



TIPPING THE SCALES: IS THE UNITED NATIONS JUSTICE SYSTEM PROMOTING ACCOUNTABILITY IN THE PEACEKEEPING MISSIONS OR UNDERMINING IT?



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We would also like to thank the Peacekeeping Forces of the United Nations, who work in difficult and dangerous environments protecting the most victimized people in the world from the effects of war and violence. This report is not meant to detract from the important work they do. As one staff representative told us, “99.9 percent of staff members in the peacekeeping missions aren’t involved in misconduct, but there are always a few bad apples.” While this report focuses, in part, on the “bad apples,” we recognize that the overwhelming majority of UN staff members are doing excellent work under great hardship.

We especially wish to thank the United States Institute of Peace for its generous support of this project. However, the opinions, findings, and conclusions or recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the United States Institute of Peace or of GAP’s Advisory Board.

Acronyms

| | |
|----------|--|
| ACABQ | Advisory Committee on Administrative and Budgetary Questions |
| ADB | Asian Development Bank |
| AfDB | African Development Bank |
| BAIGO | Bar Association for International Governmental Organizations |
| CDU | Conduct and Discipline Unit |
| DFS | Department of Field Support |
| DGACM | Department for General Assembly and Conference Management |
| DPKO | Department of Peacekeeping Operations |
| DPRK | Democratic People's Republic of Korea |
| FRR | Favorable ruling rate |
| GAP | Government Accountability Project |
| IDB | Inter-American Development Bank |
| IDB AT | Inter-American Development Bank Administrative Tribunal |
| IGO | Intergovernmental Organization |
| IJDH | Institute for Justice and Democracy in Haiti |
| JDC | Joint Disciplinary Committee |
| JIU | Joint Inspection Unit |
| MEU | Management Evaluation Unit |
| MINUSTAH | United Nations Stabilization Mission in Haiti |
| MONUC | United Nations Mission in the Democratic Republic of Congo |
| OAJ | Office of Administration of Justice |
| OIOS | Office of Internal Oversight Services |
| OLA | Office of Legal Affairs |

| | |
|------------|---|
| ONUB | United Nations Operation in Burundi |
| OSLA | Office of Staff Legal Assistance |
| PTF | Procurement Task Force |
| SEA | Sexual Exploitation and Abuse |
| SLWFP | Special Leave with Full Pay |
| UN | United Nations |
| UNAMI | United Nations Assistance Mission for Iraq |
| UNAT | United Nations Appeals Tribunal |
| UNDP | United Nations Development Programme |
| UNDT | United Nations Dispute Tribunal |
| UNFICYP | United Nations Peacekeeping Force in Cyprus |
| UNFPA | United Nations Population Fund |
| UN-HABITAT | United Nations Human Settlements Programme |
| UNHCR | Office of the United Nations High Commissioner for Refugees |
| UNMEE | United Nations Mission in Ethiopia and Eritrea |
| UNMIK | United Nations Interim Administration Mission in Kosovo |
| UNMIL | United Nations Mission in Liberia |
| UNMIS | United Nations Advance Mission in Sudan |
| UNOCI | United Nations Operation in Côte d'Ivoire |
| UNON | United Nations Office at Nairobi |
| USG | Under-Secretary-General |

EXECUTIVE SUMMARY

One of the principles embedded in the United Nations (UN) Charter is the promotion of the rule of law around the world, including in countries transitioning from conflict. All major UN peacekeeping operations are required to promote frameworks through which people, institutions and nations are held accountable under laws that meet international human rights standards. UN peacekeeping missions are also to work with host countries to strengthen the rule of law. Prior to 2009, however, the UN itself failed to fully respect the rule of law *within* the organization. That year, the General Assembly mandated the creation of a new internal justice system, after a panel of international jurists concluded that the previous system for addressing employee grievances was ineffective, lacked independence and failed to promote accountability.

The new justice system is composed of two Tribunals: the lower UN Dispute Tribunal (UNDT) and the upper Appeals Tribunal (UNAT). The experts who proposed this two-tiered system believed that this structure would strengthen the rule of law within the organization, both by protecting the rights of staff members and by holding employees at all grades accountable for their performance and their conduct. Given that the United Nations enjoys legal immunities in the countries where it operates, employees in principle have no access to domestic courts when their employment rights are violated and these internal Tribunals are a staff member's only legal recourse in a dispute.

With a grant from the United States Institute of Peace, the Government Accountability Project (GAP) – a nonprofit organization that promotes accountability by protecting whistleblowers, advancing occupational free speech and empowering citizen activists – reviewed the impact of the first two years of UNDT and UNAT decisions on the UN's oversight and accountability practices, with a focus on peacekeeping operations. We prepared databases encompassing all the judgments (Annexes VI – VIII). We interviewed complainants and whistleblowers from eight different peacekeeping missions, as well as external attorneys, staff association representatives, and officials from UN offices that play a role in the informal and formal justice system. We then compiled respondents' feedback on the new system and issues connected to misconduct, accountability and whistleblowing in the peacekeeping missions (see Annexes I – IV).

KEY FINDINGS

Improvements in the justice system:

- On the positive side, our research demonstrates that numerous respondents endorse the new justice system as an improvement over the previous one, although most also believed that additional reforms are needed. Certain respondents were satisfied with the outcomes of their cases before the new system, and the staff members reported their general perception that hearings are more impartial, especially before UNDT.

Investigations:

- Tribunal judges were very critical of the ways in which investigations were conducted by various investigative bodies, including the Office of Internal Oversight Services (OIOS).

Often, irregular or unjustifiable investigative procedures were used by investigators when reviewing misconduct cases from peacekeeping missions or capricious and arbitrary disciplinary measures were imposed by the Secretary-General or his representatives, obliging the judges to take action on violations of due process rights, regardless of the substance of the case or wrongdoing.

- The people whom GAP interviewed (“respondents”) reported that UN investigative bodies lacked independence; investigated cases poorly; dropped cases; delayed investigations; may have investigated the whistleblower rather than the misconduct reported; and failed to investigate certain cases, including ones involving abuse of authority by senior officials.

Misconduct in the peacekeeping missions:

- UNDT vindicated 68% of current or former staffers who were alleged to have committed misconduct in a peacekeeping mission. This is significantly higher than the comparable rates under the old system (44%) and for other types of cases heard by UNDT (35%).
- Several respondents believed that the administration is now more cautious in pursuing disciplinary cases from the peacekeeping missions as a result of the Tribunals’ jurisprudence. Indeed, a recent Secretary-General report (A/67/171) states that “in many cases,” the decision was made not to pursue a disciplinary measure because “the underlying investigation and supporting evidence failed to meet the higher evidential and procedural standards,” articulated by the new Tribunals. Therefore the more effective operation of the UNDT is a double-edged sword. On the one hand, there appears to be an increased awareness of the due process rights of staff members. On the other, at this point, the reforms seem to allow a certain impunity, as the organization has apparently decided that it is simpler to retain employees whose conduct has been questioned by the organization than it is to address the underlying procedural issues in the disciplinary process. Ironically, it appears that **the reformed justice system, without corresponding reforms in the UN’s internal “law enforcement” functions, may actually decrease accountability and exacerbate problems of misconduct in the peacekeeping missions.**
- Most of the complainants and peacekeeping personnel whom GAP interviewed believed that people who commit misconduct in the peacekeeping missions are not always disciplined and many could provide specific examples. Several respondents noted the disparity in discipline between managers who committed misconduct and were rarely sanctioned, and people at the lower levels, who were subject to corrective measures. Among those who reported misconduct, most said that no disciplinary action was taken against the person whom their reports implicated. Instead, the whistleblowers themselves were often retaliated against, investigated or disciplined.

Whistleblowers and witnesses:

- GAP found that whistleblowers also have a higher success rate before UNDT than before the previous justice system; judges upheld important rights in whistleblower cases, such as the right to a sufficient and adequate investigation of retaliation claims.
- However, many of the respondents expressed concerns about the way in which the organization deals with whistleblower cases in the field. Although UN employees in the field

were generally aware of how to report misconduct, almost every complainant and employee we spoke with believed that UN employees are afraid to speak up when they have information about potential misconduct in a peacekeeping mission. In interviews we heard repeatedly that those reporting misconduct in the field are likely to become the targets of retaliation.

- During the time period reviewed, UNDT issued no final decisions regarding a whistleblower retaliation case from a peacekeeping mission, although there were numerous whistleblower cases from other parts of the UN. Potential reasons for this may include: various difficulties that field staff encounter when attempting to access the internal justice system, including cost considerations and a short statute of limitations for filing a case; delayed hearing dates for whistleblower cases that go through the internal justice system; and the lack of statutory protections for whistleblowers who expose various forms of misconduct.
- While the UN requires police officers and peacekeepers to report misconduct, it fails to provide them with any protection when they do so; they cannot bring cases before the justice system and the UN whistleblower protection policy does not apply to them.
- The protection of witnesses who testify before the Tribunal is an issue raised by several judges and by some respondents. Because no protections currently exist for those who testify before the Tribunal, potential witnesses are in a vulnerable position. At the same time, UNAT judges have been reluctant to substantiate disciplinary decisions when an anonymous witness refuses to testify.

Lack of accountability at the highest levels of the organization:

- UN employees are concerned about the lack of accountability for those at the top of the organization. The most frequent recommendation made by respondents to address misconduct in the peacekeeping missions was to do more to improve the “tone-at-the-top” and to hold managers accountable.
- Many respondents believe that the justice system is not doing enough to hold senior officials, managers or the administration accountable. Indeed, GAP found that UNDT judges have been hesitant to refer cases to the Secretary-General for possible action to enforce accountability, a power that is provided for in UNDT’s and UNAT’s Statutes. GAP found only four cases (of nearly 500) in which such a referral was made and we were unable to determine whether or not the Secretary-General actually exercised his disciplinary authority in these cases.
- The research indicates that staff members’ confidence in the justice system would improve significantly if the Secretary-General took action on such referrals and if he would commit to adhering to the rule of law. The Secretary-General has occasionally failed to comply with orders issued by UNDT.

RECOMMENDATIONS

Based on our findings, we recommend that the UN:

- Revise the UN protection against retaliation policy to apply to:

- Contractors, police officers, UN peacekeepers, victims and any other person who provides information about misconduct that could undermine the UN's mission.
 - Those who suffer retaliation from contractors, sub-contractors or member states.
 - Anyone who reports misconduct of any kind involving UN operations.
 - Individuals who are perceived as whistleblowers (even if mistakenly), or as "assisting whistleblowers," and individuals who are "about to" make a disclosure.
 - Those who make disclosures to their supervisors and/or the Conduct and Discipline Unit.
 - Those who testify before the Tribunals and those who use the internal justice system.
 - The policy should also be revised to require the Secretary-General to either adopt or reject an Ethics Office recommendation within 30 days. If he fails to respond within that time period, then the recommendations of the Ethics Office should become effective.
- Create an impartial panel to review the Statute and Rules of Procedure of UNDT and UNAT. This panel should consider incorporating recommendations made by the Redesign Panel that were not included in the new justice system and should also address some of the concerns raised in Annex I of this report, such as: issues related to the independence of the judges and the registrars; limitations on remedies and legal costs; the standing of staff associations to file claims before the Tribunals; and the need for increased resources for the system.
 - Revise the UNAT and UNDT Statutes to: allow judges to make successful complainants "whole" and to award them reasonable legal fees, travel expenses, compensation and costs; permit third parties to raise claims based on the alleged responsibility of UN officials; and entertain applications for the enforcement of individual financial accountability.
 - Provide those who have been victimized by peacekeepers (or anyone acting under the UN banner) access to the internal justice system or an analogous legal system.
 - Encourage employees in the field missions to transmit their disclosures directly to OIOS or headquarters.
 - Continue to conduct training sessions in the field about the justice system.
 - Do more to promote the prosecution of alleged perpetrators by creating a public sanctions list of countries that will no longer be allowed to contribute troops due to their failure to prosecute peacekeeping cases referred to them. At the very least, a list of all countries who have failed to take action on such referrals should be made publicly available.
 - Require the Office of Staff Legal Assistance to provide counsel to field staff who request it in cases challenging disciplinary measures or retaliation for whistleblowing.
 - Require the Office of Administration of Justice to release a list of its oldest cases pending before the Tribunals and the subject matter of these cases. OAJ should also post statistics regarding the number of accountability (disciplinary) referrals, orders and recommendations made by the judges and the subsequent actions taken by the Secretary-General in those cases.
 - Extend the statute of limitations for submitting a request for Management Evaluation to at least six months and preferably one year.
 - Take prompt action to enforce accountability referrals made by judges and commit to adhering to orders and judgments.

- Issue a new, legally binding policy that clearly establishes staff members' due process rights during and following an investigation and that describes the steps that must be followed before a disciplinary measure is imposed.
- Consolidate all investigative bodies, including those in the funds, programmes and specialized agencies, into one internal oversight entity that handles all investigations, including those in the field. This body should be as external and independent as possible and should adhere to consistent investigative procedures that respect the subject's due process rights.

The final two recommendations are especially critical. The UN has created an improved justice system, but it has yet to address the problems that lead to so many employee grievances. Until the UN addresses these underlying procedural issues, especially those connected to due process in disciplinary cases, the organization's performance will continue to be flawed by misconduct in the peacekeeping missions. The ability of the United Nations to deliver on its obligation to promote the rule of law will likely suffer as a result.

Introduction

The United Nations (UN) is the source of norms and legal conventions that make human rights and peace a reality as well as an ideal. It is also the locus of global peacekeeping and conflict resolution. Currently, UN peacekeeping forces are deployed in 16 operations,ⁱ where personnel are directed and supported by the United Nations Department of Peacekeeping Operations (DPKO) and the Department of Field Support (DFS). At the same time, UN personnel are increasingly decentralized: more than half of UN personnel are stationed in the field,^{lii} often in difficult and dangerous environments. Although the majority of those serving in UN peacekeeping operations are uniformed personnel, 15 percent are civilian personnel employed directly by the UN.^{liii}

Because the United Nations enjoys functional immunity, in principle civilian personnel who have a grievance against the organization do not have access to domestic courts. Instead, they must bring their claims through an internal justice system. However, in 2006, a panel of independent international jurists found that the UN's internal justice system failed to meet "many basic standards of due process established in international human rights instruments"^{liv} and could not adequately resolve conflict *within* the Organization. Civilian personnel in the peacekeeping missions therefore had no recourse to an impartial judicial mechanism through which to contest violations of their own rights.

This panel of jurists, (the "Redesign Panel" created in response to General Assembly Resolution 59/283), observed that although a majority of UN staff members serve in field operations, the system of justice in the field was particularly weak. Panel members highlighted the dubious handling of misconduct and disciplinary cases, which constituted the bulk of cases in peacekeeping missions. Lack of legal representation for members in field duty stations, trials virtually in absentia, and excessive delays were also identified as problems affecting peacekeeping operations and field offices negatively. Over the years, the internal justice system had also acquired a reputation of ruling capriciously, at times in favor of corrupt staff members.

The Panel also found that "there is a perception of unequal justice in the United Nations" and that this perception was "particularly acute in field duty stations."^{lv} Indeed, any internal administrative grievance process between an individual and a government, corporation or Intergovernmental Organization (IGO) is inherently unequal. The judges are usually paid by the organization and the rules of procedure – including the rules regarding discovery, examination of witnesses, access to documents, costs and access to legal services – are created by it. As a result, an internal system tends to favor the organization and often provides it with a built-in advantage in a dispute. Although the Redesign Panel's recommendations were a step toward leveling the playing field, the reality is that even the best internal administrative process will leave individual staff members at a disadvantage when they try to uphold their rights. Therefore, an organization operating with an internal adjudication process must expressly commit to ensuring equality of arms and exercise its power not only to enforce its rules, but to enforce them impartially.

