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and the Empowerment of Women

Annual Report

of the Office of the Ombudsman for United Nations Funds and Programmes 2017



*Working together
to find solutions*

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Summary

The report of the Office of the Ombudsman for United Nations Funds and Programmes provides an overview of its case work in 2017, with an analysis of the major issues brought to the attention of the Office. The three major issues for the reporting period were evaluative relationships (29 per cent), job and career (24 per cent) and regulatory and financial compliance (13 per cent). The number of cases in the latter category, which includes cases that concern harassment and sexual harassment, has doubled over the past five years.

Chapter II includes an in-depth discussion of the various ways in which mediation can be of great value in workplace dispute resolution. After an explanation of the “opt-out” mediation model, which retains the voluntary nature of participation in mediation – an essential tenet of the mechanism – the Ombudsman discusses the victim-offender mediation process. He makes recommendations for both of these approaches for the funds and programmes.

The only adjudicative process for non-staff personnel is arbitration under the rules of the United Nations Commission on International Trade Law. A number of United Nations bodies have highlighted the shortcomings of this arrangement, which the Ombudsman also believes is not an equitable solution for such a large part of the workforce; he makes a recommendation in this respect.

Looking ahead, the Ombudsman shows how the training modules developed by the Office will help staff throughout the organizations to gain a better understanding of how informal resolution works on a number of levels. Greater ease of access to the services of the Office will be a major goal of future work. An innovative way of increasing access is under way with some organizations that would like to have a dedicated ombudsman presence for staff in large, non-headquarters location.



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Introduction

The Office of the Ombudsman for United Nations Funds and Programmes saw a momentous year in 2017. The Office has responded to the growing demand for the informal resolution of work place conflict in a number of constructive ways: by enriching its panel of conflict-resolution experts; traveling to country offices and increasing outreach and training activities in all the organizations served; and developing innovative initiatives to bring the Ombudsman closer to all contract holders in the funds and programmes.

While cases regarding evaluative relationships, i.e., those between supervisor and supervisee, remain the most frequent, the Office has been dealing with more cases of harassment, partly as a result of the new policies of some organizations that encourage staff to seek informal resolution where possible by contacting the Office of Ombudsman. These cases are particularly difficult for all parties concerned. As in past years, issues regarding job and career (especially recruitment, non-renewal of contract and abolition of post) accounted for the second largest category brought to the Office. The case breakdown is explained in section I. A.

With regard to awareness-raising and training, a large number of webinars have highlighted specific areas of informal conflict resolution as a means of strengthening individual competencies, as detailed in section I. B. The Office now offers regular training, including long courses, through sessions designed in response to requests from human resources offices, managers and staff. The first catalogue of courses is now on the Office website and online resources will become available in the summer.

Section II. A. contains a report on the perennial issue of performance management and presents a recommendation to improve the effectiveness of performance-management plans in the organizations.

The Ombudsman then directs attention to an aspect of harassment in the workplace that was discussed in the 2016 report: situations where staff may be disrespectful and abusive towards supervisors. Section II. B. contains information on the many avenues through which staff can report alleged harassment without resorting to slander or violating the Staff Regulations and Rules and also has a recommendation on how to deal with this form of harassment.

Significant innovation also characterizes some of the major recommendations of the Ombudsman stemming from the year's work. The first focuses on strengthening the mediation mechanism; full details are given in section II. C., which outlines the advantages of an "opt-out" system of mediation in the funds and programmes. While remaining entirely free to mediate or not, parties to a dispute would attend an initial mediation meeting with a mediator before filing a case with the United Nations Dispute Tribunal (UNDT). This model, similar to the one adopted by the World Bank several years ago, has also proven successful in a number of national jurisdictions where it has produced financial savings, eased the backlog of cases awaiting trial and resulted in settlement agreements with high approval rates from litigants.

Turning attention to an aspect of mediation that is being used increasingly in cases of alleged harassment, the Ombudsman recommends initiating a pilot programme that reinforces the informal system (alongside the formal system) and, by imparting information about it, encour-

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ages people to report and possibly resolve cases of sexual harassment through the informal system. Section II. D. discusses why arguments for informal resolution of certain alleged sexual harassment cases outweigh the arguments against it.

In a recommendation also aimed at increasing the effectiveness of staff protection, the Ombudsman has focused on the inadequacy of the arbitration process, the contractually mandated adjudicative process available to non-staff personnel, who account for some 40 to 80 per cent of the workforce of the individual funds and programmes. With the aim of establishing a more effective system of redress for this major segment of the workforce, the Ombudsman recommends the establishment of an arbitration facility, with online capabilities, to administer the arbitration processes to be conducted under the rules of the United Nations Commission on International Trade Law (UNCITRAL). Details are given in section II. E.

In reflecting on the work over 2017, the Ombudsman wishes to appeal to the management of all the organizations served to clarify the internal processes by which they interact with the Office of the Ombudsman, especially at the level of those empowered with decision-making. Negotiating a settlement agreement can be an extremely complex, delicate and time-consuming process whose unique dynamics can normally be fully appreciated only by those directly involved. Clarification of the settlement process and strict adherence to it would prevent, for example, attempts to renegotiate a tentative agreement reached by both parties with the Ombudsman often after several months of painstaking work; it would also prevent the waste of resources that can occur in this kind of situation, which makes the negotiation or mediation process unnecessarily long and expensive. In extreme cases, such attempts could even be seen as negotiating in bad faith. It is essential, therefore, to clarify at the beginning of the negotiation or mediation process the mandate and authority of those who will participate. This will not only preserve the efficacy and integrity of the settlement process but will also ensure that certain decisions are well pondered and taken at the appropriate level (generally among legal offices, offices of human resources and the executive offices).

The Ombudsman welcomes the invitations extended in 2017 by some organizations to participate in early discussions and to be involved in the elaboration of corporate policy and coordinated response to crises affecting the workplace. With his unique inter-agency perspective derived from frank, confidential exchanges with staff at all levels of the organizations, the Ombudsman is able to provide advice on such important matters as sexual harassment and can assist in ensuring that policies are coherent, effective and fair. The Ombudsman looks forward to realizing the full potential of the Office in providing its input to all five agencies.

Building on progress made in 2017 and preparing for the future, the Ombudsman team has developed a wide range of training opportunities in conflict management ready for roll-out. In this endeavour, there has been effective cooperation with the Office of the United Nations Ombudsman. Full details are given in chapter III and are on the Office website (www.fpombudsman.org). A further innovation for increased access is under way with those organizations that have large offices away from headquarters and that would like to have a dedicated ombudsman presence there. Further details are given in chapter III.

