

Government Accountability Project

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Comments on UN Internal Justice System Reforms

SECTION I

The Government Accountability Project (GAP)¹ has reviewed the recent report of the UN Secretariat regarding the establishment of a new internal justice system for the United Nations. While many aspects of this proposal represent advances relative to the existing system, GAP believes that the new system could be strengthened by amending specific aspects of the Secretariat's plan. In general, it would be more effective to adhere closely to the recommendations as they were outlined by the Redesign Panel in its original report. Moreover, GAP endorses the UN Staff Union's recent resolution regarding this matter and seconds the Union's concerns about:

1. The Internal Justice Council: The Redesign Panel proposed, and the General Assembly supported, an Internal Justice Council (IJC) consisting of a staff representative, a management representative, two distinguished external jurists (one nominated by staff and the other by management), and a chairperson chosen by consensus of the other four members. This council will play a crucial role in ensuring the independence and effective implementation of the new justice system, as it will nominate judges and monitor the operation of the system. To achieve the goal of establishing an effective council, the Secretary-General should:

- a) Rapidly complete all remaining steps necessary for the Council to operate effectively: The General Assembly mandated that the Internal Justice Council be established by 1 March 2008. The Secretary-General did not approve the first IJC members until 8 April 2008 and it is still not operational. Further delays should be avoided.
- b) Withdraw UNDT/UNAT Draft Statutes: In report A/62/782 the Secretary-General submitted draft United Nations Dispute Tribunal (UNDT) and United Nations Appeals Tribunal (UNAT) statutes for the General-Assembly's adoption. According to the Redesign Panel:

To ensure that the new formal system is functioning by 1 January 2008², it is essential to establish the Internal Justice Council at an early date so that it can compile lists of candidates for the timely appointment of United Nations Dispute Tribunal judges and the filling of any vacancies that occur within UNAT. It will be necessary to prepare a

¹ GAP is a nonprofit, non-governmental organization based in Washington, D.C. that advocates protection for whistleblowers and occupational free speech.

² The General Assembly has since changed this implementation date to 1 January 2009.

draft statute creating the Dispute Tribunal and amendments to the Statute of UNAT to confer appellate jurisdiction (A/61/205, para. 142).

This paragraph suggests strongly that the IJC is to draft these statutes. The fact that the IJC is tasked with monitoring the Justice System (A/61/205, para. 173) strengthens this interpretation and adds urgency to the need for the Secretary General to withdraw preemptively issued statutes drafted without proper consultation.³

- c) Increase budget allocations: The UN Staff Union has reported that \$107,000 has been allocated to the IJC. This amount is inadequate; it cannot reasonably be expected to cover all communications, staff support, travel and daily allowance costs.

2. Ombudsman: GAP seconds the Staff Union's concern about the process by which the new UN Ombudsman was appointed. The UN Staff Union should have been consulted in this appointment process. By appointing an Ombudsman without consultation with staff representatives, the Secretary-General has jeopardized the objectivity and credibility of the office that is to resolve disputes and monitor conflict in employment related matters.

3. Judges: GAP is concerned about the following issues related to judges:

- a) Nomination process: According to the UN Staff Union, some Member States are endorsing a State nomination process for the judges. This is inappropriate. Both UNDT and UNAT judges should be appointed by the General Assembly from the list of candidates recommended by the IJC.
- b) Grade: The Redesign Panel recommended that UNDT judges be "remunerated at the ASG level" and that UNAT judges "be paid a proper honorarium" (A/61/205, Annex III). The Secretary-General has requested that these judges be appointed at the D-2 level (A/62/782, para. 86). As the Staff Union has stated, this will threaten the independence of judges and the staff's perception of their authority, as the judges' assigned grade level will be lower than the ASG's, whose decisions they may revoke.
- c) Number: The Redesign Panel proposed that UNDT judges should ordinarily "sit alone". "However, the Panel considers it advisable to retain some elements of peer review, with assessors sitting with the judge in disciplinary cases and, if the judge so decides, in exceptional cases involving serious allegations... They will provide the judge with advice, but the final decision will be made by the judge alone" (A/61/205, para. 93). However, the Secretary-General has proposed that three judges sit for most cases, including those involving a contested administrative decision and harassment (A/62/782, para. 66). This proposal is not consistent with the Redesign Panel's recommendations and is an unnecessary expense. Funds would be better spent on fortifying the Office of Staff Legal Assistance and staff representation or on the under-funded IJC.