¹ As of June 30, 2011 there were 43,747 Secretariat staff members, 23,491 of whom were stationed in the field.

Based on this concept, the Redesign Panel made comprehensive recommendations for a more effective internal justice system and proposed an independent, transparent, professionalized and adequately resourced system that would ensure respect for the rights of staff and the accountability of managers. In addition, the Panel made a series of recommendations to address the problems it identified, including the expansion of the informal and formal justice system to cover everyone appointed to perform work for the Organization, including personnel in peacekeeping missions.

In July 2009, the United Nations launched the new, decentralized internal justice system based on the proposal of the Redesign Panel.^{vi} Most importantly, the new system established the right of appeal in keeping with Article 14 of the International Covenant on Civil and Political Rights. Any current or former staff member may appeal a decision of the new UN Dispute Tribunal (UNDT) to the United Nations Appeals Tribunal (UNAT).

With the support of the United States Institute of Peace (USIP),² the Government Accountability Project (GAP)³ undertook a study of the impact of the new justice system on the United Nations' ability to address corruption and abuse of authority in peacekeeping operations. To conduct this study, we examined the first two years of UNDT and UNAT rulings, from July 1, 2009 until June 30, 2011.⁴ Although we reviewed all cases, our focus was on identifying ones that involved abuse and wrongdoing reported or committed by UN or Office of the United Nations High Commissioner for Refugees (UNHCR) personnel in peacekeeping or political missions. We compiled databases of all decisions issued during this time period and a summary of the issues. For each peacekeeping, whistleblower and/or misconduct case, the database specifies the details of the action disputed; outlines the substance of the complaint; identifies the outcome of the case; and summarizes problems and recommendations specified by the Tribunal. These databases are available as Annexes VI-VIII of this paper.

GAP then reviewed these rulings to identify those which, in our judgment, could potentially impact UN peacekeeping and field operations, especially cases that could influence the treatment of whistleblowers, which is GAP's particular area of expertise. In addition, we identified problems or corrective actions mentioned by the Tribunal judges in order to assess the extent to which the Tribunal's judgments influence oversight and accountability practices at the UN. We also sought to determine if justice system reforms led to improved outcomes for complaints and victims and the effectiveness of the justice system in reviewing misconduct in peacekeeping operations.⁵

² The opinions, findings, and conclusions or recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the United States Institute of Peace.

³ GAP is a nonpartisan, nonprofit public interest group that promotes free speech and ethical conduct in government, corporations and Intergovernmental Organizations (IGOs). GAP helped to draft the 2005 United Nations Secretariat protection against retaliation policy (ST/SGB/2005/21) and provided technical assistance in the drafting and adoption of whistleblower protection policies at several Multilateral Development Banks.

⁴ GAP also reviewed (and developed a database of) all Administrative Tribunal decisions from June 30, 2007 through December 31, 2009, in order to obtain benchmark data. This database is included as Annex VIII.

⁵ For more information about GAP's methodology in reviewing these cases, please see Annex V.

The second phase of this study involved interviewing complainants identified through significant UNDT and UNAT rulings or recommendations. Our interviews focused on complainants⁶ and whistleblowers from the peacekeeping missions, though selected complainants were interviewed who did not work in the field. GAP interviewed complainants from eight different peacekeeping missions, as well as external attorneys, representatives from three staff associations, one judge, and representatives from six different UN offices or entities that play a role in the informal and formal justice system. These offices included the Ethics Office, Management Evaluation Unit, Office of Legal Affairs, Office of Staff Legal Assistance and two offices that did not wish to be mentioned by name in this report.⁷ GAP also traveled to the United Nations Stabilization Mission in Haiti (MINUSTAH), where we met with peacekeeping police personnel and representatives from the Conduct and Discipline Team, Legal Affairs, the Gender Unit, the Boards of Inquiry Unit, and the Office of the High Commissioner for Human Rights. All told, GAP interviewed 36 people (hereafter referred to as “respondents”).⁸ These interviews focused on the respondents’ views about and experiences with the new justice system; perceptions regarding the impact of its decisions and recommendations (especially on the peacekeeping missions); and thoughts regarding the ways that whistleblowing and misconduct are handled in the peacekeeping missions. Quotes from these interviews are included as Annexes I through IV. Relevant quotes have also been incorporated into text boxes throughout this paper.

This report combines GAP’s review of UNDT and UNAT decisions with the findings from our interviews with UN employees. It examines, through the lens of the UN internal justice system and those who have used it, the measures currently taken to address wrongdoing in UN operations and the effectiveness of these measures. In doing so, it assesses the extent to which the Tribunal’s judgments have influenced oversight and accountability practices at the UN, either positively or negatively.

I. Is the New Internal Justice System Better?

Many of the interview respondents believed that the new justice system is an improvement over the previous one. Some respondents were satisfied with the outcome of their case before the new system and it is widely believed that staff members are receiving fairer hearings than in the past. However, respondents also raised what they viewed as numerous shortcomings in the system that still need be addressed (as described in Annexes I and II) and were overwhelmingly critical of the quality of UNAT’s judgments (and, to a lesser extent, UNDT’s).

⁶ Throughout this report, we use the term “complainant” to refer to UNDT and UNAT applicants.

⁷ GAP also submitted meeting requests to the Office of Internal Oversight Services, the Registrars for UNAT and UNDT, the Office of Human Resources Management, the New York office of the Conduct and Discipline Unit, the Tribunal judges (through the Registrar’s Office), the Special Representative of the Secretary-General’s Office in MINUSTAH, and the Security Section Investigations Unit in MINUSTAH, but those offices declined our requests.

⁸ Throughout this report, we will refer to people whom we interviewed as “respondents.” However, UNDT and UNAT judges also use the term “Respondent” to refer to the Secretary-General. Therefore, in individual cases, “Respondent” refers to the Secretary-General and not to the people whom we interviewed.

GAP reviewed UNDT and UNAT cases and found that complainants are receiving more favorable outcomes than in the past, as suggested by the people whom we interviewed. We reviewed the outcomes of all misconduct, whistleblower and potential retaliation cases before the former UN Administrative Tribunal (from July 1, 2007 – December 31, 2009) and UN Dispute and Appeals Tribunals (from July 1, 2009 – June 30, 2011). We compiled databases of all decisions, analyzed each ruling, categorized rulings by types of complaints, identified all rulings favorable to the plaintiff and calculated the favorable ruling rate (FRR) of each Tribunal by category of complaint. The chart below compares FRR for misconduct, whistleblowing and “potential retaliation” cases – in which the complainant did not raise whistleblower retaliation claims per se but had harassment claims that were potentially connected to a disclosure or a refusal to engage in misconduct. As can be seen from this chart, in all but one category, the FRR rate for complainant was significantly higher before UNDT than it was in the old system.

| | Former Administrative Tribunal | UN Dispute Tribunal | UN Appeals Tribunal |
|---|---------------------------------------|---|--|
| FRR for complainant: all types of cases | Not Available | 34.7% (136 of 392) ⁹ | 23.7% ¹⁰ (23 of 97) |
| Average complainant FRR: all misconduct, whistleblowing and potential retaliation cases | 45.9% (28 of 61) | 53.7% (58 of 108) | 31.8% (14 of 44) |
| FRR: all misconduct related/disciplinary cases | 41.9% (13 of 31) | 64.6% (31 of 48) | 31.8% (7 of 22) |
| FRR: misconduct peacekeeping cases | 44.4% (4 of 9) | 68.4% (13 of 19) | 28.6% (2 of 7) |
| FRR: all whistleblower cases ¹¹ | 25% (1 of 4) | 43.8% (7 of 16) | 0% (0 of 3) |
| FRR: whistleblower cases from the peacekeeping missions | 0 cases | 0 cases | 0 cases |
| FRR: potential retaliation cases | 70.6 % (12 of 17) | 41.7% (15 of 36) | 35.3% (6 of 17) |
| FRR: whistleblower/ misconduct cases | 25% (1 of 4) | 66.7% (2 of 3) | 0 cases |
| FRR: potential retaliation/misconduct cases | 20% (1 of 5) | 60% (3 of 5) | 50% (1 of 2) |

⁹ This statistic is based on the Office of Administration of Justice’s (OAJ) reports for these time periods. It does not include cases that were withdrawn. In this chart, a “favorable ruling” means that the complainant won his or her case in whole or in part in a final judgment and was awarded relief in some form.

¹⁰ This statistic does not include UN Joint Staff Pension Board or UNRWA cases, requests for revision or remanded cases. It is based on the OAJ’s reports for these time periods. To compile this statistic, we combined the number of cases in which a complainant’s appeal was entertained in full or in part and the number of cases in which the Respondent’s appeal was rejected (as this can be seen as a favorable ruling for the complainant) and compared this to the number of cases in which a complainant’s appeal was rejected and the Secretary-General’s appeal was entertained.

¹¹ This category does not include whistleblower cases in which the complainant was also accused of misconduct, which are categorized as “whistleblower/misconduct” cases.

Although we have analyzed rulings produced over a limited number of years, certain clear trends do emerge. Most significantly, no final judgments involving whistleblower retaliation in a peacekeeping mission were issued by either the Administrative Tribunal, the Dispute Tribunal or the Appeals Tribunal. For the UN justice system, this fact is difficult to explain. In an organization such as the United Nations, it is simply not possible that there are no instances of retaliation for reporting misconduct in the field. The United Nations peacekeeping forces are deployed, often with little training or supervision, to situations in which the rule of law is weak and the balance of power is unequal. Moreover, anecdotal evidence strongly indicates that abuse and misconduct within the forces is a serious and widespread issue, and in recent years, sensational allegations of misconduct and retaliation involving peacekeeping forces have appeared in the news media with some frequency.¹² One case, in fact, became the subject of the book and film “*The Whistleblower*,” which were both presented at the UN. Speaking at the event, the Secretary General himself appeared and spoke, saying that the issues highlighted in the film had been addressed by the organization:

It is important that the public recognizes the many steps the UN has taken since then to prevent and punish such terrible abuses. In a nutshell, the UN has a clear policy, shaped by the crimes portrayed in this film. That policy is no tolerance. ... Those who ‘blow the whistle’ should now find that protections are firmly in place. ... The bottom line is that we have made much progress since the dark period portrayed in this film. We also know that we still have much to do. This film reminds us how important one person’s voice can be. It underscores how important it is to speak out against abuse or injustice. Those who do so, in good faith, must not be punished, nor should they be met with resistance from within...

We need to promote a culture in which people feel free and obliged to raise their voices in the face of wrongdoing and abuse. As Secretary-General, I try to lead by example. We must hold ourselves accountable to the highest standards.^{vii}

The authors of this study, however, spoke with numerous whistleblowers in the peacekeeping missions, including one who reported sexual abuse and misconduct; suffered career-damaging retaliation, much like the author of *The Whistleblower*; and then saw that her case could not be brought to the Dispute Tribunal for reasons of jurisdiction. We will treat this issue in depth in section III B.

Nonetheless, whistleblowers who were not from the peacekeeping missions – including those who were accused of committing misconduct – have a higher FRR before UNDT than before

¹² For examples of misconduct, see: “Uruguayan peacekeepers in Haiti accused of abuse.” *BBC*. 4 September 2011; “Pakistan UN Peacekeeping Role at Risk After 3 Punished in Haiti Sexual Abuse case.” *The Express Tribune*. 14 March 2012; and “Peacekeepers gone wild: How much more abuse will the UN ignore in Congo?” 3 August 2012. For examples of retaliation in a peacekeeping mission, see: “Whistleblowers in the UN: Victory for James Wasserstrom, the UN’s leading whistleblower.” *The Economist*. 30 June 2012 and “U.N. sex crimes whistle-blower wrongfully dismissed.” *Turtle Bay Foreign Policy*. 16 September 2011.

either the former Tribunal or the Appeals Tribunal. The whistleblower vindication rate in the pre-2009 system was 25%, whereas it is 43.8% before the new Dispute Tribunal.¹³

The UN Dispute Tribunal is also producing a FRR for complainants in more cases involving allegations of misconduct than either the former Administrative Tribunal or the Appeals Tribunal. This vindication rate is especially high for complainants alleged to have committed misconduct in a peacekeeping mission: 13 of 19 complainants won these types of cases in whole or part before the UN Dispute Tribunal.

Sections II and III of this report will focus on the outcomes of whistleblower and misconduct cases before the Tribunals, as well as respondents' perceptions regarding these topics.

II. Cases in Which UN Staff Were Accused of Misconduct and/or Disciplinary Measures Were Imposed

"There's an enormous resistance at the UN at the higher levels to anything that smacks of oversight. They want free-rein and they are given free-rein by the Secretary-General in the peacekeeping operations. It's excessively decentralized and delegated and as a result they can get away with murder and keep OIOS at bay. There are very few consequences."

~ Former UN employee from a peacekeeping mission

"When there is clear misconduct, the perpetrator often gets promoted or moved. People say that it is the easiest way to get a promotion at the UN."

~ UN employee from a different peacekeeping mission

A. Study Findings: Underreporting of misconduct, cover-ups and lack of consequences

While conducting interviews, GAP asked in-depth questions about misconduct in the peacekeeping missions. For example, we asked ten whistleblowers (from eight different peacekeeping missions) about how the organization responded to their misconduct allegations. For all complainants, we asked if they witnessed misconduct related to UN operations in conflict and post-conflict states that they did not report and also if they had specific recommendations to address issues of corruption and misconduct in these operations. Annex IV compiles the responses we received related to discipline of those who engaged in misconduct in the field as well as respondents' suggestions for addressing misconduct in the peacekeeping missions.

¹³ However, potential retaliation claims were more successful before the Administrative Tribunal than the Dispute Tribunal. Since some of these cases may have involved whistleblowers (too little information was given to be sure), the actual success rate for whistleblowers before UNDT may be lower than it first appears.

Most of the complainants and peacekeeping personnel interviewed as part of this study believed that those guilty of misconduct in peacekeeping missions are not always disciplined and many could provide specific examples. Also, among those who reported misconduct, most reported that no disciplinary action was taken against the person whom their reports implicated. One UNHCR employee with whom we spoke reported that the colleague who engaged in misconduct was promoted, rather than disciplined. Unfortunately, this did not appear to be an isolated case. One UN employee in a peacekeeping mission informed us that in the field, “when there is clear misconduct, the perpetrator often gets promoted or moved.”¹⁴

Several of the respondents with whom we spoke mentioned attempts by various parties to cover-up corruption or misconduct, For example:

- A UN police officer informed us that in his/her peacekeeping mission “they sweep things under the rug and repatriate people rather than putting them in jail. There’s no accountability here.”
- A UNHCR employee said that in a peacekeeping mission where s/he had worked “we had certain knowledge of sexual abuse of minors and things like that and our representatives there didn’t really take necessary actions and the investigation service tried to cover it up in an institutional way, you know. In [a different peacekeeping mission], when sexual abuse cases were brought out, the administration tried to systematically cover it up or solve it in a way that would never get victims their rights.”
- A UN employee stated that there is a perception that some missions do not report category one¹⁵ cases to headquarters and allow people to repatriate instead. This person said that, “there is a lack of accountability for people who cover-up misconduct in the peacekeeping missions.”
- An employee in a peacekeeping mission stated that “it’s all about protecting those in senior positions and protecting the institution against any charges of abuse of authority.”
- A former employee from a different peacekeeping mission stated that “there’s an incentive to hush-up any problems that could threaten donor support. As well as the fact that in the UN culture, they have a very hard time agreeing on what is misconduct and wrongdoing and it’s very selective, so they carve out exceptions for certain categories of individuals or for certain cronies and they will turn a blind eye... Misconduct issues are

¹⁴ This is not to suggest that the UN directly rewards staff members guilty of misconduct. Rather, it appears that in the UN bureaucracy the most efficient way to transfer a staff member is to promote him or her. Supervisors therefore appear to use this method to move a suspect staff member away from the opportunity for misconduct.