Finally, 2017 was a year of special challenge for the Office since one of the two ombudsman posts in the Office became vacant mid-year. At the time of publication of the present report, the position remains unfilled. This has meant that the Office has been understaffed while facing an increase in the number and especially the complexity of cases as well as in all its activities. The Ombudsman looks forward, with the cooperation of the constituent organizations, to a return to at least the full complement of staff in the very near future so that momentum will not be lost at such a critical point.

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I. Overview of the Work of the Office

A. Overview of cases

The Office of the Ombudsman for United Nations Funds and Programmes addressed a total of 450 cases in the period under review. Figure 1 shows that 229 were from UNDP, 45 from UNFPA, 93 from UNICEF, 22 from UNOPS, 49 from UN Women and 12 from other United Nations entities. The majority of complaints submitted were from individuals with staff contracts. International professional staff accounted for the majority of such cases. Non-staff personnel accounted for 15 per cent of the cases received. Figure 2 shows a breakdown of the number of cases by category of contract. The Office saw an increase in the number of cases from groups and from staff at the Director and above level.

Of the cases received, 44 per cent were addressed through guidance, conflict coaching and examining options; 29 per cent were addressed through action by the administration; 12 per cent were resolved through mediation or shuttle diplomacy; and the remainder through referrals to other offices and by providing information.

During the reporting period, the Office mediated 32 cases, of which 10 followed traditional mediation practice and 22 were concluded in a less structured manner. In the latter, parties may not be required to sign a written agreement to mediate, interaction is less sustained and in many cases the Ombudsman serves as an intermediary between both parties for some time before a negotiated agreement can be settled. The types of issues that were mediated tradition-

Figure 1. Cases received from 1 January to 31 December 2017

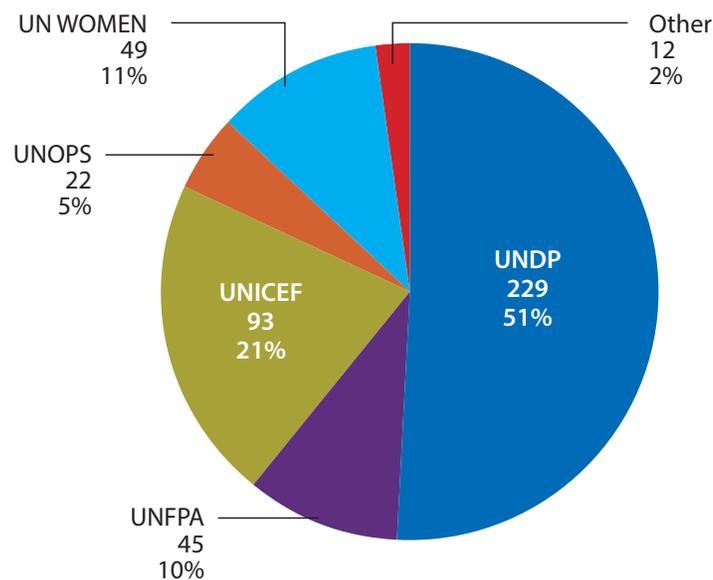


Figure 2. Number of cases by category of staff contract

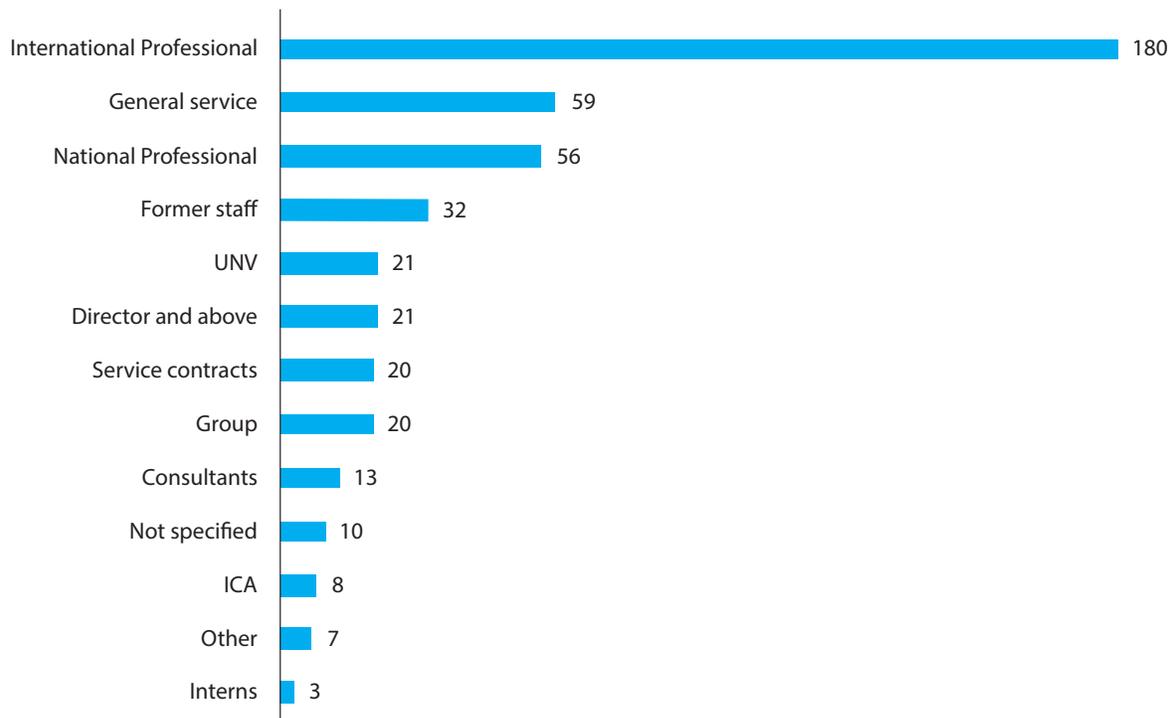
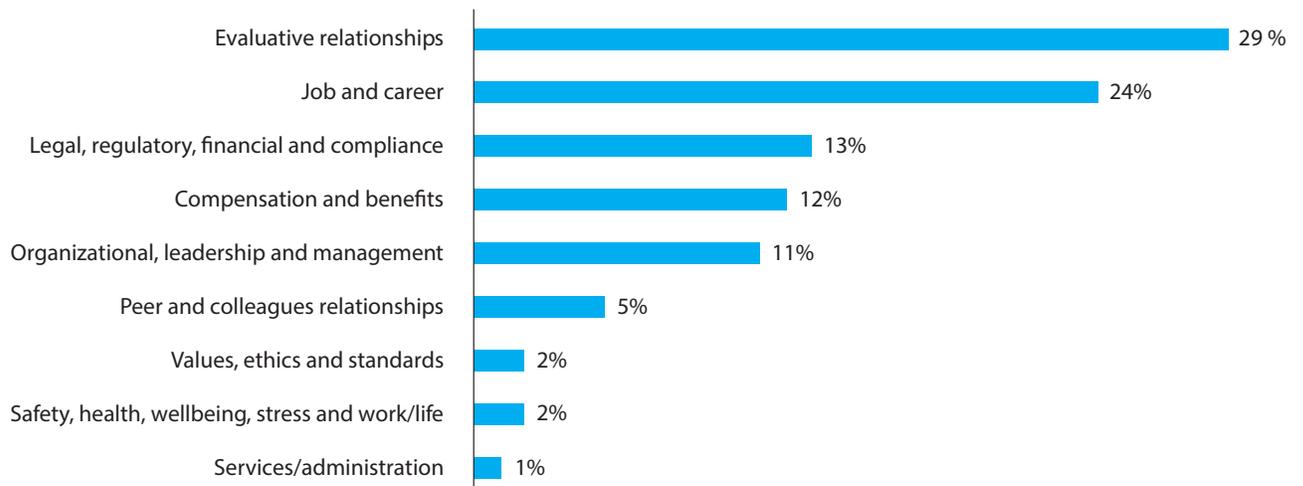