³ The Secretariat's proposed statutes are not consistent with some of the Redesign Panel's recommendations. These statutes fail to remedy many of the problems that existed in the current system and must be substantially amended, with the input of the Staff Unions and the IJC, if the UN is to have a credible system that honors the rule of law.

- d) Qualifications: The Redesign Panel recommended that UNDT judges have 10 years relevant professional experience and that UNAT judges have 15 (A/61/205, para. 129). The Secretariat has proposed that this “professional” experience be altered to “judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions” (A/62/782 Annex I, art. 4.3b). As the UN Staff Union has pointed out, this could result in the disqualification of younger judges, who may be more independent. This stipulation could also disqualify candidates who may have less experience in administrative law, but valuable experience in labour and civil jurisdictions or knowledge of human rights law in an employment setting.
- e) Conflict of interest: GAP agrees with the Staff Union that the draft UNDT and UNAT statutes should both have a more extensive definition of a judicial conflict of interest. These statutes should be amended to stipulate that a judge “who has a conflict of interest or a personal bias or interest concerning a party, or has expressed an opinion concerning its outcome, or a member of his or her immediate family who has a financial interest in the outcome of the proceeding shall recuse himself or herself. Any party has the right to request recusal of a judge for the same reasons.”
- f) Removal and resigning: GAP supports the UN Staff Union’s position that the IJC should play more of a role in the removal and resignation of a judge and that the Secretary-General should not be involved in these processes. Therefore, GAP agrees that Article 4.10 of the proposed UNDT Statute, and the corresponding language in the UNAT statute, should read “A judge of the Dispute Tribunal may only be removed by the General Assembly, on the recommendation of the Internal Justice Council, on grounds of proven misconduct or incapacity,” and that 4.11 should read “A judge of the Dispute Tribunal may resign by notifying the General Assembly through the chairman of the Internal Justice Council.”

4. Jurisdiction

- a) Administrative justice: The Redesign Panel explicitly outlined the jurisdiction of UNDT (A/61/205, Annex I). The Secretariat, however, has narrowed this jurisdiction. The Secretariat states that the Dispute Tribunal can hear applications filed by an individual “(a) *to appeal an administrative decision* that is alleged to be in non-compliance with the terms of appointment or the conditions of employment; or (b) *to appeal an administrative decision imposing a disciplinary measure*” (A/62/782, Annex I, art. 2.1, emphasis added). The Redesign Panel’s proposed UNDT jurisdiction did not include this italicized language. By limiting appeals to administrative decisions, the Secretariat prevents staff members from appealing when no formal administrative decision has been issued but terms and conditions of employment have been violated or altered de facto. Employees must be able to appeal all forms of non-compliance and disciplinary measures, whether formally or informally imposed.
- b) Criminal jurisdiction: Since the new tribunals will not prosecute crimes *per se*, the UNDT and UNAT statutes should include instructions concerning referral of cases that involve criminal behavior to the relevant national jurisdictions. The statutes should also include instructions for handling cases once a *prima facie* finding of criminal conduct has been

issued. All internal investigations should be carried out by OIOS under the supervision of the Dispute Judge

- c) Protection of individual rights: The Secretariat has deleted the Redesign Panel's recommendation that UNDT hear complaints:

[A]lleging prejudicial or injurious conduct that does not conform to the Staff Rules and Regulations or administrative instructions, that involves a breach of the duty of care, the duty to act in good faith or the duty to respect the dignity of staff members, that infringes their rights, including the right to equality, or was engaged in for an improper purpose, including reprisal for seeking the assistance of the Ombudsman's Office or for bringing action before the Tribunal (A/61/205, Annex I, art. a. iii).

The failure of the Secretariat to include this language will curtail staff members' rights to protect themselves from discrimination, harassment and other forms of abuse. The Secretariat must include this language in order to safeguard the labor rights of its employees and to guarantee a safe, fair and respectful workplace.

- d) Interns and volunteers: GAP agrees with the Staff Union that the formal system should cover interns and volunteers. GAP also suggests that the system apply to additional categories of employees (as explained in more detail below in Section II point 2).