¹⁵ OIOS groups misconduct allegations into categories, depending on how serious the offense is. Category 1 allegations include, inter alia, SEA allegations, gross mismanagement, bribery/corruption, procurement violations, embezzlement and major theft/fraud. Category 2 allegations include, inter alia: discrimination, harassment, sexual harassment, abuse of authority and simple theft/ fraud. See <http://cdu.unlb.org/UNStrategy/Enforcement.aspx>.

overwhelmingly handled informally in the peacekeeping missions. For example, if someone is involved in some sort of egregious sexual misconduct, someone will pull them aside and tell him that he should stop doing that, it's embarrassing and people are aware of it. But there's never any discipline unless it's so public and so flagrant that he's basically flouting authority.”

Several respondents noted the disparity in discipline between managers who committed misconduct and people at the lower levels, who were sometimes disciplined even when they did not commit misconduct:

- One respondent said that at UNHCR, “accountability depends on the grade. If you are at a lower-level there may be accountability but not at a higher-level; they get away with it. There's one rule for the worker bees and another for everyone else.”
- Another UNHCR employee noted that, in general, for a colleague in the field “there will be punishment [if they engage in misconduct], but for managers there is no accountability.”
- A former UN employee who was accused of misconduct while stationed in the field stated that “if you know people, you can do whatever, you can steal, they won't say nothing ... but, if you don't know anybody, they just have to point the finger at you and you're out... They always decide to pick somebody as a scapegoat.”
- A former employee from a peacekeeping mission said, “In general they don't want to see it [misconduct], but if they have to deal with it, the culture of impunity applies to the higher level individuals. So it's done discretely or behind closed doors and usually in half-baked measures that are not accountability... There's the culture of impunity in the UN in general and in peacekeeping it's an even higher-level.”

It should be noted that similar concerns were raised by the former Under-Secretary-General for the United Nations Office of Internal Oversight Services (OIOS) – which investigates reports of mismanagement and misconduct in all UN activities under the Secretary-General's authority – in her 2010 End of Assignment Report. She wrote that:

Experience has demonstrated that senior staff, in particular those who may report to the Secretary-General, use their considerable authority to secure treatment not generally accorded to staff in more subordinate positions. This includes delaying investigations in different ways. Regrettably, there is a strong perception in the Organization that individual accountability does not exist uniformly; that senior staff can act with impunity, absent accountability. This perception presumably follows from a perception of inconsistent practice as to proportionality. There are instances where certain forms of misconduct have resulted in summary dismissal while other conduct, seemingly more severe or perpetrated by staff with greater responsibility, is subject to little or no sanction.^{viii}

GAP, however, asked an Office of Legal Affairs (OLA) representative questions connected to discipline of those who commit misconduct. When we asked this representative if s/he thought that managers are held more accountable under the new system, s/he expressed frustration about cases in which the UN had taken steps to discipline a manager or staff member, only to have the decision overturned by the Dispute Tribunal. Similar concerns were mentioned in an article by journalist Column Lynch, who said that some UN officials “fear the new body's intrusive orders will weaken the authority of the Secretary-General over his staff and potentially upend U.N. efforts to hold U.N. officials accountable for mismanagement or misconduct.”^{ix}

The following section will examine the ways in which the UNDT and UNAT judges handled misconduct cases in the field and will explore which of the above perceptions, if any, are substantiated by UNDT and UNAT judgments.

B. Study Finding: High vindication rate before UNDT for complainants from peacekeeping missions who were accused of misconduct

While at first glance, no obvious pattern appears that would allow us to conclude that the UNDT has either improved or further compromised the internal justice system at the United Nations, we've selected specific cases for detailed description in order to illustrate a persistent problem with the processes that handle staff/management conflicts and disputes.

As demonstrated in the cases below, the Tribunal judges were frequently confronted with irregular or unjustifiable investigative procedures or capricious and arbitrary disciplinary measures. The cases show that, in a sense, the reforms of the Tribunal have had a perverse effect, in the absence of reforms in the investigative and disciplinary processes. Because investigators are sometimes either operating outside their guidelines or are allowed extraordinary latitude in their inquiries, the judges face violations of staff members' due process rights they must address, regardless of the seriousness of the alleged misconduct or the likelihood that it actually occurred. In addition, because senior management is both accorded and accustomed to absolute authority in disciplinary decisions, the judges also face disputes in which the punishment is clearly disproportionate to the misconduct. This is exacerbated by the administration's apparent reluctance to apply the presumption of innocence and by the abolition of the Joint Disciplinary Committees (JDC) and the corresponding hearing process.¹⁶

In other words, the Tribunal ruling represents the “end of the story.” Irregular investigative and disciplinary processes that took place before the dispute arrives at the Tribunal oblige the judges

¹⁶ According to the Secretary-General's 2011 report on Administration of Justice: “The new justice system and the concomitant abolition of the Joint Disciplinary Committee have shifted the responsibility for conducting the factual and legal analysis of a case to the Office of Human Resources Management. In the former system, the Secretary-General referred disciplinary matters to the Joint Disciplinary Committee for the establishment of the facts and for advice as to what disciplinary measures, if any, should be imposed. With the abolition of the Joint Disciplinary Committee, the Office of Human Resources Management is required to perform increasingly detailed analyses of the cases before it.” (A/66/275, para. 126). In other words, in the past the JDC established the facts, whereas now it is done by the Administration and can be reviewed by UNDT, which doesn't have the authority to conduct an investigation. Therefore, under the new system, there is not automatically a hearing or inquiry in disciplinary cases in which the underlying facts are unclear or in dispute.

to take action on violations of due process rights so frequently that the substance of the case cannot be fairly addressed or resolved.

Selected Cases with Favorable Rulings

During the time period under review, complainants accused of misconduct¹⁷ in a peacekeeping mission were vindicated in whole or part by UNDT in 13 of 19 cases (68.4%). These cases included, inter alia:

- **Five MONUC cases:** There were four related United Nations Mission in the Democratic Republic of Congo (MONUC) disciplinary cases¹⁸ in which the Secretary-General summarily dismissed the complainants for serious misconduct after an investigation by the OIOS Procurement Task Force (PTF).¹⁹ These cases involved improper interference with MONUC's contract bidding process, (i.e. soliciting and accepting bribes from companies bidding on MONUC contracts). The complainants challenged violations of their due process rights and problems with the PTF investigation. One complainant also claimed that there were more senior procurement personnel who engaged in misconduct who were never investigated.^x UNDT found in three of these cases that there was not sufficient evidence to establish misconduct and in the fourth (UNDT/2010/173) it found that there was misconduct but that it did not warrant summary dismissal.²⁰ The judges ordered that all four complainants be reinstated and in some cases awarded compensation as well.

In these decisions, the judges were very critical of the PTF's investigation and of violations of the complainant's due process rights. For example, in judgment 2010/118 Judge Nkemdilim Izuako found that the "OIOS/PTF investigation report was unfair and prejudiced against the Applicant, portrayed an unfortunate desperation to establish her guilt and unprofessionally served up accusations as facts in this case."^{xi} In judgment 2010/56 Judge Izuako found that the OIOS PTF investigation was "based on findings and conclusions following an investigation conducted with bias, subjectivity and with no regard for fairness. The report consists of mere allegations dressed up as facts, exceeded the scope of its assignment, is tendentious and speculative." She concluded that the investigation was not "conducted with an open mind, objectivity or with strict regard to fairness" and that the PTF chose "to discountenance every explanation or position that supports the Applicant's case as false."^{xii}

¹⁷ GAP's definition of "misconduct" cases included: those in which a complainant was accused of misconduct, the contested administrative decision was related to alleged misconduct or an investigative report substantiated misconduct.

¹⁸ These cases included judgment UNDT/2010/185, 2010/173, 2010/56 and 2009/49.

¹⁹ The Procurement Task Force was a temporary investigations body established after the Oil-for-Food scandal to pursue cases involving bid-rigging, bribery and other procurement-related misconduct. It has since been abolished.

²⁰ In one case (2010/185), the decision to vindicate the complainant was made, in part, because the witness in the case refused to testify before the Tribunal.

In a similar but unrelated MONUC case (judgment 2010/36), the complainant successfully contested the decision to summarily dismiss him for “soliciting and accepting money from a vendor who did or sought to do business” with MONUC. The Tribunal found that the PTF report in that case was “prejudiced, full of innuendos, riddled with ridiculous findings and completely and unjustly tars the Applicant with a brush of criminality.”^{xiii}

- **UNDT/2011/106:** The complainant, who worked for the United Nations Operation in Burundi (ONUB), contested the decision to summarily dismiss him for misconduct, after OIOS concluded that he had engaged in workplace harassment. The Tribunal found that the actions of the complainant did not amount to serious misconduct and therefore the imposition of summary dismissal on him was wrongful. The judge was critical of a number of offices and found, inter alia, that:
 - “The conclusions reached by both the JDC and the OIOS investigators...were incorrect.”
 - “The due process rights of the Applicant were breached in the failure to provide him with a copy of the complaint against him by the time he faced investigators.”
 - “The Organization must be careful to see that its commendable policies and initiatives for the protection of women and other vulnerable persons are not misused or misapplied.”^{xiv}
- **UNDT/2011/123:** In 2011/123, the complainant, who worked for the United Nations Advance Mission in Sudan (UNMIS), contested the Secretary-General’s decision to place him on Special Leave with Full Pay (SLWFP) in 2006, after OIOS prepared a draft report that associated him with several procurement irregularities. Judge Marilyn Kaman found, inter alia, that the organization did not properly exercise its discretionary authority when it placed the complainant on leave and that the complainant’s “due process rights were violated during the OIOS/PTF interrogations.” The Judge awarded the Applicant the sum of two years’ net base salary and stated that:

The way that the Organization handled the Applicant’s case creates the impression that the Organization’s actions were a rushed response for purposes of preserving its relations with Member States, rather than for the purpose of initiating an impartial inquiry founded (*sic*) the Organization’s regulations and accompanying due process principles. The Organization’s response in this case did not respect rights clearly and unambiguously afforded to staff members when misconduct is suspected.^{xv}

Selected Cases with Unfavorable Rulings

The majority of the misconduct cases cited above were financial in nature or related to procurement. This was also true of peacekeeping misconduct cases in which the complainant received an unfavorable ruling before UNDT. For example, in UNDT/2009/09 the complainant, who worked for the UN Stabilization Mission in Haiti (MINUSTAH), was dismissed after allegedly diverting thousands of liters of fuel for his personal use and falsifying official records. In UNDT/2010/24 the complainant was dismissed from the UN Mission in Ethiopia and Eritrea (UNMEE), after he was charged with fraudulent use of UNMEE training funds. In UNDT/2010/46, the complainant, a driver in Cote d’Ivoire, challenged his dismissal for repeatedly submitting false invoices for reimbursement under the medical insurance plan. But in

these cases, the Tribunal found sufficient evidence of the complainant's misconduct and found the disciplinary measures to be proportionate.

Two complainants brought disciplinary peacekeeping cases that did not involve financial misconduct to the UNDT and lost. Judgment UNDT/2011/83 is notable because the complainant was the Principal Deputy to the Special Representative of the Secretary-General (Assistant Secretary-General level) at the United Nations Interim Administration Mission in Kosovo (UNMIK). In 2007 OIOS conducted two investigations into his alleged misconduct and the retaliation with which he was charged. His appointment was not extended, allegedly "because the Secretary-General did not want to answer questions about ... sexual exploitation, corruption, ethics violations and the ICTY indictment." Judge Thomas Laker found against the complainant's challenge of the decision not to extend his fixed-term appointment, as "it is within the Secretary-General's discretion to take action to address the negative impact of allegations which could jeopardize the reputation and proper functioning of the Organization where those allegations concern the most senior officials of a United Nations body, like UNMIK, which is so exposed not only to local public opinion but also to international attention."^{xvi} This was an important decision, as it shows that the Dispute Tribunal is willing to hold senior managers accountable when their alleged actions could negatively influence public opinion.

In the second case (UNDT/2010/041), the complainant, a former transport assistant in the United Nations Operation in Côte d'Ivoire (UNOCI), contested the Secretary-General's decision to dismiss him after he was identified by two women from a photographic array for having engaged in sexual exploitation and abuse. The Tribunal rejected the application and "deems that the sanction taken against the complainant was the appropriate sanction in view of the charge of having resorted to the services of women for sex, women who, as the undisputed evidence has demonstrated, were the victims of human trafficking."^{xvii} However, this complainant subsequently won his case before the UN Appeals Tribunal (UNAT/2010/87), which found that the UN should respect the presumption of innocence and that "the onus should therefore be on the administration, which is charging a staff member with misconduct, to establish the factual basis for the disciplinary measure taken against the staff member." The UNAT judges found that in this case the charges were "solely based on anonymous statements made to an Office of Internal Oversight Services (OIOS) investigator. The Appeals Tribunal is of the view that ... a disciplinary measure may not be founded solely on anonymous statements."^{xviii} The UNAT therefore rescinded the Secretary-General's decision to summarily dismiss the complainant.

In the future, this particular ruling may make it particularly difficult for the UN to discipline those who have been accused of sexual exploitation and abuse (SEA), as the evidence in such cases will usually involve statements from a witness. Because of the sensitive nature of these cases, many witnesses may wish to remain anonymous. This is exacerbated by the fact that the UN whistleblower protection policy does not apply to witnesses before the Tribunal or to people who are not employed by the UN. Moreover, the limited resources of the UN make it unlikely, even in cases where the whistleblower protection policy does apply, that the Secretariat will actually provide physical protection for a witness. (*See Section IX for a more detailed discussion of this issue*).

This case underscores the seriousness of the problems that persist in the justice system despite the reform of the Tribunals. The frequency of improper investigative procedures and a lack of

protection for witnesses may allow complainants to the Tribunal who are clearly guilty of serious crimes to escape sanction.

C. Investigations: Flawed and violating due process rights

“Investigations [by OIOS] have always been poorly done [in the field]. It’s appalling the way OIOS investigates cases or doesn’t investigate. They don’t bother to find out all the facts.”

~ Staff association representative 1

“If you’re going to have a system of justice, you have to start with professional people in the investigative level. And there has to be due process there.”

~ Staff association representative 2

In reviewing UNDT cases, GAP observed that numerous judgments were critical of the United Nations oversight mechanisms, especially the Office of Internal Oversight Services (OIOS), and of the actions taken by the Secretary-General and his representatives in disciplinary cases. In particular, in the disciplinary decisions above, UNDT judges were critical of:

- The severity of certain disciplinary decisions taken by the Secretary-General.
- Denials of due process rights during an investigation.²¹
- The way that some investigations have been conducted in the peacekeeping missions by the Procurement Task Force, OIOS and the SIU.