Figure 3. Overview of all issues in 2017 by percentage



ally included working relationships and job and career issues; however, with less structured mediations, it was possible to address such issues as alleged harassment as well as compensation and benefits issues.

Figure 3 shows a breakdown of issues by percentage that staff brought to the Office. The three main issues were: evaluative relationships – 29 per cent; job and career – 24 per cent; and legal, regulatory and financial compliance – 13 per cent.

Figure 4. Organizational breakdown of main issues in the evaluative relationship category

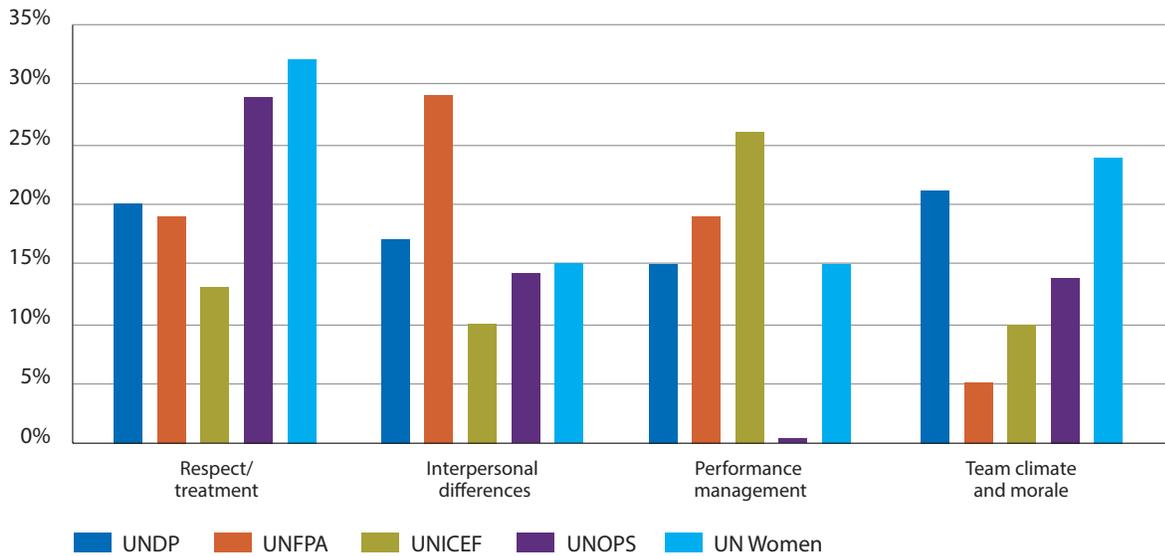
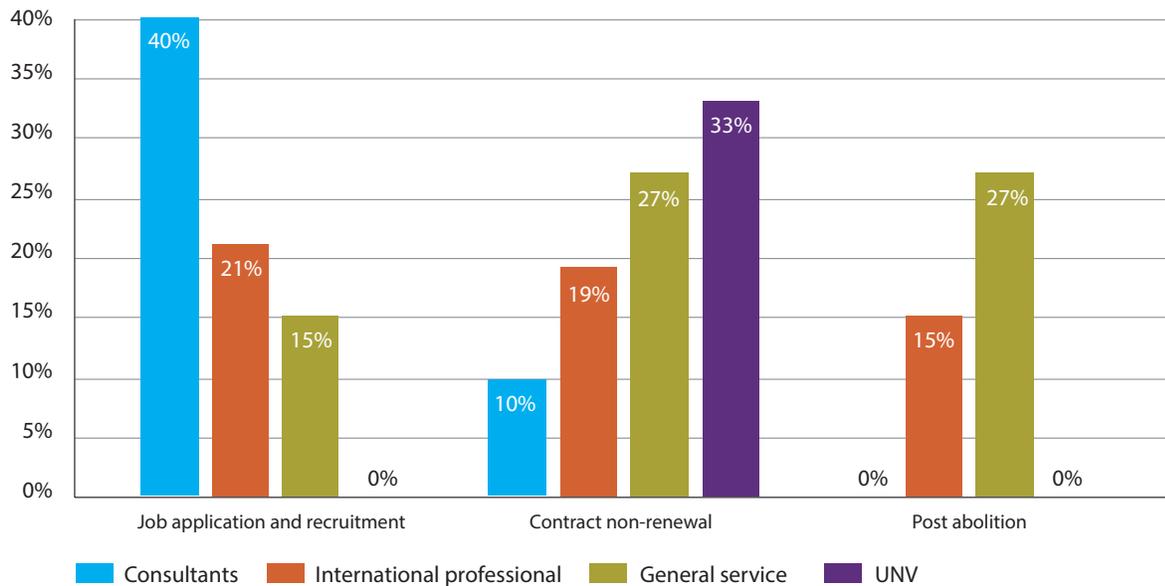


Figure 5. Staff category breakdown of the main issues in the job- and career- related category



The major reason why staff have contacted the Office during the last five years has been evaluative relationships, the category that denotes issues dealt with in the supervisor/supervisee relationship, mainly: respect/treatment; team climate and morale; interpersonal differences; and performance management and feedback (see figure 4 for an organizational breakdown of these issues). In the majority of evaluative relationship cases, the Ombudsman assists staff by listening, guiding, coaching and examining options on how they can address the issues themselves. With permission from the staff who have visited the Office, the Ombudsman can also