5. Staff Associations

- a) Locus standi: GAP agrees with the Redesign Panel's recommendation to allow staff associations to bring actions on behalf of their members or on their own behalf. As the Panel stated, "Because staff members are sometimes reluctant to enter the formal justice system for fear of reprisals, it is considered necessary to give staff associations an independent right to bring action to enforce the Staff Rules and Regulations. This is consistent with the jurisprudence of ILOAT and will help promote accountability. The right of a staff association to bring a class or representative action will promote efficiency in the judicial process" (A/61/205, para. 82). GAP urges Member States and the Secretariat to adopt this recommendation.
- b) Staff-Management agreements: The Redesign Panel recommended that UNDT should be able to review applications by a staff association against the Organization or its funds and programs, "To enforce the Staff Rules and Regulations or **associated administrative instructions**" (A/61/205, Annex I b ii). The statute proposed by the Secretary-General would not allow the staff associations to challenge administrative instructions.

GAP agrees with the Staff Union's recommendation that the formal system should be able to hear complaints of non-implementation of binding staff-management agreements.

6. Compensation

- a) Specific performance: The Redesign Panel recommended that the UNDT have the "power to grant final and binding relief by way of (a) specific performance injunction and

declaratory decree, including the order that an appointment be set aside...” (A/61/205, para. 83). The Secretary-General has not extended this power to UNDT. Specific performance – a binding court order that would require one party to perform a specific action – is necessary to ensure that the Tribunal’s decisions are honored. Without this stipulation, management could circumvent a judicial order by merely paying compensation. This authority is the foundation for the rule of law to be legitimate. As the Redesign Panel stated about the current UNAT:

A number of the difficulties within the formal justice system stem from the Statute and the jurisprudence of UNAT. By article 10.1 of its Statute, UNAT may order specific performance. However, it is required at the same time to fix compensation (normally limited to two years’ net base salary), which the Secretary-General may decide to pay as an alternative if that is considered to be in the interests of the Organization. The power of the Secretary-General to choose between specific performance and the payment of limited compensation can, and sometimes does, result in inadequate compensation, particularly in cases of wrongful termination or non-renewal of contract. A system that cannot guarantee adequate compensation or other appropriate remedy is fundamentally flawed. More significantly, a system that does not have authority to finally determine rights and appropriate remedies is inconsistent with the rule of law” (A/61/205, para. 71).

- b) Salary limits: The Secretary-General’s proposed Statute of UNDT would limit compensation to “the equivalent of two years’ net base salary of the applicant” in normal cases, but would “allow the payment of a higher indemnity in exceptional cases” (A/62/782, Annex I, art.10.4). If a complainant prevails, however, the relief must be comprehensive to cover all the direct, indirect and future consequences of the contested action. Relief should not be limited to two years salary, especially if the case has exceeded that time period. Also, as pointed out by the Staff Union and the Bar Association for International Governmental Organisations, this two-year limit discriminates against local staff members, whose salary compensation may be inadequate even to cover legal costs.
- c) Legal costs: Attorney fees and associated litigation costs should also be available for all who substantially prevail. Although a new Office of Staff Legal Assistance will be available to provide pro bono representation, there is no guarantee that it will be sufficiently staffed.⁴ Further, there may be cases in which a professional attorney with specific expertise is needed to ensure effective representation and equality of arms.⁵ The Redesign Panel stated that UNDT could award relief in the way of “Orders for the payment of out-of-pocket expenses and legal costs, provided that an order should be made for the payment of a staff member’s legal costs only if, in the opinion of the judge,

⁴ Based on past precedents with analogous new remedial institutions, such as the Ethics Office, initial funding and staffing may not be adequate to meet demand for services.

⁵ For example, UN funds and programs have failed, in certain cases, to provide staff members or consultants with the proper visa for an assignment. As a result, these employees have become vulnerable to immigration proceedings. They must be able, therefore, to hire an immigration attorney if necessary and be eligible for reimbursement for any expenses they incur as a result.

it was appropriate to have private representation” (A/61/205, para. 83). Similar language should be added to the Secretary-General’s proposed UNDT Statute.

7. Burden of Proof: GAP seconds the Staff Union’s concerns about the “administrative” justice concept proposed by the Secretariat and the effect that this could have on burden of proof standards. GAP also urges the General Assembly to resist the proposal made by one member state that would allow the Secretary-General to “withhold secret or confidential evidence” from UNDT (A/63/55, p. 23). This selective justice, which allows one party to a dispute to decide what evidence the other party may see, is inconsistent with human rights standards that the UN itself advocates for in the judicial systems in its member states.