This latter concern was also raised by twelve respondents whom GAP interviewed. In fact, concerns about investigations were the second most common problem about the informal or formal justice system raised by respondents (after quality of judgments issued by the judges of both Tribunals). Respondents were concerned that OIOS and other bodies that conduct investigations in the field:

- Investigate the whistleblower rather than the misconduct committed.
- Fail to investigate certain cases, including cases involving abuse of authority by senior officials.
- Drop investigations without providing an explanation.
- Investigate cases poorly.

²¹ This issue was also raised by Edward Flaherty and Xavier Campos in their 2011 article “*The Reform of the UN Internal Justice System: The “Lampedusa” Syndrome*” (available at <http://www.unjustice.org/news68.htm>). They found that “the real problems for the UN and, in general, for International Organizations, start with the inadequate guarantees of due-process in connection with ‘internal investigations’ and disciplinary proceedings ... Contrary to international standards (such as art. 6 of the ECHR), in UN internal investigations and disciplinary proceedings, staff have no due process rights during the ‘preliminary investigation procedures’, may be disciplined for ‘not cooperating’ during preliminary investigation and have no express right to a presumption of innocence.”

- Investigate those who lack political connections and not those at the top.
- Lack independence and are sometimes politically motivated.
- Fail to provide due process.
- Have a flawed investigative manual (*in the case of OIOS specifically*).
- Take too long to complete reports.

Numerous reforms would have to be made to address these problems. One person interviewed suggested that proper investigative procedures be established and implemented, as also suggested by Judge Adams (*see section D below*). Another respondent recommended that OIOS' investigative reports should be public and more widely distributed.²²

With respect to the peacekeeping missions, additional concerns were raised by respondents about the number of distinct investigative bodies that exist within the missions and the lack of clarity regarding the jurisdiction of each.²³ Concerns were also raised regarding the propriety of a mission investigating itself, especially when the case involves a senior manager, and about Conduct and Discipline Units launching investigations in the field even though they are not investigative units. These problems are substantiated by the Secretary-General's 2011 report on the Administration of Justice, which states that one of the bottlenecks in the procedures for resolving disciplinary cases is "the length of the investigation process and the number of entities involved in investigations, as well as the quality of fact-finding and other inquiries conducted by non-professional investigators."^{xix}

Respondents also raised the "tone-at-the top" problem and the inability of the Secretary-General to police upper managers, given that the Secretary-General "and his predecessors have shown, historically, little capacity to do this." One person recommended that there should be an independent, external mechanism for investigating internal corruption and whistleblower retaliation complaints from the field that could make recommendations to the Security Council or another body outside the Secretariat ("so they can't be politically interfered with.")

Similar concerns were identified by the UN Joint Inspection Unit (JIU) – an independent oversight body mandated to conduct system-wide evaluations and investigations in the UN. In a 2011 report on the "Investigation Function in the United Nations System," JIU found:

In the United Nations many actors share responsibility for investigations... [Staff members] are concerned, as are the Inspectors, that **investigations conducted by**

²² GAP believes that, at a minimum, such reports should be provided to the whistleblower and the victim. See, also, Kathleen Jennings study, "Protecting Whom? Approaches to Sexual Exploitation and Abuse in UN Peacekeeping Operations," in which she recommends that the UN communicate "the outcomes of investigations to both the complainant and the local community where the violations occurred, as well as keeping complainants as informed as possible on the status of investigations (to avoid perceptions of whitewashing)... Limited and responsible information-sharing with the complainant and, where relevant, civil society, community leaders and media outlets will help combat the impression of whitewashing at seemingly little cost to the investigation's integrity." (p. 46, 70)

²³ According to a 2012 report of the Secretary-General (A/67/171), "depending on the subject matter and complexity," an investigation can be undertaken "by the Head of Department or Office or his or her designees, or by the Office of Internal Oversight Services, at its own initiative or at the request of the Head of Department or Office." (para. 7)

non-professional investigators and/or entities which are not independent but are part of management, can result in conflicts of interest, information not being handled properly, an uneven application of standards, and problems with due process, as well as cases being “dropped” or taking undue time to complete ... The Inspectors believe that the argumentation for consolidating investigations in the internal oversight entity is compelling and that this should be done urgently in the interests of fairness to all staff and stakeholders in the conduct of formal investigations. ^{xx} **(original emphasis)**

RECOMMENDATION: The Joint Inspection Unit recommended that “Executive heads who have not yet done so should direct that all investigations be consolidated in the internal oversight entity of each organization.”^{xxi} GAP seconds this recommendation and suggests that the UN Secretariat consolidate all investigations – including investigations in the field – into one internal oversight entity. Heads of other departments or offices should not be allowed to conduct investigations, or designate people to conduct them, especially since these parties may not be trained investigators.

RECOMMENDATION: The Joint Inspection Unit also recommended that the Secretary-General “set up an inter-agency task force that will develop options for establishing a single consolidated United Nations system Investigation Unit by the end of December 2013 for presentation to the legislative bodies.”^{xxii} GAP believes that it is an important recommendation and that it would be a step forward in resolving some of the independence and procedural issues that continue to plague various UN investigative bodies. We further recommend that this entity be as autonomous as structurally possible.

D. Recommendation made by UNDT in relation to misconduct: Create new policy outlining the steps in the disciplinary process

Rulings issued during the period under review show that UNDT judges were also frequently critical of the lack of due process in misconduct cases. In one case in particular (UNDT/2010/030/R) the judge discussed shortcomings in the current policy for “Due Process in the disciplinary process” (ST/SGB/2009/7) and encouraged the Secretary-General to adopt an additional administrative instruction. In this decision Judge Michael Adams concluded that ST/SGB/2009/7 could “encourage arbitrary and capricious decision-making,” and that “the description in the heading of this rule as providing ‘due process’ is a misrepresentation.” He wrote that it is “a strange and unfortunate feature of both the old scheme and the new that there is no reference to any requirement that the staff member actually be found guilty of misconduct before imposing either a disciplinary or non-disciplinary measure.” He noted that the policy:

... Seems to have been drafted for the specific purpose of conferring as wide a discretion as possible on the Secretary-General (and his or her delegates)... to do from beginning to end whatever they happen to think is reasonable and give the staff member as little traction as possible to question the process... Moreover, the process by which such a finding

would be made is not provided for, except the requirement of an investigation. What are the responsibilities of the Secretary-General in relation to the investigation – is he bound by the findings of primary fact, the inferences drawn by the investigators, their findings of law or their views of the proper, useful or convenient scope of the investigation? Nor is there an explicit obligation to document the process by which the Secretary-General reaches his or her conclusion ... Although the staff member must be given the opportunity to respond to the charges, there is no express requirement that the response should be taken into account, nor what should happen if new facts are disclosed.

Adams concluded that “it is imperative that, one way or another, each of the steps to be taken following the investigation and before a staff member is found guilty of misconduct and a disciplinary or non-disciplinary measure imposed is clearly identified and the relevant matters to be proved are specified in a manner that is legally binding.”^{xxiii}

When GAP asked offices within the UN if any procedures had changed as a result of the Tribunals’ decisions, no one mentioned a change to the disciplinary procedures. However, according to a 2011 report by the Secretary-General, “the revision of the administrative instruction on revised disciplinary measures and procedures ... has been initiated by the Office of Human Resources Management.”^{xxiv}

RECOMMENDATION:²⁴ The UN should issue a legally binding policy that clearly establishes, in the words of Judge Adams, “each of the steps to be taken following the investigation and before a staff member is found guilty of misconduct and a disciplinary or non-disciplinary measure imposed.” (UNDT/2010/030/R, para. 47)

III. Whistleblowing

²⁴ Throughout this report, GAP will make a series of recommendations to address various problems identified by respondents and Tribunal judges.

“If staff members see misconduct in the field, most won’t report it. You’ll get a very brave one who will do it, but most will just close their eyes to it, because they’re afraid of the consequences. They’re unprotected.”

~ *Staff association representative*

“My chief told me that I was not loyal to him [after I blew the whistle]. And I asked him, what am I supposed to be: loyal to you or loyal to the organization?”

~ *UN employee from a peacekeeping mission*

As shown in the chart in Section I, whistleblowers have a higher success rate before UNDT than before the previous justice system. But although the vindication rate for whistleblowers has increased, many of the people whom we interviewed expressed concerns about the way that whistleblower cases are still dealt with in the field, suggesting that any lessons learned from UNDT cases have not yet resulted in actual improvements in the treatment of whistleblowers from the peacekeeping missions.

During the time period reviewed (July 1, 2009 – June 30, 2011), UNDT issued *no* final decisions regarding a whistleblower from a peacekeeping mission, although there were numerous whistleblower cases from other parts of the UN. This, however, does not mean that there were no whistleblowers from the peacekeeping missions. During the course of our study, GAP spoke with whistleblowers from eight different peacekeeping missions, as well as several whistleblowers from UNHCR. Whistleblowers from the peacekeeping missions exist and some – though not all – have brought cases before the Dispute Tribunal. Section A below will examine what respondents said about whistleblowing in the peacekeeping missions. Section B will analyze possible explanations for the lack of judgments regarding UN whistleblowers from the peacekeeping missions.

A. Study Finding: Some improvement, but generally whistleblowers lack protection

Study Finding: Civilian personnel in the field know how to report misconduct, but don’t think their identities will be protected if they do so

GAP first sought to determine if civilian personnel in the field are aware of how to report misconduct. We found that the general consensus among the people whom we interviewed was that staff members working in the field know to report misconduct. Personnel reported that they had been informed about what to do if they witnessed misconduct or sexual exploitation and abuse (SEA) and some mentioned that they participated in online training courses connected to this topic. Indeed, when GAP visited the MINUSTAH mission, the Conduct and Discipline Unit (CDU) – which oversees discipline in the peacekeeping missions and receives misconduct

complaints – informed us that they have a comprehensive public information strategy regarding how to report SEA, which was promoted in posters, a video, a website and other media. GAP saw several posters related to SEA hanging prominently throughout the mission, including the one below:



However, several people raised concerns about the mechanisms for reporting misconduct in the field. One UN employee believed that in one mission the CDU was in the habit of encouraging people *not* to pursue allegations. Five respondents mentioned concerns about confidentiality. As one employee said, “If you do go to the CDU here, before you go out, the whole mission knows. Because the chief of CDU here is known to tell people who reported... so it backfires right away.” As one respondent noted:

You live in a fishbowl in a mission. You must assume everyone knows your business... It's such a small environment that it's almost inevitable the people will find out [the identity of the whistleblower]. Everyone [in the mission] knows who it was who blew the whistle immediately. The information is leaked.

These concerns were similar to those raised in Kathleen Jennings' 2008 report *“Protecting Whom? Approaches to Sexual Exploitation and Abuse in UN Peacekeeping Operations,”* in which she examined the impacts of the UN's zero-tolerance policy in the UN Stabilization Mission in Haiti (MINUSTAH) and the UN Mission in Liberia (UNMIL). She found that:

In both Haiti and Liberia, most informants considered under-reporting of SEA violations to be a serious, albeit necessarily unquantifiable problem Further adding to the perceived burden of internal reporting is that, although the complainant's identity is supposed to be protected, the general sense among informants is that confidentiality cannot be ensured in such a close environment,

especially when investigations are launched and witnesses interviewed (witnesses' identities are not necessarily kept confidential). This was essentially confirmed by other informants charged with SEA policy enforcement.^{xxv}

This is not an easy problem to fix, as some people believed that, due to the small size of some peacekeeping missions, people will often figure out who the whistleblower is regardless of whether or not confidentiality is provided. But increasing the role of headquarters in processing reports of misconduct from the field could be a useful first step.

RECOMMENDATION: Whistleblowers from the field missions should be encouraged to send their reports to OIOS or headquarters, rather than through local channels. Posters, pamphlets and other documents that contain information about how to report misconduct should also include the contact information for OIOS. If a whistleblower works for a small office and fears retaliation, then OIOS should consider conducting an audit or an investigation that is not obviously based on a whistleblower's disclosures, in order to protect the whistleblower from being identified and retaliated against.

Study Finding: UN employees in the field are afraid to speak up about misconduct

“There’s a lot of stuff going on here, but no one wants to bring it out....People are afraid to speak up because they will be sent home. They know things are wrong here, but you’re better off not saying anything.”

~ UN police officer from a peacekeeping mission

“Whistleblowing [in the field] is a problem. Staff don’t want to get involved anymore because they are the ones who end up suffering - they are the ones who end-up under investigation. And it’s usually because of the people they are reporting, who are normally at the higher level.”

~ Staff association representative

Although UN employees in field offices were generally aware of how to report misconduct, almost every complainant and employee in a peacekeeping mission we interviewed believed that UN employees in the field are afraid to speak up when they have information about misconduct. This also appeared to be the case at UNHCR, as several employees there expressed this fear, and a 2011 survey of 7,000 UNHCR staff members found that 70 percent of respondents reported a fear of speaking up – a dramatic increase from previous years.^{xxvi} Given that UNHCR is a human rights agency that assists refugees, many of whom seek asylum in order to defend their rights to freedom of expression, these findings are particularly troubling.

In the past, the UN has acknowledged underreporting of misconduct in the peacekeeping missions. As Kathleen Jennings wrote in a 2008 report, the UN “itself cautions against reading too much into the statistics [regarding SEA violations], noting that ... reports

from other organizations suggest chronic underreporting of allegations of sexual exploitation and abuse, in particular of minors, against United Nations personnel...^{xxvii}

Respondents gave several reasons why UN employees may be afraid to report misconduct in the field. Some staff members said that they believe that the report will go nowhere and “nothing will be done” to correct the corruption. According to one staff representative, “if people see that there are consequences for the perpetrators then they will report it [misconduct]. If they see the perpetrators get away with it, and the whistleblower is retaliated against then they won’t report it. And unfortunately that is what happens [in this peacekeeping mission].” This is a significant concern, as surveys in the U.S. have repeatedly shown that the primary reason would-be whistleblowers fail to report misconduct is because they “did not think anything would be done to correct the activity” that they exposed.^{xxviii}

Other respondents expressed a concern that staff members in the field feel “unprotected” when they report misconduct. One whistleblower from a peacekeeping mission said that part of the problem is the culture:

As it is now, they [whistleblowers] are viewed as snitches and anyone who sticks his head out to report wrongdoing is first going to get his head lopped off and the wrongdoing will continue unabated. So there’s no incentive whatsoever for people to report misconduct and enormous disincentives, which are constantly reiterated and repeated to anyone who speaks out against wrongdoing.

A few people also said that they were intimidated when they tried to speak out. One whistleblower informed us that s/he was told to remain silent because if s/he said anything it could “put peoples’ lives in danger.” Another said that someone tried to physically intimidate him/her when s/he exposed illegalities in a peacekeeping mission.

Study Finding: Staff members believe that they will become the targets of retaliation if they report misconduct

“For me, I spoke the truth and I became the victim. Anyone who is a whistleblower does become a victim in the end...We were supposed to be somewhat protected from any retaliation, and that just wasn’t the case.”

~ Former UN whistleblower (not from a peacekeeping mission)

“The whistleblowing concept in the UN doesn’t work. We would like to think that it does work, but it doesn’t work, especially when it comes down to lower-level staff. They are just hung out to dry and there is no protection for them.”