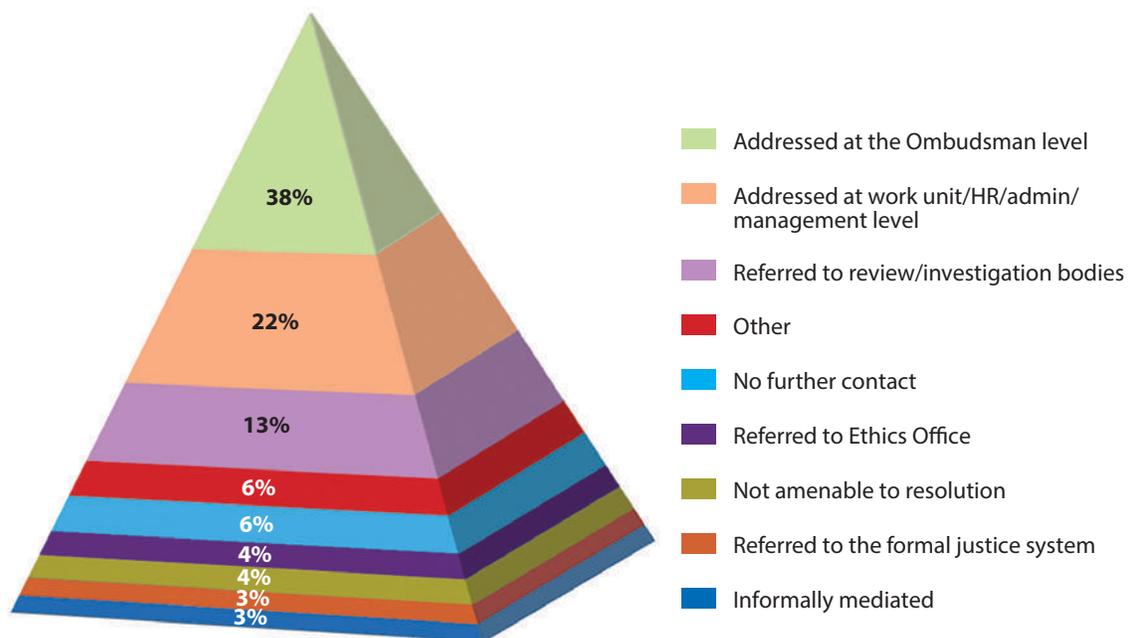
approach the supervisor and/or representatives of human resources to explore possible solutions, including mediation.

The main causes of conflict in the job- and career-related category are: job application and recruitment; non-renewal of contract; and abolition of post (see figure 5 for a breakdown by category of staff). Over 34 per cent of the cases that fall into this category are addressed with the help of the work unit, human resources, the administration or management. A higher percentage of consultants than in the past submitted complaints regarding job application and recruitment while UNV contract holders submitted a higher number of complaints about the non-renewal of their contract and General Service staff presented the most issues concerning abolition of post. The majority of the cases are addressed at the ombudsman level, where options are considered with staff on how to address their issue, or through shuttle diplomacy and mediation.

Cases that concern alleged harassment, sexual harassment, discrimination and disciplinary processes form part of the legal, regulatory, financial and compliance category. Cases in this category have doubled over the past five years, owing to a number of factors: (a) encouragement by management to try and initially resolve such disputes informally and amicably; (b) an increase in the number of offices that have been affected by several incidents of harassment and have requested the intervention of the Ombudsman; (c) an increase over the past three years in the number of non-staff that have reported concerns in this category – the majority of cases are nevertheless brought by staff members.

When staff come to the Office of the Ombudsman to raise concerns about harassment, they often do not know which mechanism they should use to address their concern. While the Office provides informal services and does not have the mandate to investigate cases, it does provide a safe space for staff to explore options for action in the formal and the informal parts of the justice system. During the reporting period, 13 per cent of the cases in this category were referred to formal investigative or disciplinary offices. Figure 6 indicates how the cases were addressed.

Figure 6. Breakdown of the outcome of cases in the legal, regulatory, financial and compliance category



B. Outreach activities

A survey conducted by the Ombudsman in 2017 and the Global Staff Survey results show that the majority of staff who responded in the funds and programmes workforce is aware of the Office of the Ombudsman. Visits by the Ombudsman to country offices, however, demonstrated that although most staff did indeed know about the Office, they were unclear, and at times very unclear, about how the Ombudsman functioned and how the Office could help with their work-related concerns. In response, the Office has increased the number and type of interactions, virtual and in-person, with the funds and programmes workforce.

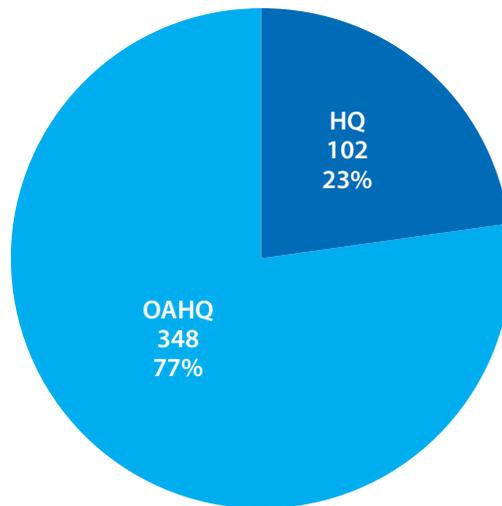
The majority of complaints received by the Office were initiated by staff. The number of requests from the administration for the Ombudsman to intervene in conflict situations continued to increase.

Figure 7 shows that 77 per cent of the cases addressed during the reporting period were from country offices and 23 per cent from headquarters locations. During the reporting period, the Ombudsman visited 13 countries in five regions. In addition, the Office conducted outreach activities at various headquarter locations and participated in several panel discussions via electronic media.

The Ombudsman survey revealed that of those responding, 54 per cent of the funds and programmes workforce experienced disagreements, interpersonal differences, or confrontations at least one to three times a year. For this reason, the Office continued to focus its efforts not only on cases that were reported but also on addressing the root causes of conflict in the workplace by strengthening its efforts to deliver conflict-management training and information sessions. During the reporting period, the Office delivered 20 training sessions and workshops on various themes relating to workplace dispute resolution.

The majority of complaints received by the Office were initiated by staff. The number of requests from the administration for the Ombudsman to intervene in situations of conflict continued to increase. The Ombudsman has observed that sometimes such requests for intervention take place after offices have independently tried to resolve a conflict by trying to mediate the matter themselves. The Ombudsman is thereafter called upon after such independent interventions do not yield positive results or in some cases lead to a deterioration of circumstances.

