraph 4 of its resolution 61/261, it is important to rely on judges' professionalism to deal with the workload of the Tribunal. That is why the judges respectfully request the Assembly to approve the amended rules of procedure adopted during their plenary session, with the intention of ensuring the greatest functional efficiency and speeding up the settlement of cases.

Acknowledgement

80. The judges wish to again express their appreciation for the assistance of the Office of Administration of Justice and the work and dedication of the legal and administrative staff of the Registries of the Dispute Tribunal.

Annex III

Report of the United Nations Appeals Tribunal on allegations of misconduct and information of incapacity in 2019

In 2019, no allegations of misconduct were filed against any judge of the Appeals Tribunal and no judge of the Appeals Tribunal was incapacitated.

Sabine **Knierim**
United Nations Appeals Tribunal President

Annex IV

Report of the United Nations Dispute Tribunal on allegations of misconduct and information of incapacity in 2019

1. The present report is submitted in accordance with paragraph 21 of the mechanism for addressing complaints regarding alleged misconduct or incapacity of the judges of the Dispute Tribunal and the Appeals Tribunal, which states that the respective Presidents of the Dispute Tribunal and the Appeals Tribunal shall submit an annual report to the General Assembly on the disposition of complaints through the Internal Justice Council.

2. Paragraph 20 of the mechanism states:

> The process of review of the complaint up to the final disposition thereof shall be confidential. If the final disposition is that set out in paragraph 11, 13 or 19 (a), the name of the judge concerned shall continue to remain confidential following completion of the process.
>
> Consequently, the names of the judges concerned will remain confidential.

3. A complaint filed against a judge on 9 November 2018 was closed by decision of the judges of the Tribunal, who unanimously concluded on 24 July 2019 that the complaint was not well founded and decided to close it, in accordance with paragraph 19 (a) of the mechanism.

4. On 13 May 2019, a complaint was filed against a judge.

5. After several judges were recused or recused themselves, and following the changes in the composition of the Tribunal, the receiving judge ruled on the complaint on 17 September 2019. The receiving judge decided that no further action was appropriate, in accordance with paragraph 11 of the mechanism.

6. On 8 September 2019, four separate complaints were lodged against the same judge. Several judges recused themselves. The receiving judge decided that it would be preferable for all judges (except those who had recused themselves) to decide jointly on the four complaints rather than the receiving judge determining the complaints alone. Consequently, all judges (except the ones who had recused themselves) unanimously concluded that the complaints were not well founded and decided to close them, in accordance with paragraph 19 (a) of the mechanism.

7. There were no other complaints under the mechanism in 2019.

8. For completeness, information about the complaints filed so far in 2020 is provided herewith.

9. On 10 January 2020, a complaint was filed against another judge. The President decided under paragraph 11 of the mechanism that no further measures were appropriate.

10. On 15 January 2020, a complaint was also filed against another judge of the Tribunal. The receiving judge decided under paragraph 11 of the mechanism that no other measures were appropriate, as the complaint fell outside the scope of the mechanism because it only raised questions regarding the judicial decisions taken by the judge concerned.