~ Staff association representative

In interviews we heard repeatedly that those reporting misconduct in a peacekeeping mission may become the targets of retaliation. One staff representative believed that this fear was

exacerbated by the fact that many staff members in the peacekeeping missions have temporary contracts. According to this representative, “at the end of the day, our contracts are for one-year and they say ‘no expectation of renewal.’ How can you have a real justice system when everything is so temporary?” Similarly, one former employee of a peacekeeping mission told us:

I can think of maybe one out of fifty people who witnessed wrongdoing [in the peacekeeping missions] who actually stood up about it. A very, very tiny percentage of witnesses are actually prepared to come forward and that is because very often – and increasingly – you have a contractual situation where higher-ups can choose to renew or not renew your contract or abolish your position so people feel very vulnerable... they stand to lose everything very quickly reporting corruption. There’s no real protection for them.

Another former employee from a peacekeeping mission noted that:

It seems amazing to me that it’s supposed to be so difficult to lose your job in the UN. So there are so many rubbish people in there: deadwood who do absolutely nothing at all and it was all ‘we can never get rid of them.’ And yet the people who are outspoken and try to do things, it’s dead easy to get rid of them. There’s a culture of personal fiefdoms run on fear rather than on professionalism. And the word integrity doesn’t seem to figure anywhere.

One staff representative pointed out that retaliation is often very subtle at the UN. For example, rather than give an employee the lowest score on a performance review, a supervisor will simply assign an average score, because it cannot be rebutted, and very bad comments. The representative noted that retaliation also takes the form of a failure to promote.

Two people with whom we spoke raised concerns about how retaliation follows a whistleblower from one mission to another. One whistleblower noted that the retaliation to which s/he was exposed in one mission for raising concerns followed her/him to the next mission. Similarly, a staff representative stated that :

Staff who blow the whistle are sent to a different mission, but before they are sent there, the new mission already knows why the person is being sent there and then they are harassed again... One manager will call and say ‘Are you taking this person? This person blew the whistle and we had a big investigation here and we believe this is the person who blew the whistle on this.’ Managers tend to protect each other.

Several other respondents raised concerns about management’s attitude toward whistleblowers. As one whistleblower from a peacekeeping mission said, “The issue is management. Sometimes they gang up against the staff, especially if you speak up.”

A serious concern, raised by both staff association representatives and whistleblowers, was the tendency of the organization to investigate the whistleblower rather than the person against whom allegations of wrongdoing have been made. This punitive practice is certainly not

confined to the UN, but it is serious indeed. The chilling effect of investigating the whistleblower rather than his/her disclosure may eliminate all willingness to report misconduct for years. As one whistleblower from a peacekeeping mission stated, “the trend seems to be that if you make a complaint [in this mission] they find you guilty no matter what.” A staff representative thought that this was particularly the case when the wrongdoer was at a higher-level than the person who reported misconduct. Yet another staff representative reported that s/he had seen cases of “ping-pong” retaliation in a peacekeeping mission, in which someone reported something in good faith, but the report was not substantiated and the person whom they complained about tried to get the whistleblower investigated in retaliation for the report. S/he pointed out that “the person does not rest until they find out who reported them.”

Some whistleblowers whom we spoke with also said that staff members remain silent because they’ve seen the consequences of speaking up. As one whistleblower who was accused of misconduct informed us, “People [in my mission] know a lot of stuff but after what happened to me they won’t report it. Everybody’s afraid. And I can understand that... Because people you know, you can put a bomb in their ear or on their head, they will not say anything now, because they will protect their job.”

Study Finding: Staff members are concerned about the effectiveness of the Ethics Office

“I learned the hard way. I believed at every step someone would do the right thing. My case went through all the informal and formal mechanisms and no one did anything.”

~Whistleblower (not from a peacekeeping mission)

Concerns were also raised regarding the effectiveness of the mechanisms for protecting whistleblowers, especially about the Ethics Office – which reviews retaliation complaints submitted by UN employees who have reported corruption or other wrongdoing. One whistleblower called the Ethics Office “deeply flawed,” a perception that is supported by the Office’s record. According to the Ethics Office’s annual Activities Reports from 2006 – 2011, approximately 297 retaliation complaints have been received since the Office’s launch in 2006. It appears that the Ethics Office found a *prima facie* case of retaliation – meaning that the case passed its initial burden of proof hurdle – in approximately 2.7% of these cases. But after a subsequent investigation by OIOS, the Ethics Office apparently only substantiated retaliation and recommended relief in one case. Thus, the statistics show that approximately 99.7% of UN personnel who have submitted retaliation complaints have not ultimately been shielded from retaliation. And even that one whistleblower who was vindicated has apparently not yet been completely protected from retaliation.²⁵

In 2011, under a new director, the record of the Ethics Office improved, as there were three *prima facie* findings that year and one case that was ultimately substantiated (versus *five prima*

²⁵ See http://www.whistleblower.org/storage/documents/July_11_letter_to_the_Secretary-General.pdf for more information about that case.

facie cases, total, from 2006-2010, with apparently no ultimate findings of retaliation). Also, the Ethics Office has informed us that the “overwhelming majority of reports of misconduct cited in retaliation complaints submitted to the Ethics Office do not involve serious allegations of misconduct such as fraud or corruption, but rather concern allegations of inappropriate supervisory conduct relating to work performance matters.” This statistic also included cases in which someone requested advice regarding the protection against retaliation policy, but did not submit a complaint.

In the end, however, the published statistics indicate that *no* whistleblower at the UN has been fully protected from retaliation since the Ethics Office was established. Given this record, it is no surprise that whistleblowers are afraid to come forward. Until the Ethics Office builds a reputation as a refuge for whistleblowers that effectively protects them from the consequences of retaliation, staff members will be hesitant to speak up when they witness misconduct.

Despite the Ethics Office’s record, some employees from the peacekeeping missions are still approaching it for protection or advice. When GAP met with the Ethics Office Director, we were informed that there was a 155% increase in requests from peacekeeping missions for all advisory services²⁶ from the August 2009 – July 2010 reporting period to the August 2010 – July 2011 reporting period.^{xxix} Ethics officials attributed part of this increase to the fact that the Office has increased its outreach to the peacekeeping missions.

B. Study Finding: UN tribunals issue zero decisions on peacekeeping whistleblower cases

From July 1, 2009 to June 30, 2011, UNDT issued *no* final decisions regarding a whistleblower from a peacekeeping mission, although there were numerous whistleblower cases from other parts of the UN. GAP believes that there are several reasons for this lack of final judgments:

- Numerous respondents with whom we spoke expressed concerns about how difficult it can be for people in the field to access the internal justice system. As one respondent said, “I know a lot about the system and have access to it [and it’s still difficult to navigate]. The feedback I get from people in the field is that it is ten times worse.” One staff representative noted that, “We need to educate people in the field more about the justice system,” and that sometimes people in the field receive contradictory information about it. Although numerous offices within the informal and formal justice system, such as the Ethics Office, the UN Ombudsman and Mediation Services Office and the Office of Staff Legal Assistance, have conducted training sessions in the peacekeeping missions, it appears that more should be done to educate the staff in the peacekeeping missions about the new justice system. These concerns were also raised by the Internal Justice Council in its 2010 report on the Administration of Justice. The Council:

[W]as dismayed at the low level of understanding of the new system among staff members and management, particularly outside New York...Consistent with the report of the Redesign Panel... training of management personnel in the new

²⁶ This includes services that are not related to whistleblowing, such as guidance on ethics related issues.

system, particularly in duty stations outside New York, needs to be undertaken...^{xxx}

RECOMMENDATION: The offices within the informal and formal justice system should continue to conduct trainings in the field.

- One whistleblower indicated to us that his/her attorney from the Office of Staff Legal Assistance (OSLA) – which provides free legal advice to staff members – advised him/her not to raise retaliation claims before the Tribunal. Thus, there may be cases in which a staff member made a disclosure and was retaliated against, but decided to highlight due process errors instead. This may be especially true of some of the four cases that GAP categorized as potential retaliation cases from a peacekeeping mission and as potential retaliation/misconduct (meaning that discipline was potentially a retaliatory measure), as these cases sometimes did not contain enough information about the disclosure to determine if the complainant was a whistleblower.
- Several whistleblowers raised concerns with us about how long their cases have been pending before the justice system. For example, one whistleblower case that was filed under the previous system still had not been heard as of August 2012, even though final judgments have been issued in cases that were subsequently filed. GAP is concerned that, due to the politically sensitive nature of some whistleblower cases, judges may be delaying hearings. Given that the new justice system was supposed to be expeditious, these delays are of great concern.

RECOMMENDATION: The Office of Administration of Justice should release a list of the oldest cases pending before UNDT – including all cases that are still pending from the old system – and the subject matter of these cases in order to determine if certain politically sensitive cases are being purposefully delayed. The resolution of cases that are more than two years old should be prioritized.

- Respondents also said that cost considerations could be preventing staff in the field from bringing cases before the justice system. One staff representative noted that many personnel in the field cannot afford to go through the justice system, in part because of the expense of traveling for a hearing. This problem was also noted by the Redesign Panel, which found that:

In disciplinary cases, physical distance between field duty stations and Headquarters results in substandard justice ... [that] is only a few degrees removed from trials in absentia. The Organization must in all cases make budgetary provision for a staff member accused of misconduct to appear before disciplinary proceedings in person, even when he or she has the services of counsel.^{xxx1}

This recommendation was seconded by one person whom GAP interviewed who suggested that the UN pay the travel costs for complainants and their counsel to attend a hearing. This

is the practice in at least one other Administrative Tribunal at an Intergovernmental Organization.²⁷

Also, local UN staff have low salaries, and since awards before the Tribunals are usually based on a portion of the complainant's salary, local staff may receive only a few thousand dollars for a case that took years to argue. According to one attorney, "for local staff it is the worst of all discrimination and very unfair... those who are local staff get almost no compensation and that's why you see very few of these cases coming up in the internal justice system, simply because they have no means to be represented."

This problem is exacerbated by the fact that the UN Office of Staff Legal Assistance (OSLA) – which provides free legal advice to staff members – does not accept every case that it receives and concerns have been raised about the quality of its representation (see Annex I). According to the UN Office of Administration of Justice Activity Report for 1 July 2010 to 30 June 2011, complainants were self-represented in 43% of the cases before UNDT, whereas only 31% were represented by OSLA.^{xxxii} According to the 2010 report of the Internal Justice Council, (A/65/304) "Legal assistance to staff at peacekeeping missions remains an area of concern." (para. 72)

Respondents were also concerned about the failure of the new system to make complainants – especially whistleblowers – whole. As one attorney said, the two-year cap on compensation "constitutes a major impediment for whistleblowers, as well as a denial of justice in some cases, particularly in those where harassment and discrimination took place." The Tribunals' Statutes preclude many types of remedy (such as mandatory reinstatement) and severely restrict financial compensation and award of costs. The Statutes also fail to meet the standards set by the U.S. Congress. In December 2011, Congress passed the Consolidated Appropriations Act, 2012. According to section 7049(a)(1)(b) of this law,^{xxxiii} 15 percent of the contribution to any United Nations agency shall be withheld if it is not taking steps to "implement best practices for the protection of whistleblowers from retaliation, including... results that eliminate the effects of retaliation." Whistleblowers in the UN system can face years of protracted litigation to enforce their rights, only to obtain minimal compensation that does not correct the full consequences of the retaliation.

RECOMMENDATION: Revise the UNDT and UNAT Statutes to remove caps on compensation awards and to allow the judges to award the relief necessary to make the successful complainant whole. The judges should also be allowed to award costs to successful litigants, including reasonable legal fees and travel expenses.

RECOMMENDATION: OSLA should be required to provide counsel to field staff who request it in disciplinary or whistleblower retaliation cases.

²⁷ According to Article V(3) of the Statute of the Inter-American Development Bank AT, "the Bank shall pay for reasonable personal transportation expenses of an Applicant stationed in any of the Bank's Field Offices, and those of an attorney, for the purpose of their attendance at the Tribunal proceedings at which their presence is necessary, provided that the Tribunal authorizes such expenses in advance, at the written request of the Applicant."

- Because staff from the peacekeeping missions are so far removed from the Tribunals and sometimes receive contradictory information about their rights, it may be difficult for them to meet the short statute of limitations for accessing the justice system. Currently, a complainant must file a management evaluation request with the Management Evaluation Unit (MEU) in the Office of the Under-Secretary-General for Management within 60 days of receiving an administrative decision that they wish to contest. This step is required before most complainants can file with the justice system.²⁸ However, according to best practice²⁹ whistleblower policies from around the world, six months is the minimum functional statute of limitations for whistleblowers to become aware of or act on their rights and one-year statutes of limitations are consistent with common law rights and are preferable.

In UNDT/2011/111, Judge Coral Shaw observed that the statute of limitations may negatively impact staff members' rights. According to that decision:

The Statute of the Tribunal prevents it from giving relief to staff members even in rare cases where exceptional circumstances exist that would otherwise justify the waiver of the time limit...This applies also to the current Staff Rules relating to time limits for requests for management evaluation ... Appropriate legislative changes to the Staff Rules and the Statute of the Tribunal could rectify this source of injustice.^{xxxiv}

This latter recommendation is important, given that in judgment 2011-UNAT-108, UNAT held that UNDT “erred on a question of law in determining that it had authority to waive the deadlines for administrative review.”^{xxxv} Therefore, UNAT has determined that UNDT does not have the authority to waive this deadline, even in cases in which officials from a peacekeeping mission fail to provide “helpful information” about the appeals procedures (as occurred in this case).^{xxxvi}

This strict statute of limitations has the potential to be a problem in many peacekeeping cases, as people in the field are more isolated and may not have easy access to information about their rights. Indeed, UNDT has dismissed numerous cases from the peacekeeping missions due to the fact that the complainants missed the required deadline.³⁰

In a February 2012 resolution, the General Assembly decided, that “the time limit for completing management evaluations may be extended by the Dispute Tribunal for a period of up to fifteen days in exceptional circumstances when both parties to a dispute agree.”^{xxxvii} Although this is progress, it still does not go far enough to address this problem.

²⁸ For more information see <http://www.un.org/en/oaj/unjs/formalres.shtml>.

²⁹ See http://www.whistleblower.org/storage/documents/2011_International_Best_Practices_10.25.pdf.

³⁰ See, for examples: UNDT/2010/158, 2010/198, 2010/167 and 2011/91.

RECOMMENDATION: The statute of limitations for submitting a request for Management Evaluation should be revised to at least six months. If the UN wishes to meet best standards in international law, then it should be changed to one year.³¹

- GAP spoke with whistleblowers who were not directly employed by the UN, including UN police officers. Peacekeepers and UN police officers are on the frontlines and are therefore the employees who are most likely to be aware of sexual exploitation and abuse, human trafficking and other serious crimes or misconduct committed in peacekeeping missions. But while the UN requires police officers and peacekeepers to report misconduct, it fails to provide those who report this type of misconduct with any protection when they do so. UN police officers and peacekeeping personnel cannot bring cases before the justice system and the UN whistleblower protection policy does not apply to them.

GAP was consulted in the drafting of the UN protection against retaliation policy (UN/ST/SGB/2005/21). At that time, we raised concerns about the exclusion from the policy of contractors. In discussions, the then Under-Secretary-General (USG) for Management's office assured us that contractors would have whistleblower protections. Unfortunately, seven years after the adoption of the original policy, amendments have not yet been made that will cover contractors. In the course of this study, GAP has identified numerous shortcomings in coverage provided by the ST/SGB/2005/21 that should be addressed, but this is one of the most important.