Figure 7. All cases, 2017, country offices vs headquarters



The Ombudsman recognizes the importance that offices give to managing workplace conflict themselves. Nevertheless, the impact of resolving conflict without the benefit of expertise can be devastating. Often, the need for a knowledgeable third-party neutral perspective is discounted at the expense of keeping the conflict within the bounds of the office for fear of reputational damage. The Ombudsman would like to emphasize the importance of early, professional intervention. Interaction with the Ombudsman is confidential and early intervention or consultation with an Ombudsman in a dispute, even when people opt to resolve the conflict themselves, will increase the likelihood of resolution. Above all, contacting the Ombudsman should be seen as taking advantage of confidential, professional services intended to help to resolve conflict at the level at which it has occurred. It should never be seen as escalating the situation (it is quite the opposite, in fact), turning to outsiders for help, or, in the view of some supervisors, referring the matter to headquarters. In this context, the Ombudsman reiterates that the motto of the Office is “working together to find solutions”.

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II. Observations and Recommendations Concerning Conflict in 2017

A. Performance management

The Ombudsman commends the ongoing efforts of all the organizations served to monitor and improve their guidelines and tools for performance management and development. Organizations have emphasized that the prime goal of performance-management systems is to help supervisees to improve performance through positive, sustained dialogue, coaching and training. Both supervisors and supervisees benefit from this and in turn it helps to build a more congenial, mutually reinforcing team environment. With the help of clear guidelines, supervisees can better manage their own professional goals and supervisors can support them and provide learning opportunities more effectively. The resulting clear delineation of individual responsibilities is especially important in the face of decreasing resources.

The Office dealt with a number of cases in 2017 where performance goals had not been met and the Ombudsman wishes to draw attention to best practice in this area. Where efforts to address underperformance do not produce the results hoped for both by supervisee and supervisor, the next step in this proactive process is to establish a performance-improvement plan, which is a time-bound action plan agreed between the supervisor and the supervisee with each one's roles and responsibilities clearly spelled out.

The implementation of performance-improvement plans should include clear targets for improvement, accompanied by coaching, close supervision and performance discussion, which should be held on a regular basis. Both the supervisor and the supervisee should keep in mind the positive nature of the exercise: to bring about targeted, measurable improvement in performance through dialogue and feedback. If this is established, it is much easier for the supervisee to welcome the opportunity to participate in a career-strengthening process and for the supervisor to measure improvement in a transparent, objective manner. The Ombudsman has noted that in some cases, both the supervisor and supervisee perceive the exercise as punitive and as part of a process leading to separation on grounds of underperformance with the result that the supervisee, seeing the die cast, may challenge the need to establish a performance-improvement plan. Such misconceptions are regrettable when resources are being used in an attempt to help the supervisee to attain full potential and remain a part of the workforce through a structured improvement plan. The Ombudsman encourages all participants in a performance-improvement plan to adhere to its basic goal of improvement and retention of talent.

The Ombudsman has noticed that while each organization has developed a number of good practices for performance-improvement plans, not all organizations have a clear procedure for their implementation. For example, some policies allow for a rebuttal of the performance-improvement plan, and lay out clear guidelines for it while others do not. Further, in some cases, supervisors do not have clear guidelines about actions to take when a performance-improvement

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plan does not result in the targeted performance improvement or when the supervisee refuses to participate. The Ombudsman therefore encourages human resources offices to make extra efforts to learn from the practices of other organizations and to introduce clearer, standardized guidelines, processes and tools into their own organization that will enable the implementation of performance-improvement plans more efficiently. The guidelines must clearly stipulate the different steps to be completed before implementation so that the exercise does not come as a complete surprise. It is also key to clarify in the guidelines (a) the consequences if the performance shortcomings are not rectified and (b) the timeframes for the different actions involved in the procedure, including the rebuttal process. The tightening of the guidelines will help everyone involved to understand the purpose of the exercise and contribute to its success. In addition, greater clarity could result in fewer cases in this area brought to the attention of the Office.

Recommendation:

- **The Ombudsman recommends that the organizations continue to invest time and resources in establishing clearer procedures for effective implementation of their performance-improvement plans, and human resources units should give targeted advice to the staff member concerned and to the managers.**
- **The Ombudsman recommends that the organizational leaders reiterate that performance-evaluation mechanisms are intended to be positive tools and should provide constructive guidance.**

B. Complex aspects of harassment

The Ombudsman has noted situations where tension arises between long-serving staff members and supervisors who are new to the system. Against the background of change being introduced into the system, the long-serving staff may perceive possible erosion of core values and may feel that it is their responsibility to raise their concerns to the supervisor. Or the long-serving staff may simply have a strong preference for previous practices. Fortunately, it is often possible to have a healthy, helpful dialogue on these issues and to move ahead in a mutually respectful manner. Nevertheless, as the Ombudsman noted in the annual report for 2016, “situations arise where it is the staff member who has been disrespectful and abusive towards the supervisor. Usually, the staff member has been in the unit or office or the organization for a longer period than the supervisor” and “from a position of perceived power, the staff member challenges and undermines the authority and decision-making of the supervisor, and at times, mobilizes other staff against the supervisor as well”. The Ombudsman has observed further examples of this behaviour in the year under review and wishes to point out that as the funds and programmes rightly review and strengthen the formal processes to address complaints from staff, especially in the area of harassment, it is also important to address this kind of improper behaviour, which prevents supervisors from doing their job properly.

While not common, the Ombudsman has dealt with cases where, at times even via emails sent to multiple recipients, staff have labelled peers as “poor performers” and supervisors as “harassers” or “unethical”. Allegations such as these have elicited no or weak direct responses from the accused staff or from the administration, typically reaffirming zero-tolerance policies and reminding complainants where they should bring their concerns. In the view of the Ombudsman, this stems from the fear that a response could make the situation worse and that a supervisor, for example, could be formally reported simply for telling complainants clearly about the consequences of their behaviour. Furthermore, an inadequate response can convince the complainants that they have the right to continue broadcasting their

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grievances outside of the proper channels, thus gaining them a reputation as being invulnerable, the negative effect of which goes well beyond the people directly involved in the conflict. The situation is so severe that, in a few but noticeable cases, supervisors have approached the Ombudsman on a “preventative basis”, having already been threatened to be reported if, for example, they do not give the complainants a positive evaluation, “especially in the current climate” or if complainants do not secure desired positions for which they may in fact not be the best candidate or even not possess the required minimum skills and experience. Serious accusations against peers and supervisors, when aired publicly and especially not followed up by the initiation of a formal redress procedure with the competent offices, can represent, in addition to slander, a form of harassment, leading to disciplinary measures. At the same time, staff who believe that they have been harassed have many avenues available to them that do not involve slander, poisoning the work environment or violating the Staff Regulations and Rules. As indicated in the Standards of Conduct for International Civil Service and in the frameworks established by the organizations to address non-compliance with those standards, these avenues include approaching the supervisor (or the supervisor of their supervisor), human resources offices, the Ethics Office, the Office of Investigations and, of course, the Office of the Ombudsman.