8. Appeals: GAP endorses the Redesign Panel’s insistence on a two-tiered justice system in order to comply with international law regarding due process. GAP also supports the Staff Union’s statement stipulating that the jurisdiction of UNAT should not be limited. As the Redesign Panel said, “When in the determination of his rights and obligations in a suit at law an individual is deprived of the right to appeal, this severely weakens the fairness of the procedure. International standards establish the right to an effective remedy, the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal, and the right to an appeal” (A.61/205, para. 10).

9. Transitional Measures

As the Staff Union has pointed out, the Secretary-General’s proposed transitional measures in paragraphs 82-89 of A/62/782 are inefficient and potentially unjust. Cases on appeal to UNAT should not be referred back to UNDT, as this step represents a substantial delay in the judicial process. Instead, these cases should go directly to UNAT, as soon as UNAT becomes operational.

The Secretary-General’s proposed compensation scheme in paragraphs 94 and 95 of A/62/782 is improper. It is also an inefficient use of resources and a possible impediment to justice to award judges an honorarium per judgment to remove the anticipated backlog of cases.

SECTION II

In addition to the above comments in support of the UN Staff Union’s concerns, GAP adds the following observations:

1. The Internal Justice Council

To demonstrate his commitment to an impartial system, the Secretary-General should have appointed an independent, international jurist to the IJC, like those appointed to the Redesign Panel. Indeed, he was required by the General Assembly to appoint at least one “distinguished external jurist” (A/62/597, para. 36). Instead, he appointed the current and past directors of the General Legal Division of the UN Office of Legal Affairs (OLA). The intent behind the General Assembly’s resolution was the appointment by management of at least one independent jurist external to the Organization. The appointment of IJC members should comply with commonly understood standards of independence.

2. Staff Covered by the Internal Justice System

The United Nations policy, “Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations” (ST/SGB/2005/21), provides protection from retaliation for “any staff member (regardless of the type of appointment or its duration), intern or United Nations volunteer” who reports misconduct or cooperates with an audit or investigation. However, the Secretary-General’s proposed justice system would not apply to volunteers, interns and certain categories of staff members who are putatively protected by ST/SGB/2005/21. Any credible whistleblower protection policy must give those who are aggrieved by illegality or abuse of power normal judicial due process rights, including the right to a genuine day in court. The Secretary-General must not, on the one hand, afford all individuals in the service of the United Nations protection against retaliation and, on the other, deny certain classes of individuals the means to assert these rights. By failing to extend the jurisdiction of the formal justice system to all, the Secretariat undermines the credibility of its commitment to justice for all of those who work for the UN system, in whatever capacity.

The Secretary-General’s proposal to limit access to the justice system (A/62/782, para. 6d) also contravenes the Redesign Panel’s recommendation, cited below:

All individuals appointed to perform work for the Organization by way of personal services should have full access to the informal and formal justice system of the United Nations. The Redesign Panel considers that, in addition to those currently covered by article 2 of the Statute of UNAT, the system of justice should be extended to:

- (a) Any person appointed by the Secretary-General, the General Assembly or any principal organ to a remunerated post in the Organization;
- (b) Any other person performing personal services under contract with the United Nations. This category includes consultants and locally recruited personnel of peacekeeping missions (A/61/205, para. 20).

3. Compensation for Complainants Who Prevail

- a) Punitive damages: The Redesign Panel recommended that UNDT have the power to grant “damages, including, in exceptional circumstances, exemplary or punitive damages” (A/61/205, para. 83b). The Secretary-General’s proposal, however, specifically stipulates that UNDT *may not* award punitive damages (A/62/782, Annex I, art. 10.7). To prevent repetitive violations, the parties responsible for misconduct must be held accountable. Otherwise, managers may remain undeterred from continuing forms of discrimination or harassment. In whistleblower complaints, for example, when the victim of harassment prevails, the most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. If UNDT does not have the power to grant punitive damages, it *must* have another means to hold the wrongdoer accountable and to deter future misconduct. Therefore, UNDT must have the power either to award punitive damages or binding disciplinary sanctions (specific performance). *The Secretariat’s attempt to curtail both options is inappropriate and creates an intentional*

vacuum of accountability. The accountability gap inherently eliminates the concept of deterrence and creates the certainty of repetitive violations.