RECOMMENDATION: ST/SGB/2005/21 should be revised to address the following concerns:

1. The scope of protection against retaliation provided in section 2.1 should be extended to apply to contractors, UN police officers, UN peacekeepers, victims and any other person who provides information about misconduct that could undermine the United Nation's mission. The key to receiving protection should be the content of the information disclosed, not the identity of the person disclosing it.³²
2. Whistleblowers who make a protected disclosure to the UN should be protected from harassment by contractors, sub-contractors or member states and such retaliators should be disciplined. For example, most Multilateral Development Bank whistleblower protection policies allow the Banks to apply sanctions or suspend contractors who engage in whistleblower retaliation.³³

³¹ Alternatively, as recommended by the Bar Association for International Governmental Organizations in "Reform of the United Nations Administration of Justice," UNDT "should be authorized to suspend or waive the applicable deadlines for management evaluation where there are compelling reasons."

³² Such comprehensive coverage is provided by some Intergovernmental Organizations. See, for examples, section 5.1 of the African Development Bank's (AfDB) Whistleblowing and Complaints Handling Policy, and section 8 of the Asian Development Bank's (ADB) Whistleblower and Witness Protection Policy.

³³ See, for example, AfDB Whistleblowing and Complaints Handling Policy, sections 6.2 and 6.3; ADB Administrative Order No. 2.10, section 8.5; and Inter-American Development Bank (IDB) Staff Rule No. PE-328, section 109 and 110.

3. Sections 8 and 2.1 should be revised to extend protection to anyone who reports misconduct of any kind involving UN operations, not just violations of certain rules and regulations by a “United Nations *staff member*.” Best practice whistleblower standards established in international and national law require that whistleblower rights cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity that undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties. Clearly, misconduct by a UN peacekeeper or UN police officer should be covered by this definition even though they are not directly employed by the UN, as such misconduct has the potential to pose a specific danger to public health and safety, to create liability for the organization, and to undermine the organization’s mission, since these people are deployed under the UN banner. Moreover, since the Secretary General’s bulletin on “Special Measures for Protection for Sexual Exploitation and Sexual Abuse” requires UN staff members to report “concerns or suspicions regarding sexual exploitation or sexual abuse by a fellow worker, whether in the same agency or not and *whether or not within the United Nations system*,” (*emphasis added*)^{xxxviii} whistleblowers should be granted protection from retaliation if they make such disclosures.
4. Best practice whistleblower protection laws also cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as “assisting whistleblowers,” (to guard against guilt by association), and individuals who are “about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The World Bank (Staff Rule 8.02, section 2.04); AfDB Whistleblowing and Complaints Handling Policy (section 6); and IDB (Staff Rule No. PE-328, section 104) all provide such protections. The United Nations should as well.
5. Expand the list of offices to which a protected disclosure can be made. Currently, the list includes “the Office of Internal Oversight Services (OIOS), the Assistant Secretary-General for Human Resources Management, the head of department or office concerned or the focal point appointed to receive reports of sexual exploitation and abuse,”^{xxxix} which varies from mission to mission. This list should also include the Conduct and Discipline Unit/Team (which may be the focal point, but not necessarily) and the whistleblower’s supervisors.
6. The Ethics Office’s recommendations for protecting a whistleblower are not binding and there is no timeline for the enforcement of its decisions. Thus, even when the Ethics Office recommends relief – as it did in one recent case – the whistleblower may still not be protected. To address this concern, section 6.2 should be revised to provide a deadline by which the Secretary-General must decide whether or not to enforce the Office’s decision. We suggest the following language: “*Should the Ethics Office not be satisfied*

with the response from the head of department or office concerned, it can make a recommendation to the Secretary-General. The Secretary-General shall make and communicate the decision to adopt or reject the Ethics Office's recommendations within 30 days to the Ethics Office, complainant and the department or office concerned. In the absence of a response within the specified time period, the recommendations of the Ethics Office become effective."³⁴

C. Whistleblower cases before UNDT: Higher vindication rate, recognition of fundamental rights

"So you might say that you have a whistleblower defense, and I know that the Secretary-General says this in relation to encouraging people to come forward and denounce sexual exploitation ... and my response to that would be yes there is but you are going to lose your job, you're going to have to wait two years for your hearing and you might get compensation and then they're going to appeal it. In the meantime, what are you supposed to do? It's not a great incentive to say that there's an independent tribunal system that will protect you once we have sacked you. There needs to be something much more... There have to be more solid protections in place for those people who do come forward."

~ Former UN employee from a peacekeeping mission

The overall complainant win rate for whistleblowers in the new system (43.8%) is substantially higher than in the old system (25%).³⁵ In reviewing these cases, GAP found that UNDT has established the following rights for whistleblowers:

- The right to judicial review of an Ethics Office decision. In judgment UNDT/2011/63 Judge Vinod Boolell found that it "would be absurd that a decision, such as the one in this case, which impacts a staff member's rights, should be unchallengeable."^{xli}
- The right to the investigative report about his/her retaliation claims and the right to respond before a final decision is made that no retaliation occurred. Judge Adams pointed out that "this will also give to staff members who fear retaliation or have suffered it, confidence that they will be protected or the situation made good and give malefactors good reason to fear that they will be found out."^{xli}

³⁴ See section IV for additional recommendations regarding ST/SGB/2005/21.

³⁵ These statistics do not include cases in which the complainant was a whistleblower who was also disciplined. For example, in judgment UNDT/2010/176 the whistleblowers, who worked for UNDP, submitted complaints to the UNDP Administrator. An article subsequently appeared in the paper about the complaint and the whistleblowers were charged with disclosing or participating "in the disclosure of information to external sources." This case was categorized as whistleblower/misconduct case.

- A legal right to be protected from retaliation, which requires “a sufficient and adequate investigation.”^{xlii}
- The right to a shifting burden of proof once a *prima facie* determination of retaliation has been made. This means that the Ethics Office cannot merely adopt the investigation report into the retaliation claims prepared by OIOS. It must ensure that clear and convincing evidence exists that the contested action would have been taken absent the protected activity before dismissing the case.^{xliii}
- In one case in which the statute of limitations expired, Judge Nkemdilim Izuako took the extraordinary step of recommending a United Nations Human Settlements Programme (UN-HABITAT) case “to the Secretary-General for sympathetic review with a view to bringing substantive justice and closure to it” and pleaded for him to take “a compassionate view.”^{xliv} The judge wrote that:

This recommendation is made bearing in mind the special measures that have been put in place with regards to the protection of whistleblowers who risk their jobs, professional lives and livelihoods by courageously seeking to expose wrong-doings within the Organization. The United Nations, being the foremost international Organization for setting standards for governments and other organizations, needs to review the case of this Applicant as this will serve not only the ends of justice but also to reassure whistleblowers that they are indeed protected.^{xlv}

To date, no action has been taken by the Secretary-General in this case, despite subsequent requests from the whistleblower.

Although there were no peacekeeping whistleblower cases in which a final decision was issued during this time period, there were specific peacekeeping cases that involved potential retaliation claims (i.e. refusing to engage in misconduct) in which a final decision was issued.³⁶ In addition, there were several whistleblower peacekeeping cases in which UNDT issued an order or interim decision, but did not issue a final decision during the relevant time period. As a result, these cases are not included in the statistics above. Examples of such cases include:

- UNDT/2009/71: The complainant requested the suspension of the decision not to extend her fixed-term appointment at the United Nations Peacekeeping Force in Cyprus (UNFICYP). The complainant submitted a complaint against the chief, Civil Affairs Branch and the senior advisor, UNFICYP, to OIOS, though the exact allegations are not detailed. The complainant was subsequently informed that the investigation report had concluded “that the allegations

³⁶ See UNDT/2011/80, 10-196, 10-174 and 11-13, which are categorized as “potential retaliation cases.” In UNDT/2011/013, for example, the complainant, a former budget officer in the United Nations Assistance Mission for Iraq (UNAMI), alleged that his negative performance appraisal was a reprisal for his refusal to carry out orders given by his direct supervisor in contravention of the rules. In particular, he claimed to have refused, in 2006, to transfer USD \$20,000 to the Chief Budget Officer’s private account.

made in her complaint were not supported by the evidence and that the DFS had hence concluded that the case should be considered closed.”^{xlvi}

- UNDT/2009/0007: The complainant in this case requested that the implementation of the decision to remove her as the coordinator of the Women’s Rights and Gender Unit at the Office of the High Commissioner for Human Rights (OHCHR) be suspended. Although she did not raise whistleblower retaliation issues in her case per se, the complainant has publicly cited her role in "exposing U.N. involvement in sexual crimes in Bosnia, as well as the U.N.'s 'collusion' in the rendition of six Algerian nationals to Guantanamo Bay, as among the reasons she may have lost her job.”^{xlvii} In judgment 2011/156, which was issued in September 2011 (and therefore not incorporated into GAP’s review of decisions), Judge Coral Shaw found in the complainant’s favor and ordered that the decisions to reassign her and not renew her contract be rescinded.
- UNDT/2011/182: The complainant, who was a P-4 level Political Affairs Officer with the United Nations Assistance Mission for Iraq (UNAMI) contested the non-renewal of his fixed-term contract and other related administrative decisions. According to the decision, in 2005, after the complainant’s contract expired, he “made a series of serious allegations concerning the conduct of the SRSG [Special Representative of the Secretary-General for Iraq]... The OIOS undertook a comprehensive investigation into each of the 13 allegations made by the Applicant as well as into three complaints from other sources. Two of the latter complaints were found to have substance and the SRSG subsequently reimbursed the Organization.”^{xlvi}

The OIOS report also made negative observations about the complainant’s behavior during the investigation, ultimately resulting in OHRM placing a note in his Official Status File “that concluded that none of the allegations of misconduct made by the Applicant against the SRSG had been substantiated” and which stated that the complainant should therefore not be employed by the Organization in the future.”^{xlix} The complainant referred to shortcomings in the OIOS investigation, including the failure to “refer to the Applicant’s corroborating witnesses being interviewed by OIOS” or to provide an explanation about the reasons that they were not contacted.¹

Judge Coral Shaw found that OHRM breached the complainant’s rights by placing the note in his file without providing him the opportunity to respond or mentioning OIOS’ finding that the complainant “did not transmit the information regarding the allegations with knowledge of their falsity or with willful disregard of their truth or falsity.” The judge noted that:

The Organization imposed what was effectively a disciplinary outcome: a punitive ban on his whole UN career because he made a report which was subsequently found to be without sufficient foundation. If this type of response is permitted this would act as a disincentive to people coming forward with complaints... In addition, the Respondent’s actions towards the Applicant were in stark contrast to the treatment accorded the SRSG about whom he complained.

Although the SRSG was found wanting in two respects he did not receive any disciplinary action apart from the repayment of monies wrongfully claimed.^{li}

This case therefore highlights: a) a disparity in treatment between upper managers from the peacekeeping missions who commit misconduct and staff members who report it; b) that OHRM blacklisted the whistleblower when his reports were not substantiated, even though this may have been partly due to OIOS' apparent failure to contact his witnesses; and c) various shortcomings in OIOS investigations.

- Order 19/NY/2010:³⁷ In this case, the complainant, a former “senior United Nations official in the United Nations Interim Administration Mission in Kosovo (UNMIK), alleged that certain actions, supplied by other senior UN officials, concerning the management of public enterprises in Kosovo were unlawful.” He alleges that he was subsequently subjected to retaliation, which Judge Adams characterized as:

A number of apparently high-handed, perhaps unlawful, certainly extraordinary, actions to detain the Applicant and search his vehicle and his home. A poster containing his photograph was placed at the entrances of UNMIK headquarters to ensure that he would not be allowed to enter and ‘Do not cross’ tape was placed on his office for some considerable time, long after investigations had concluded that there was no wrongdoing on the Applicant's part. Not surprisingly, all these actions had a predictable and, it might have been, intended devastating effect upon the Applicant's reputation, magnified by widespread publicity.^{liii}

When it reviewed the complainant's retaliation complaint, the UN Ethics Office found that there was a *prima facie* case of retaliation, meaning that the case passed its initial burden of proof hurdle and proceeded to the next stage. In accordance with the UN Secretariat's whistleblower protection policy, an investigation was then conducted by OIOS. The Ethics Office, based solely on the body of the OIOS report (the Annexes to the report were apparently not read), subsequently decided that the complainant had not suffered retaliation. The judge commented that there were “a number of troubling matters that raise concerns about the adequacy of the investigation and the correctness of the [Ethics] Director's approach.”^{liiii}

In June 2012, UNDT Judge Goolam Meeran issued a final decision in this case. He found that the Ethics Office misapplied the burden of proof in making the determination that the complainant did not suffer retaliation. According to the judge, at that stage in the process, the burden rested not with the complainant but with the Administration, which was required to prove by clear and convincing evidence that it would have taken the same action absent the whistleblowing. He found that the “Ethics Office merely adopted the Investigation Report and recommendations of ID/OIOS and appears to have abrogated its responsibility to address the correct legal test.”^{liiv} This case demonstrates UNDT's

³⁷ Although several orders were issued in this case, a final judgment was not issued during the review period, so it was not included in the UNDT whistleblower case statistics.

commitment to monitoring the Ethics Office and sends a message that the judges will not tolerate failures to properly apply the UN whistleblower protection policy.

Once again, a number of the rulings reviewed show the impact on the justice system of improper investigative procedures and disciplinary practices. While the Tribunal attempts to create responsible jurisprudence and rule consistently, when due process norms are violated, these goals become unreachable.

D. Whistleblower cases before UNAT

The UN Appeals Tribunal only reviewed three whistleblower cases – none of which were from the peacekeeping missions – during GAP’s review period. The UNAT ruled against the whistleblower in all of these cases. As Louise Otis, a member of the Redesign Panel, noted in *“The Reform of the United Nations Administration of Justice System: The United Nations Appeals Tribunal After One Year,”* UNAT recommended in one of its first judgments that there be safeguards for those who report misconduct:

To date, however, the UNAT has not yet had occasion to clarify the legal aspects of retaliation, which remain governed by a Secretary-General’s Bulletin from 2005.^{lv} In the tribunal’s first year, the issue has arisen as a factual question only, and the UNAT has either dismissed the allegations outright,^{lvi} or has ruled the sanction in question to be justified regardless of the allegations,^{lvii} or has refused for procedural reasons to consider the allegations. In no case has the tribunal yet defined retaliation or whistleblowing, nor has it discussed key issues such as the applicable standard of proof.^{lviii}

On July 8, 2011, just after the end date of GAP’s review of Tribunal decision, the UN Appeals Tribunal issued a decision in a whistleblower test case. This judgment, 2011-UNAT-148, involved the case of Artjon Shkuratj, the United Nations Development Programme (UNDP) whistleblower who made much publicized disclosures regarding UNDP wrongdoing at its Democratic People’s Republic of Korea (DPRK) office. Shkuratj was partially vindicated before UNDT, which substantiated the UN Ethics Office Director’s finding³⁸ (which UNDP failed to enforce) that the organization violated his due process rights by not giving him a chance to review or respond to adverse findings about him made by an investigative body. However, UNDT did not substantiate retaliation and Shkuratj therefore appealed the decision.³⁹

UNAT dismissed the complainant’s appeal and reduced the amount of compensation ordered by both UNDT and the UN Ethics Office Director. Unfortunately, this decision establishes the

³⁸ This case is not included in the statistic above regarding the Ethics Office’s record of protecting whistleblowers, as the role that the Office played in this case was distinct, because the case was not handled according to normal UN or UNDP procedures for protecting a whistleblower.