Recommendation:

- **The Ombudsman recommends that supervisors firmly address public accusations of improper behaviour not channelled through the proper redress mechanisms. The administrations of the funds and programmes should support supervisors in addressing similar incidents in a direct manner via informal discussions and, in the most severe cases, by reporting the cases as a form of harassment.**

C. Mediation

In its resolution 62/228 of 22 December 2007 on the administration of justice at the United Nations, the General Assembly, inter alia, stressed the pivotal role of mediation in reconciling differences. In keeping with this important resolution, which reflected the rapidly growing awareness and acceptance of the informal resolution of conflict, the Office of the Ombudsman for United Nations Funds and Programmes has offered mediation services since 2007. Mediation has been defined in several ways. Simply put, mediation is a voluntary process wherein a third-party neutral assists all parties in communication and negotiations with a view to finding a mutually acceptable solution of a difference or a dispute.

In view of the global focus on mediation and its growing importance as an effective means of informal resolution of conflict in the workplace of the funds and programmes, the Ombudsman is continuing to expand and strengthen its use in accordance with the wishes of the General Assembly expressed in its resolution 62/228 and others.

It is worthy of note that various international legal systems have shown willingness to adopt mediation practices on a larger scale and have thus introduced mediation requirements into their judicial system. Directive 2008/52/EC, for instance, provided the minimum regulatory standards for mediation legislation to be transposed by the Member States of the European Union into their national legal systems. The Directive’s objective, as stated in Article 1, is to “facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.” The “balanced relationship” between mediation and litigation has been interpreted to mean that a minimum number of cases filed in the national courts should be first mediated, if need be, by making that a pre-litigation requirement (as expressly allowed by art. 5, section 2).

The Ombudsman also notes that the President of the UNDT, in his letter of 2 October 2017 to the Chairperson of the Sixth Committee, voiced his thoughts regarding the need to have “compulsory judicial mediation” in all cases before they are the subject of a final hearing before the Tribunal.

The Ombudsman believes that some clarifying points regarding the concepts of “mandatory” and “compulsory” in the context of mediation will be useful since they seem to contradict a central tenet of mediation: that mediation is a voluntary process. However, a requirement to attend an initial mediation meeting is, clearly, not a requirement to undergo an entire mediation process, let alone to resolve the case through mediation. Furthermore, a mediation settlement itself can be reached only on a voluntary basis.

One of the arguments against mediation is that it may not work in a particular case or certain areas of disputes. In this regard, it is important to note that mediation has some value in each case, for each party. A failed mediation may not in fact have failed - there may be no agreement on the day but airing the issues face to face may mean a settlement is reached soon after, or at least there may be agreement on some points, which leaves fewer points to litigate and potentially fewer costs incurred. Empirical research as well as anecdotal evidence suggests high satisfaction rates among participants, post-mediation, even when mediation was required. In several cases, a settlement is reached after the mediation has failed, and thanks to the mediation. The mediation process thus normally allows the parties to obtain a higher level of empowerment and recognition.

Currently, the funds and programmes follow a fully voluntary mediation model where the parties may or may not opt to attempt to resolve their disputes through mediation. On the basis of significant measures taken to promote mediation in different international jurisdictions, the Ombudsman would like to propose the introduction on a trial basis of an “opt-out” system of mediation in the funds and programmes whereby the parties would be only required to attend an initial mediation meeting, or a pre-mediation session, with a professional mediator. During that initial meeting, the parties can then either decide to enter into the full mediation procedure or not. Because the parties retain the freedom to go through the mediation process or not, after the initial meeting, the model proposed is fully compatible with the current terms of reference of the United Nations Office of the Ombudsman and Mediation Services.

An alternative model preserving the parties’ freedom to mediate or not, while requiring a more serious and structured effort at settlement, would be for the funds and programmes to commit to mediate when the other party so asks. This model has been in place at the World Bank for a decade and is regarded as very successful. Over the years, more than 90 per cent of participants have reported high satisfaction with the process and affirmed that they would recommend mediation to others. Under this model, too, it would be advisable to allow each party to “opt out” at the end of the initial mediation meeting, to save time and energy where the chances of reaching a final agreement may appear slim. In fact, the initial mediation meeting is designed to provide litigants with a form of screening into the viability of the process, which depends on a multiplicity of factors that are best assessed during a joint meeting. These factors include the nature of the legal case, the parties’ legal positions as well as their personal and professional interests (such as time, reputation and confidentiality), the attitude and experience of their counsel and, of course, the credibility and ability of the mediator.

The discussion on the best possible model for the funds and programmes and, ideally, in the United Nations system as a whole, will require extensive consultations. Hence the Ombudsman for the Funds and Programmes wishes to propose at this time a trial programme, which could involve multiple mediation models at the same time, for the sake of generating comparable empirical evidence and thus stimulating more informed consultations. The timing and scope of

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the trial programme, too, should be the subject of further discussion and consultation, not only within the funds and the programmes. In any event, studies thus far suggest that mediation can contribute significantly to the settlement of disputes. In turn, models of mediation requiring at least an initial mediation meeting have shown a sharp increase in the number of mediated cases without reducing substantially the settlement rate. In the end, this very empirical evidence is at the basis of the General Assembly's repeated resolutions to increase the use of mediation as a means of dispute prevention and resolution.

The proposed model would work for new cases. For those pending, the Ombudsman would welcome the opportunity to explore with all relevant stakeholders ways in which more cases can be referred to mediation. The Ombudsman notes that in 2017 several cases deemed intractable, pending both before UNDT and United Nations Appeals Tribunal (UNAT), were successfully mediated thanks to effective cooperation of the Office with the judges, the Office of Staff Legal Assistance and the legal departments of the funds and programmes.