- b) Abuse: The Secretary-General has proposed that “Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before the Tribunal, it may award costs against that party” (A/62/782, Annex I, art. 10. 5). As the Bar Association for International Governmental Organisations has pointed out, this definition (of abuse) should be expanded to include compensation for errors of law and facts. This is customary in other legal systems.
- c) Failure to renew a contract: Often in whistleblower cases retaliation is passive, taking the form of failure to renew a contract, rather than outright termination. The Dispute Tribunal should be empowered to order rescission of a decision not to renew an employee’s contract. Therefore, if Article 10.4(a) is allowed to stand, it should include contested administrative decisions concerning the “failure to renew a contract.”⁶
- d) Overall recommendation: To reflect these suggestions, GAP recommends that Article 10.4 of the Secretary-General’s Draft Statute of the United Nations Dispute Tribunal be replaced with the exact language used by the Redesign Panel in paragraph 83 of A/61/205 or, alternatively, that existing section 10 of the Secretary-General’s Draft Statute be revised to read:

4. Where the Dispute Tribunal determines that an application is well founded, it **shall** order one or more of the following **forms of binding relief as necessary for the prevailing employee to be made whole**:

- (a) Rescission of the contested administrative decision or specific performance,
- (b) Compensation, **as necessary to make the employee whole for all the direct or indirect consequences of the actions successfully appealed,**
- (c) Interest **and any other indirect financial consequences from the violation,**
or
- (d) Costs, **including attorney fees, litigation expenses and expert witness fees.**

5. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before the Tribunal **or erred on the law or facts**, it may award costs against that party.

6. This section, which states “The Dispute Tribunal may not award exemplary or punitive damages,” should be deleted or, alternatively, the word “not” should be deleted.

⁶ Indeed, this was the scenario in the Andrew Thomson whistleblowing case that sparked the UN’s whistleblower reforms. Under current language, Thomson would be barred from jurisdiction. The loophole raises serious questions for this policy’s legitimacy.

*7. This section should be deleted. If point 6 is amended to include punitive damages, then language does not need to be inserted here. If 6 is not amended, then the following language should be added to this section: **A complainant may seek, and the Dispute Tribunal may order, binding disciplinary sanctions.***

4. Transitional Measures

In the “Office of Staff Legal Assistance Proposal for the United Nations,” prepared by GAP, an optional review system is proposed.⁷ This transitional system would be a form of alternative dispute resolution, in which a skilled and independent mediator would assist the employee and management in the discussion of their concerns and work toward a mutual agreement. Similar forms of alternative dispute resolution exist as part of the African Development Bank’s whistleblower protection policy and the model whistleblower law to implement the Organization of American States Inter-American Convention Against Corruption. Employees who have submitted their cases to the JAB could choose to have their cases heard by the JAB, carried over into the new justice system or mediated through this pilot review system. This pilot system, which is described in more depth in GAP’s proposal, could resolve a substantial number of pending cases.

5. Other concerns

- a) Deadlines and the role of the Ethics Office: According to ST/SGB/2005/21, UN whistleblowers have the option of approaching the Ethics Office to seek an investigation and protection against retaliation. Such an investigation could help a whistleblower to fortify his or her judicial case and should be admissible as evidence by the UN employee. An investigation could also help resolve cases before they reach the justice system. However, although this informal system can complement the formal justice system, it is “without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms. An individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding” (ST/SGB/2005/21, para. 6.3).

Whistleblowers should have the option of 1) going directly to the formal justice system, bypassing the Ethics Office, 2) going through both processes simultaneously or 3) going to the Ethics Office and then appealing through the formal justice system. Article 8 of the proposed statute of UNDT seems to preclude this last option. That provision states that in cases “where a management evaluation is required, the application must be filed: a) Within 30 days of the applicant’s receipt of the response to the management evaluation or b) Within 30 days from the expiry of the 45-day response period, if no response to the management evaluation was provided” (A/62/782 Annex I, art. 8 1.d.i). In cases where this management evaluation is not required “the application must be filed within 30 days of the notification of the applicant’s receipt of the administrative decision” (A/62/782 Annex I, art. 8 1.d.ii). This article does not provide a clear deadline for those who have appealed through the Ethics Office process. Therefore the article should include a deadline for appeal for whistleblowers who wish to appeal *after* an Ethics Office or

⁷ This report is available on GAP’s website at <http://www.whistleblower.org/doc/FINAL%20GAP%20OSLA%20Paper%20in%20Adobe.pdf>

Ethics Committee Decision has been issued. A failure to include such a stipulation could prevent complainants who allege retaliation in response to a disclosure of misconduct from having access to the formal justice system.

- b) Office of Legal Assistance: GAP wishes to reiterate that OSLA must be adequately funded and staffed.