³⁹ GAP, which has periodically advised Shkuratj throughout his ordeal, strongly disagreed with the Judge’s finding that there was no retaliation in this case. See <http://www.whistleblower.org/blog/31-2010/720-un-tribunal-awards-compensation-to-long-suffering-undp-whistleblower> .

precedent that UNAT can alter, with little explanation or justification, awards made by the office charged with protecting UN whistleblowers from retaliation. The only justification that UNAT provided was that the Ethics Office's award seemed "excessive, especially in view of the finding against Shkurtaj on the underlying merits." UNAT's ruling ignores the fact that Shkurtaj incurred \$25,000 in legal costs alone, simply for trying to get UNDP to honor an Ethics Office decision that it should have enforced in the first place. For those rare UN employees who are vindicated by the Ethics Office, this decision could result in them facing years of protracted litigation just to have the Office's decision enforced.⁴⁰

IV. Lack of Protection for Witnesses

"If staff members and others are constrained from appearing before the Tribunal or from giving full and honest evidence because of a perception or fear of retaliation this strikes at the very heart of the independent and transparent system of administration of justice mandated by the General Assembly resolution 63/253."

~Judge Coral Shaw, Judgment 2011/156, para. 95

The protection of witnesses before the Tribunal is an issue that was raised in several Tribunal judgments and by some of the complainants whom we interviewed. Given that this issue could impact whistleblowers who are called to testify before the Tribunal or complainants with retaliation claims who call others to testify, GAP believes that it is an important concern for the United Nations to address.

In judgment 2011/156, Judge Coral Shaw noted that:

Some witnesses before the Tribunal spoke of fears of possible retaliation by the Organization against those who chose to or were asked to give evidence to the Tribunal... The former staff representative who gave evidence spoke of the concerns of staff members who would otherwise have been prepared to speak on behalf of the Applicant but who were too apprehensive about the possible adverse consequences to them... It is for the Respondent as employer of all staff members to assure them that that they are immune from any suggestion of retaliation for participating in the Internal Justice System. If staff members and others are constrained from appearing before the Tribunal or from giving full and honest evidence because of a perception or fear of retaliation this strikes at the very heart

⁴⁰ UNAT tends to reduce compensation awarded by UNDT in general. According to a 2011 UN Advisory Committee on Administrative and Budgetary Questions report (A/66/7/Add.6): "During the period from 1 July 2009 to 31 May 2011, 38 judgments of the Dispute Tribunal awarded compensation equal to, or more than, six months net base salary, although a number of these were subsequently reduced or vacated by the Appeals Tribunal... Upon enquiry, the Advisory Committee was informed that the judgments overturned by the Appeals Tribunal to date had resulted in a reduction in awarded compensation of approximately \$1,880,000." (para. 89)

of the independent and transparent system of administration of justice mandated by the General Assembly resolution 63/253.^{lix}

The importance of protecting witnesses from retaliation is heightened by the fact that UNAT judges have been reluctant to substantiate disciplinary decisions when an anonymous witness refuses to testify. In decision 2010-UNAT-087, for example, the judges stated that they are of the view that “a disciplinary measure may not be founded solely on anonymous statements.”^{lx}

Similarly in UNDT/2010/185 Judge Vinod Boolell held that:

Where a party in a disciplinary case is relying solely or heavily on the testimony of a witness on whom anonymity was conferred at the investigation stage, to establish a charge of misconduct, that party cannot expect the Tribunal to endorse this decision during a hearing. It is up to the party seeking anonymity, or any other protective measure in respect of a witness, to move the court for those measures to be granted.^{lxi}

Although the UNDT judges have granted anonymity in some cases (see UNDT/2010/41, in which the witnesses were victims of human trafficking), it has not done so in every case (see UNDT/2010/185). Because no protections currently exist for those who testify before the Tribunal, this leaves potential witnesses and whistleblowers in a very vulnerable position. As the UN Ethics Office pointed out in its 2010 Activities Report:

During the reporting period, one of the requests received by the Ethics Office was related to a request from the Registrar of the United Nations Dispute Tribunal to monitor the situation of staff members who had provided testimony in the course of a case and who had expressed fear of retaliation for their collaboration with the Tribunal. This means that testifying before the Tribunal or collaborating with it would be considered a protected activity, an aspect that is not currently included in the existing policy on protection against retaliation. The Ethics Office is engaged in consultations with relevant offices within the Secretariat to consider revisions to the protection against retaliation policy in the light of recent developments in the internal justice system.^{lxii}

In April 2012, GAP asked the UN Ethics Office director if any action had been taken by the administration to address this concern. We were told that the idea has not yet been discussed at a policy level within the Organization and that, while the Office “would currently assess such requests for protection on a case by case basis, taking into consideration the spirit of the Bulletin, the Ethics Office has recommended a comprehensive review of the Organization's existing PaR [Protection Against Retaliation] policy, which would include consideration of the scope of coverage under the current policy.”

It should be noted that the failure to protect witnesses was also a problem in the previous justice system. As attorneys Edward Patrick Flaherty and Sarah Hunt pointed out in a 2006 article, “the UN’s internal dispute resolution system also has the problem of reluctant and hostile witnesses

... If a staff member is asked to give evidence, many are reluctant to do so due to the possibility of future retaliation by the hierarchical bureaucracy.^{lxiii}

Recommendations

“I find it deeply upsetting that this is the nature of the United Nations, that we cannot have the transparency that’s needed in order to give protection to people, not just the people who are whistleblowers but also the people who are the subjects of the abuse, mainly the women in the countries where they are serving. It’s absolutely incomprehensible to me that they won’t deal with it.”

~ Former UN employee from a peacekeeping mission

The lack of protections for witnesses before UNDT and UNAT is inconsistent with what the UN promotes in its member states. The UN Office of the High Commissioner for Human Rights has stated that witness and victim protection “is an essential component of efforts to monitor, investigate and prosecute human rights violations and other crimes” and has promoted witness and victim protection programmes in a number of countries.^{lxiv} A report by the UN High Commissioner for Human Rights on the “Right to Truth” found:

- “If a country’s justice system is unable to secure convictions because of failures in the production of witness evidence, its capacity to deal effectively with past abuses as well as the confidence of its people in the justice system are compromised. Thus, the failure to provide protection to witnesses can severely affect fundamental rights, such as the right to justice and the right to the truth.”
- “The protection of witnesses and victims is also an integral part of the fight against impunity. Principle 10 of the updated Set of Principles for the protection and promotion of human rights through action to combat impunity states that ... States should ensure the safety of witnesses and others from intimidation and retaliation, before, during and after judicial, administrative or other proceedings.”^{lxv}

Further, according to the Annex to General Assembly Resolution 60/147:

A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies ... States should ... Take measures to minimize the inconvenience to victims and their representatives ... and ***ensure their safety from intimidation and retaliation***, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims ... Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.^{lxvi} (***emphasis added***)

The UN is not meeting this standard in operating the internal justice system at the organization itself.

In addition, one respondent interviewed for this study observed that there is a “great bias” against those who exercise their right to appeal and suggested that filing a claim before the justice system should be a form of protected disclosure. At the World Bank, an IGO that has its own administrative tribunal, staff members are prohibited from retaliating against any person who uses the conflict resolution system in good faith.^{lxvii} The UN should therefore prohibit retaliation against those who use the internal justice system and protect those who believe that they’ve been retaliated against for using it.

RECOMMENDATION: The UN Secretariat protection against retaliation policy (ST/SBG/2005/21), and the corresponding policies at the UN funds and programmes, should be amended to include protections against retaliation for those who testify before the Tribunal – including witnesses or victims who may not be employed by the organization – as well as those who use the internal justice system.

In a well-known case of sexual abuse that was filmed and posted on the Internet, a Haitian boy was allegedly sexually assaulted by Uruguayan peacekeepers. He was subsequently scheduled to testify against his alleged attackers. In January 2012, the men were released from jail and a UN spokesperson said that they would be free “until the teen could be located for testimony at which point the men would be back for trial.”^{lxviii} The statement suggested that the men would not be convicted unless the witness testified. The boy and his family then traveled from Haiti to Uruguay for a judicial “inquiry” (it was not a penal trial).^{lxix} The demand that the victim testify in this way may well be considered an unreasonable burden to place upon him, given what had allegedly already been done to him. The insistence that he appear in Uruguay, as well as in the courtroom, could also be considered a violation of this General Assembly resolution.

This, however, is one of the “success” stories, as it is unfortunately one of the few cases in which the troop-contributing country took steps to hold the alleged perpetrators accountable. According to statistics on the Conduct and Discipline Unit’s website, in 2010 the UN followed-up with member states in 74 cases regarding sexual exploitation and abuse, but only received responses regarding disciplinary action taken by national authorities in 29 cases (39 percent). In 2011, the UN followed-up with 60 states and received only 26 responses (43 percent).^{lxx} In misconduct referrals that excluded sexual exploitation and abuse, the response rate was even lower: 21 percent in 2010 and 33 percent in 2011.^{lxxi}

Such a poor rate of follow-up regarding prosecutions suggests that victims in peacekeeping missions are denied any sort of judicial remedy when they are victimized by peacekeepers and that member states – and the UN itself – are failing in their obligation to “make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy,” as stipulated in General Assembly Resolution 60/147.^{lxxii} Indeed, as the United States Institute of Peace pointed out in a 2005 report, there is a need “to ensure effective programs of assistance for victims who make substantial claims, even when neither the victim nor the United Nations is able to obtain redress from the perpetrator of the abuse.”^{lxxiii}

RECOMMENDATION: The UN should take steps to ensure that those who are victimized by peacekeepers have the right to remedy.⁴¹ This should include the prosecution of the perpetrators. It could also include granting those who have been victimized by anyone acting under the UN banner access to the internal justice system or an analogous system. The UNDT and UNAT Statutes should also be revised to allow Member States or other third parties to raise claims “based on the alleged responsibility of United Nations officials, e.g. within the framework of peace-keeping operations,” as previously suggested before the Sixth Committee in its 64th session.^{lxxiv}

It should be noted that in January 2012, the Assistant Secretary General in the UN peacekeeping department said that the UN is considering the establishment of a sexual exploitation and abuse sanctions list of countries that would no longer be allowed to contribute troops to peacekeeping missions in order to pressure countries to prosecute.^{42lxxv} One employee in a peacekeeping mission whom we spoke with was extremely supportive of this idea. S/he said that the UN claims that if it could look into misconduct or prosecute, troop contributing countries wouldn’t send peacekeepers, but s/he didn’t think that was true. S/he also stated that “there’s a lot of frustration in the mission that member state rules don’t allow for us to deal with this issue properly. Working for the UN is not a right; it’s a privilege and immunity should be functional.”

This sanctions list would be an important first step. At the very least, the UN should be publishing the names of countries that fail to prosecute. Although this list presumably exists, it is not released publicly and GAP has been unable to obtain it from any of the sources with whom we spoke.

RECOMMENDATION: Create a sanctions list of countries that will no longer be allowed to contribute troops due to their failure to prosecute peacekeepers and publicly release a list of countries that have failed to comply with their prosecution obligations. At the very least, a list of all countries that have failed to take action on such referrals should be made publicly available.

⁴¹ For a detailed analysis of this issue, see Sweetster, Catherine. “Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel.” *New York University Law Review*, (2008). 1643-1677 and Zeid, Ra'ad Zeid Al-Husseini. *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in UN Peacekeeping Operations*. Rep. no. A/59/710. United Nations General Assembly, 24 Mar. 2005.

<<http://cd.undp.org/Portals/0/Documents/KeyDoc5.pdf>>. As Sweetster notes, compensation is critical to helping victims obtain the resources necessary to “rebuild their lives... It represents recognition and concern for victims by the international organization, rather than merely the individual wrongdoer.” (pg. 1662) Similarly, in paragraph 56 of his report, Prince Zeid suggests that “The United Nations ought to establish a voluntary trust fund for victims to provide assistance to victims of sexual exploitation and abuse by United Nations peacekeepers.”

⁴² This idea has been proposed in various studies. See for example, the U.S. Institute of Peace’s 2005 study on “*American Interests and UN Reform: Report of the Task Force on the United Nations*.” It recommended that “states that prove unwilling or unable to ensure discipline among their troops should not be permitted to provide troops to peacekeeping missions.” (p. 24) See, also, Alexandra Harrington’s 2005 *Hein Online Law Journal Library* article “Victims of Peace: Current Abuse Allegations against U.N. Peacekeepers and the Role of Law in Preventing them in the Future.”

V. Accountability of Managers and Tone at the Top

“The reform of the justice system was supposed to help improve accountability at the UN but unfortunately the judges are reluctant or afraid, I don’t know, but there is nothing about accountability in the new justice system. It’s totally absent ... We get some sort of professionalism, but not accountability.”

~ External attorney who represents UN Staff Members

When the Redesign Panel members reviewed the previous justice system at the UN, they found that it promoted “neither managerial efficiency nor accountability.”^{lxxvi} In proposing a new system, the Panel emphasized “that the effective rule of law in the United Nations means not only the protection of the rights of staff members and management, but accountability of managers and staff members alike.”^{lxxvii} It further stated that “reform of the internal justice system is a sine qua non for broader management reform of the Organization. A large part of the current management culture in the Organization exists because it is not underpinned by accountability. Accountability can be guaranteed only by an independent, professional and efficient internal justice system.”^{lxxviii}

This section will analyze the actions taken under the new system to hold managers accountable and respondents’ perception regarding the accountability of managers before the justice system. At the outset, it should be noted that, in a strict sense, the Tribunals are not really established to order or enforce discipline. Although they are empowered to do so, their primary purpose is to redress an injustice done to a staff member and not to try, convict and punish the parties responsible for that injustice. The actions of the Tribunals in this regard reflect the lack of precedent for dictating or enforcing discipline.

A. Study Finding: UN employees believe the justice system is not doing enough to promote accountability

“There is no accountability for management. If you go before the Tribunal you may win or lose your case, but the manager will not be held accountable.”

~ UN employee stationed in a peacekeeping mission

Many of the complainants, lawyers and staff representatives with whom we spoke had strong opinions about the ways in which the new justice system is – or is not – promoting the

accountability of managers. On the positive side, some people expressed the view that the mere existence of the new justice system is improving managers' behavior. According to one staff representative, "everyone knows about the justice system now. Especially at the managerial level, they are very much aware of the justice system and how it works. So they are willing to take the reins up and send out documents regarding what's acceptable, codes of conduct, etc. So [the new justice system] has made a difference in that sense."