Fostering the use of mediation, before or during the litigation phase, should not be seen simply as a quantitative device to save limited and precious resources. Mediated agreements, as made by and for the parties, normally produce superior qualitative outcomes, as they can best take into consideration interests and priorities of the parties. Indeed, while a judgement inevitably looks at the past, a good mediated settlement tends to look at the present and the future. Furthermore, as a structured settlement process, mediation can be a far superior mechanism to other alternative dispute resolution methods, such as shuttle diplomacy. The parties being all together, whether in a physical space or via video or audio link, allows a concentrated settlement effort that might otherwise take a series of contacts and meetings, over a long period of time. Lastly, especially in the context of interpersonal disputes, nothing can be as effective as a facilitated encounter when the parties are unwilling or have been unable to meet face to face: it can facilitate communication and understanding in order for the parties to move on from the conflict in the attempt to transform their future interactions and relationship. After almost 25 years of experience as a mediator, the Ombudsman is still to hear from a single participant that mediation, even when it failed, was "a waste of time".

Recommendation:

- **The Ombudsman recommends the introduction on a trial basis of an "opt-out" system of mediation in the funds and programmes whereby the parties would attend at least an initial mediation meeting with a mediator before filing a case with the United Nations Dispute Tribunal. Alternatively, the funds and programmes would unilaterally commit to participate in such a meeting before litigation is filed, if the other party so asks.**

D. Victim-offender mediation

In the wake of recent campaigns, discussions about the effective management of workplace sexual harassment have become more focused. There is an ongoing debate within the United Nations about the most effective recourse and reporting mechanisms available. Most view this as a discussion about reinforcing the formal channels of internal justice in order to deal better with cases of sexual harassment and misconduct. However, it is also important to have a parallel approach, which is to reinforce the informal system alongside the formal system of internal justice. The importance of both the informal and formal channels – and of the United Nations practicing within the system what it accomplishes internationally – has been emphasized on many occasions by the General Assembly and by Secretaries-General.

Mediated agreements, as made by and for the parties, normally produce superior qualitative outcomes, as they can best take into consideration interests and priorities of the parties.

The informal channel, which includes ombudsman services (confidential advice/coaching) and mediation, can serve as an additional avenue for sexual harassment cases. In this context, under the United Nations zero-tolerance policy on sexual harassment, whether a complaint is dealt with formally or informally is the choice of the aggrieved individual. Mediation may appear to be counterintuitive in this context but it has untapped potential to deal effectively with such cases, especially where formal legal resolution is not possible. In cases where there is insufficient evidence, for example, the impacted are left with no recourse under the formal system. However, these concerns could still be addressed via the informal system.

It has been reported that a large number of complainants in sexual harassment primarily want the behaviour to stop; and mediation can provide an ideal setting to achieve this primary aim.

The main argument in favour of using ombudsman services and mediation is the confidentiality of the process, which is likely to encourage the impacted to speak up and the alleged offender to engage in a facilitated dialogue, where possible and appropriate: it creates a more secure setting for them to talk about their concerns. At the same time, the confidentiality of the process ensures least disruption in the workplace. Mediation is also a voluntary process, meaning it can take place only when the parties agree to it. Moreover, if the mediator feels that mediation in a given case would not be the best recourse, s/he can refer the parties to other available avenues that are better suited to the dynamics of that individual case. Therefore, under no circumstances does the Ombudsman's intervention prevent the formal reporting of a case.

Although there are strict guidelines within the United Nations regarding workplace misconduct, it has been seen in the past that violations of the guidelines, including some cases of sexual harassment, can best be understood in the light of varied perceptions, misunderstanding, miscommunication or different cultural expectations. In such cases, mediation provides a unique opportunity for both the parties to discuss and learn about each other's perspectives. Even when the actions are intentional, it will help the offender to understand their impact and with proper communication such behaviours can stop immediately, as noted.

The Ombudsman further highlights that victim-offender mediation (VOM) and restorative justice have been in practice for decades. The primary goal in these practices is to hold the offenders directly accountable to the victims and simultaneously focus on providing assistance and adequate compensation to the victims. Initially, these programmes dealt with juvenile cases and minor property crimes but over time their scope has expanded to more severe crimes, including physical assault, rape and even murder.

The Ombudsman notes that mediation in sexual harassment cases adopts similar principles to those guiding VOM and restorative justice practices. The Ombudsman team have experience in mediating cases involving sexual harassment. However, lacking the much-needed institutional support, very few sexual harassment cases undergo an informal resolution process. Therefore, the Ombudsman recommends initiating a pilot programme that reinforces the informal system (alongside the formal system) and, by imparting information about it, encourages people to report and possibly consider addressing cases of sexual harassment through the informal system, as an additional option.

Possible arguments against such a programme could be raised in regard to the scope of the mediation settlement, a possible settlement of complex/contentious cases, the public perception, or the possibility of concessions to the offender. It is important to mention that these concerns can be mitigated as mediation is a very flexible mechanism, both in process and substance. The parties themselves determine the scope of mediation settlement. For example, it could be limited to settling interpersonal differences, creating the environment for an apology or for designing special workplace arrangements for the future. In any event, especially in cases where there has

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been physical abuse or there is a significant power imbalance between parties, mediators may use their discretion to end the mediation so that the impacted party can start formal proceedings against the alleged offender.

The positive aspects of mediating certain sexual harassment cases thus outweigh any negative aspects. The immediate issue, however, remains: to reinforce the work of the informal system and effectively communicate it to the right audience to increase reporting and effective management of these cases.

Recommendation:

- **The Ombudsman recommends that a pilot programme of ombudsman and mediation services be initiated to address sexual harassment in the workplace, thus reinforcing the informal system alongside the formal system.**

E. Arbitration

The question of personnel working for United Nations common system organizations on non-staff contracts has been addressed by a number of United Nations forums. The General Assembly, the Chief Executives Board and the Joint Inspection Unit (JIU) have been the main bodies concerned with the conditions of service of this class of personnel, who very often perform tasks identical to those performed by staff members. While the various bodies have acknowledged the need to ensure equitable access for non-staff personnel to a grievance system, one of the key JIU findings is that “there are no effective representation and internal justice mechanisms for non-staff personnel” (JIU/REP/2014/8, page 42).

When informal resolution fails, the present non-staff contracts provide for formal recourse to disputes via arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL). Arbitration is a well-established and widely used means of out-of-court dispute resolution, where the two sides select an impartial third party, known as an arbitrator. An arbitrator is an adjudicator who, after taking into consideration all evidence and testimony presented, renders a binding decision known as an arbitrator’s award.

However, there are some drawbacks to this, the biggest of which, in the context of the funds and programmes, is the provision for non-administered or ad hoc arbitration proceedings under the UNCITRAL rules. The procedure for a non-administered arbitration is more labourious for the parties, thus deterring non-staff from pursuing it to resolve their disputes. Moreover, arbitration can be a costly process. According to the UNCITRAL rules, the cost of an arbitration (including the arbitrator and lawyer fees), has to be borne by the unsuccessful party or parties. Additionally, some arbitration clauses require the arbitration to take place in New York. This makes it harder for non-staff personnel, especially those working in remote stations, to initiate arbitration proceedings, and also adds to the already high costs. By way of contrast, staff members, who have access to the internal justice system, bear no costs for seeking redress to their disputes.

In several instances, the Office of the Ombudsman has had visitors who were either unaware of the arbitration policy in place, lacked clarity about the process of initiating arbitration or were reluctant to resort to arbitration because of the costs involved. In his report on the administration of justice at the United Nations submitted to the General Assembly at its seventy-second session, the Secretary-General noted that 133 cases (from 2009-2016) were initiated in different national courts by non-staff personnel whereas the total number of arbitration notices in this time period was only 10 (see A/72/204, annex II), thus pointing to the ineffectiveness of the policies in place.

The procedure for a non-administered arbitration is more labourious for the parties, thus deterring non-staff from pursuing it to resolve their disputes. Moreover, arbitration can be a costly process.

Further, in 2017, the Office received 15 per cent of its cases from non-staff personnel, far less than those received from staff members. This is especially significant since non-staff personnel constitute a much higher percentage of the workforce of the funds and programmes than do staff members. While the reasons for this low percentage vary, on a few occasions after the initial contacts, non-staff personnel asked the Ombudsman not to engage in settlement talks with the administration. They did so having already decided not to pursue arbitration should the Office's intervention not resolve their problem. These non-staff personnel perceived that the de facto unavailability of an adjudicative process to address their concerns limited the administration's interest in actively engaging in settlement talks, because of the very low "litigation risk". In these cases, doing nothing at all was seen by these colleagues as the best course of action to avoid possible, indirect reprisal if the Ombudsman were to engage unsuccessfully with the administration.

A similar thought process, which also limits the potential of the Ombudsman's intervention, is not uncommon in the broader dispute-resolution world. In fact, contrary to common opinion, the use and viability of consensual dispute-resolution processes (such as those of the Ombudsman) are greater where the subsequent adjudicative process is effective and trusted, as the desire to avoid a prompt, negative decision pushes each party towards settlement. In turn, the greater the number of cases where the Ombudsman can effectively engage both parties to foster settlement, the fewer the cases that will ultimately end up in litigation.

The Ombudsman thus proposes establishing a neutral, independent arbitration facility within the funds and programmes that would maintain a roster of professional arbitrators with expertise in employment or labour law. The expedited arbitration rules, as proposed by the Secretary-General in his report on the administration of justice at the United Nations to the General Assembly at its sixty-seventh session (A/67/265) could adopt the UNCITRAL rules as a framework where the decision of the arbitrator is final and binding, and have modifications to simplify the process, make the facility more cost-effective, and keep it aligned to the needs of the United Nations system. Another key feature of the facility could be to have an option of online arbitration. Online arbitrations are becoming increasingly common, and can prove effective in the context of the funds and programmes for disputes arising in field offices or between people working in different locations.

Other key aspects that would need to be addressed are the enforcement of awards and the allocation of costs, including lawyers' fees. Under the present provisions, non-staff cannot seek enforcement of arbitration awards because they do not have access to the UNDT nor can they initiate proceedings in national courts. Thus, it is important to clarify the recourse available to non-staff personnel in such situations.

The Ombudsman notes that the costs of recruiting non-staff personnel are substantially lower than those of recruiting staff members. Thus, the funds and programmes might find a means of incorporating into the conditions of service an arbitration facility that would provide a more practical system for dispute redress for non-staff personnel.

Finally, the Ombudsman underlines that the discussion about establishing such an arbitration facility was recently re-started at the initiative of one of the funds and programmes, as part of an effort to improve good governance, particularly for field-based activities.

Recommendation:

- **The Ombudsman recommends that the funds and programmes fund an arbitration facility and cover all administrative costs of an arbitration as well as the arbitrators' fees. Additionally, a provision could be introduced to reimburse lawyers' fees to non-staff personnel up to a fixed amount.**

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III. The Way Forward

The Ombudsman looks forward to increasing outreach activities in the year ahead. Having finalized its training curriculum, the Office will be introducing new programmes, courses and seminars that will have maximum effect in helping staff at all levels in the five organizations to hone their conflict-management skills. These outreach activities, which the Ombudsman expects to attract a growing number of staff and management, are in line with the mandate of the Office to educate and train the workforce in conflict management and resolution.

The training will continue to focus extensively on various aspects of communication. In interaction with visitors, the Ombudsman team continues to witness that poor communication skills are the main factor in the escalation of conflicts. The Ombudsman is convinced that by concentrating on improving communication skills, conflicts can be de-escalated or prevented in the initial stages. The Ombudsman notes in this context that the funds and programmes offer a wide range of professional courses on a number of topics to staff around the world, including in communication skills. Without in any way seeking to replace or duplicate these courses, the Ombudsman believes that the content and delivery mechanisms of the programmes designed and offered by the Office can provide value added since they are based on direct, real-life situations of workplace conflicts dealt with on a regular basis. The Ombudsman team engaged in developing training offerings consists of the Ombudsman and other team members with world-class expertise in particular aspects of conflict management and resolution.

The courses are designed to provide hands-on learning to the participants through simulations, interactive sessions and group activities. Most presentations draw a comparison between the ways in which people tend to act, which leads to the escalation of the conflict, and how they could act to minimize conflict at work. For ease of access, and to broaden its outreach, the Office is also finalizing online training modules for staff at all levels.

The team will continue to collaborate effectively with the other Ombudsman Offices within the Office of United Nations Ombudsman and Mediation Services as well as the funds and programmes in delivering these training courses and developing new ones.

Details of all the offerings of the Office of the Ombudsman are on the website. The Ombudsman encourages all members of the workforce of the funds and programmes to consult the listing and contact the Office for ways in which to enrol in one of the courses.

During the year under review, there were more opportunities than in the past to co-mediate and cross-mediate cases with members of the Office of the United Nations Ombudsman and Mediation Services and it is hoped that more opportunities will arise in the future for this fertile sharing of expertise.

Plans to increase and facilitate access to the services of the Office include the possibility raised by some organizations with large offices away from headquarters of having an ombudsman presence. Such an arrangement would provide more immediate, accessible informal dispute-resolution mechanisms for staff in these locations. The Ombudsman is finalizing this plan, including the funding modality, with representatives of interested organizations.

The Ombudsman is convinced that by concentrating on improving communication skills, conflicts can be de-escalated or prevented in the initial stages.

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United Nations Entity for Gender Equality
and the Empowerment of Women

**Office of the Ombudsman for
United Nations Funds and Programmes**

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