However, in general the people whom we interviewed were of the view that the justice system did not do enough to hold senior officials, managers or the administration accountable. In our interviews this was the third⁴³ most-frequently mentioned shortcoming with the justice system (after problems with the quality of judgments and with investigations). Some of the concerns raised by the respondents who spoke with us included:

- Judges are not recommending accountability sanctions (for those who commit improprieties) frequently enough.
- Managers are not being personally held accountable. For example, no money is taken from their budget if the organization loses the case and although they may defend their decision before the Management Evaluation Unit (MEU) – which reviews administrative decisions contested by staff members prior to a case proceeding to the internal justice system – they are not always required to defend the decision before UNDT.
- External lawyers are seeing the same types of cases over and over again/managers are not learning from their mistakes.
- Attorneys for the Secretary-General are not disciplined and there is no recourse for addressing their misconduct.
- The justice system is not addressing the disparity in disciplinary sanctions imposed on managers (less severe) versus staff members (more severe).
- Some senior managers were not disciplined after they lied under oath, even though the judge noticed their perjury.
- The Tribunal can only recommend that action be taken against the manager and cannot enforce the outcome.
- The Administration has ignored some deadlines and orders issued by the Tribunals and there were no consequences for having done so.

GAP also met with the Management Evaluation Unit (MEU) in the Office of the Under-Secretary-General for Management, which had a very different view of accountability issues connected to managers. According to the MEU Chief, senior managers are "fully embracing the system" and "managers comply 100 percent with requests for comments ... The quality of the comments is high."

The following sections will analyze the actions that the UNDT and UNAT judges have taken with regards to holding staff members and managers accountable, to determine if some of the perceptions raised by respondents are supported by the actual record of the Tribunal.

⁴³ This concern tied with two others: 1) the independence of judges; and 2) the view that the justice system itself was fundamentally flawed or too similar to the previous system. Each of these concerns was raised by eleven people.

B. Study Finding: UNDT & UNAT judges rarely refer cases to the Secretary-General for action to enforce accountability

“The UN has procedures in place [for addressing corruption in peacekeeping missions], but implementing the procedures is a problem ... The best thing they can do is to hold managers accountable, especially before UNDT.”

~ UN employee from a peacekeeping mission

“The Tribunal wishes to call attention to the conduct of some managers who have through recklessness and their lack of the required managerial skills, engaged in actions in their official capacity that not only embarrass the Organisation but bring about heavy cost-implications in the award of monetary compensation. It is necessary that the Secretary-General calls such managers to account in a way that there are real or tangible consequences for the individual manager.”

~ Judge Nkemdilim Izuako, judgment 2011/192

The Redesign Panel recommended that the Dispute Tribunal “be given express power to refer the evidence in any matter to the Secretary-General for consideration of possible disciplinary action, action to enforce financial accountability or the lifting of immunity.”^{lxxxix} The Panel also recommended that:

In order to achieve an effective change in management culture and to properly address the prevailing perception that the present system shields managers from accountability, the Redesign Panel proposes that they personally answer for their acts and decisions and that the formal justice system entertain applications for the enforcement of individual financial accountability. Moreover, United Nations Dispute Tribunal judges should refer appropriate cases to the Secretary-General for possible action to enforce accountability.^{lxxx}

As a result of the Redesign Panel’s recommendation, Article 10.8 of UNDT’s statute and Article 9.5 of UNAT’s Statute allow the judges to “refer appropriate cases to the Secretary-General of the United Nations or executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability.” This referral power is an important step in promoting a more effective and accountable management culture within the UN. In reviewing UNDT and UNAT cases, GAP therefore looked for examples in which the judges exercised this authority.

We found that although the UNDT judges frequently made observations regarding shortcomings in an oversight process or in a decision taken by a manager, they rarely referred cases to the Secretary-General under Article 10.8. None of the lawyers or complainants whom we interviewed had represented a client in which this was done. In general, the external attorneys with whom we spoke believed that accountability referrals were under-utilized and several expressed a desire to see this power exercised more often. For example, one attorney observed

that “we rarely see anything about accountability in their judgments... They never say if the people responsible for the improprieties should be held accountable. There should be a link... I think that it would start a process by which the Secretary-General is compelled to do something about it.” This attorney claimed that one of the reasons judges fail to make such referrals in cases involving senior management is due to the fact that the parties they might refer outrank them, a problem that s/he identified as “a major deficiency in the system.”

When we asked a representative from the UN Office of Legal Affairs if s/he knew how many accountability referrals had been made, we were told that s/he believed it had happened in two cases. One of the cases was appealed, however, so no action was taken pending the outcome of that appeal. The representative said that s/he believed that action was taken in the other case, but did not say which case it was nor could s/he explain the process through which the UN would uphold such a decision (i.e. s/he didn’t know who in the UN would be responsible for ensuring that such a decision was implemented by the Secretary-General).

GAP found two UNDT referrals (under article 10.8) during the period that we reviewed. They were:

UNDT/2010/030/R: In this case, Judge Adams found that the Under-Secretary-General of the Department for General Assembly and Conference Management’s (USG/DGACM) testimony before the Tribunal was “untruthful in a number of significant respects” and referred the matter to the Secretary-General under article 10.8 for possibly disciplinary procedures and measures. The judge wrote that “the matters potentially to be referred concerned the USG/DGACM’s *official* conduct as Under-Secretary-General in relation to the Applicant’s complaint, and his *personal* conduct in giving evidence.” The Judge found that the USG’s behavior “concerns conduct which undermines the integrity of the internal justice system and the processes of the Tribunal itself.” The Judge considered the conditions under which such a case should be referred and concluded that the conduct should be seen as “significantly inappropriate” and that the seniority of the official should be considered.^{lxxxix}

But rather than take action to enforce accountability, the Secretary-General appealed this decision to UNAT, contending that “the trial court had no authority to direct the Secretary-General to do anything.”^{lxxxix} In response, the UNAT judges affirmed Judge Adams’ referral under Article 10(8) in its entirety, thereby demonstrating their support for accountability referrals.

UNDT/2011/58: In this decision, Judge Marilyn J. Kaman referred the case to the Secretary-General for possible enforcement of accountability measures, “to determine whether the unfortunate possibility of nepotism may have occurred.” Judge Kaman wrote that she hoped “that the Secretary-General will take this accountability referral seriously so that a complete and full investigation into the described practices within the present Judgment can be made.”^{lxxxix}

After GAP completed its review of Tribunal cases, we were informed that UNDT judges made referrals under article 10.8 in at least two subsequent decisions.⁴⁴ These included:

UNDT/2012/89: In this decision Judge Vinod Bollell referred a case to the Secretary-General for investigation. The person to be investigated moved from United Nations Population Fund (UNFPA) to a top position in Eritrea with the United Nations Development Program (UNDP). The judge found that this person appeared to be “escaping accountability by virtue of his move to UNDP, and that is something that cannot be condoned.”^{lxxxiv}

UNDT/2012/114: In this decision, it was found that the United Nations Office at Nairobi’s (UNON) legal counsel advised the UNON Director General that “the Tribunal’s orders were illegal and therefore UNON was allowed to not implement the suspension of action order while an appeal to the UN Appeals Tribunal (UNAT) was sought.” Judge Nkemdilim Izuako found that “serious concerns arise as to the future of a justice system in which a legal Counsel representing the Secretary-General actually advises and argues that ‘her belief’ that the Tribunal exceeded its jurisdiction entitled her to advise UNON to disobey the Tribunal’s orders... Such brazen contempt for the rule of law is certainly not expected of a legal officer who represents the Secretary-General of the United Nations!” The judge also found that:

UNON officials by their actions in this case have engaged in strong arm tactics and acted as if they make their own laws in a way that no decent organization can be proud of, least of all the United Nations Secretariat. As a global organization that, among other things, has set up at least a unit whose mandate is the promotion of the rule of law worldwide, the Secretary-General’s attention needs to be called to the actions of those of his officials who trample on the enduring principle of the rule of law and thereby enthrone and elevate impunity.

The case was therefore referred to the Secretary-General to determine “a. What action should be taken in respect of the conduct of the Director General of UNON in dealing with the complaints made by the Applicant and disregarding the Tribunal’s orders; and b. What action should be taken in respect of the conduct of the UNON’s Legal Adviser in advising disobedience of the Tribunal’s orders.”^{lxxxv}

The four decisions above show that some UNDT judges are willing to hold managers in the UN accountable, especially in connection to questionable actions taken by managers before the Tribunal. However, GAP did find reluctance by some judges to make referrals under Article 10.8. Notably, in decision 2010/174 Judge Jean-François Cousin stated that “whereas the Applicant requests that disciplinary proceedings be instigated against the persons allegedly responsible for acts of harassment and discrimination against him, it is not for the Tribunal to order the Secretary-General to take the initiative of instituting disciplinary proceedings against a staff member. The Tribunal can therefore only reject such a request.”^{lxxxvi} Judge Cousin therefore downplayed the powers given to the Tribunal under Article 10.8. Our review showed that this approach to the accountability functions of the Tribunals tends to prevail, and it remains

⁴⁴ It is possible that other referrals were made after the conclusion of GAP’s review, as we did not review cases after June 30, 2011. However, since these two cases were specifically brought to our attention, we decided to incorporate them into this study.

a source of some concern. Also, GAP did not find any UNAT cases in which a referral was made under Article 9.5 of its statute.

The Office of Administration of Justice, (OAJ), which coordinates the functioning of the internal justice system, did not have statistics on its website regarding the number of cases in which an accountability referral was made or information about the outcome of such referrals. This is a major shortcoming, as numerous respondents whom we spoke with stressed the importance of the UN having examples of cases in which managers were held accountable. As one employee from a peacekeeping mission said, if the UN wants to tackle corruption and misconduct in the peacekeeping missions, “the best thing they can do is to hold managers accountable, especially before UNDT.” In addition, the OAJ should report on the Administration’s record of implementing orders and recommendations issued by the Tribunal judges.

Based on our interviews, GAP considers that staff members’ opinions on the effectiveness of the new justice system would increase substantially if they knew that the Secretary-General were acting on accountability referrals made to him by the Tribunal judges. When we asked respondents if they had any specific recommendations to address issues of corruption and misconduct in the field, the most frequent recommendation referred to steps that might be taken to improve the “tone-at-the-top” and to hold managers accountable. (see Annex IV) Similarly, in a 2011 report on Administration of Justice the UN Advisory Committee on Administrative and Budgetary Questions noted that “the number of judgments in favour of staff to date could be seen as being reflective, at least in part, of managerial weaknesses. These must be addressed as matter of priority, which will also require that individuals be held accountable for their managerial actions.”^{lxxxvii}

RECOMMENDATION: When the resolution of a case at the UNDT or the UNAT clearly shows managerial misconduct, judges should refer the case in question to the Secretary-General under Article 10.8 of UNDT’s Statute and Article 9.5 of UNAT’s Statute, rather than merely noting concerns about certain managers’ behavior.

RECOMMENDATION: The Secretary-General should take action in the cases referred to him under Article 10.8 of UNDT’s Statute and Article 9.5 of UNAT’s Statute, as appropriate.

RECOMMENDATION: OAJ should prominently post statistics on its website and in its reports regarding the number of referrals made by the judges and the subsequent actions taken by the Secretary-General in those cases. It should also report on the Administration’s record of implementing Tribunal orders and recommendations. This information should also appear in its reports to the General Assembly.

C. Study Finding: The Secretary-General and his representatives have occasionally failed to uphold the rule of law

An issue that was raised several times by Judge Adams was the failure of UN management to comply with UNDT orders. For example, in the *Bertucci* case (order 59) Adams exposed

continued efforts by UN management to undermine the authority of UNDT. Judge Adams found that the Secretary-General failed to produce documents ordered by the Tribunal and noted that the Secretary-General, “does not get to decide which orders he will comply with and which he will ignore. *In my view, the refusal constituted an attack on the rule of law embodied in the Statute of this Tribunal.*” (emphasis added)^{lxxxviii}

This “attack on the rule of law” by the Secretary-General is troubling, given the role of the UN in promoting the rule of law throughout the world. As Louise Otis, a member of the Redesign Panel, noted, in the *Bertucci* case:

In light of the continued non-compliance with the orders, Judge Adams ultimately rendered a decision in favour of the Applicant, with negative inferences having been drawn from the Secretary-General’s refusal to produce the documents. In dismissing the Respondent’s arguments that the Secretary-General should be considered like a head of state, and so accountable politically rather than judicially, Judge Adams’ rejection was pointed: ‘His lawyers can claim that the Secretary-General should be considered as a head of state as much as they like, but he leaves his crown outside the courtroom.’^{lxxxix xc}

However, the *Bertucci* case is not the only instance in which such a showdown has occurred. According to *Washington Post* journalist Colum Lynch, the Secretary-General, “has refused to comply with numerous orders from a new U.N. personnel tribunal to hand over confidential documents and other sensitive information needed to resolve legal claims by U.N. employees of unfair treatment, according to court documents.”^{xc}

The Secretary-General should agree to abide by UNDT and UNAT orders. As the Internal Justice Council noted in its 2010 report on Administration of Justice:

[I]t is important that the General Assembly and the Secretary-General endorse the principle that the orders of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal are binding. This was a key aspect of the report of the Redesign Panel (A/61/205, para. 14),^{xcii} and was endorsed by the Secretary-General (A/61/758, paras. 17 and 21). Moreover, the endorsement of this principle is important if the Dispute Tribunal and the Appeals Tribunal are to play a significant role in ensuring accountability.^{xciii}

RECOMMENDATION: The Secretary-General and his representatives must commit to adhering to orders and judgments issued by the Tribunals and to enforcing the rule of law embodied in the Statute of the Dispute and Appeals Tribunal.

In a related issue, some people whom we interviewed expressed concerns about a lack of discipline for lawyers for the Secretary-General who commit perjury, as well as the lack of consequences when the administration ignores deadlines and orders. Three people suggested that UNDT and UNAT should have the power to hold a party in contempt. Although the UNDT judges have already concluded that they have this power, the UN may want to consider revising

the UNDT and UNAT Statutes to explicitly provide for it and to allow the judges to issue an obligatory fine to any party that fails to comply.

D. Additional recommendations for improving managerial accountability

“Individuals must be personally liable for these decisions. And the culture of the impunity at the top – which is compounded by immunity as well – is devastating to transparency and accountability. It can’t happen under those circumstances. So there needs to be consequences for the individuals who make these decisions or fail to intervene.”

~ Former UN employee from a peacekeeping mission

To promote accountability, the Redesign Panel recommended that managers “personally answer for their acts and decisions and that the formal justice system entertain applications for the enforcement of individual financial accountability.”⁴⁵ This, however, was not done. While Article 10.6 of UNDT’s Statute does allow the Tribunal to award costs against a party that “manifestly abused the proceedings before it,”⁴⁵ it does not allow for applications for the enforcement of individual financial accountability per se.⁴⁶ An independent attorney who brings cases before the Tribunals told us that the Redesign Panel envisioned each department/each office defending its own decisions. The Panel did not anticipate a centralized legal office responsible for all defense. S/he views this fundamental change in the Panel’s vision as unfortunate: “Because at this stage it appears that the attorneys who are representing the organization simply feel that they are defending the organization, really at all costs.” Also, compensation is paid from a general account rather than a specific department’s budget, thereby negating personal repercussions for managers who make poor decisions.

The Bar Association for International Governmental Organizations (BAIGO), a group of attorneys who are active before UNAT, UNDT and other IGO Administrative Tribunals, has been especially critical of the way in which the new justice system was designed:

The payment of compensation out of general funds encourages abuse of authority, improper selection and questionable investigation practices at the UN. The Secretary-General has never reported or explained why responsible officials are

⁴⁵ In some cases UNDT has used this power to fine a complainant. For example, in UNDT/2009/72 and 2010/85, the complainant requested the rescission of the decision by which the UNHCR Inspector General decided not to follow-up on his report about professional misconduct. He claimed that he was retaliated against for his staff representation and whistleblowing activities. The Tribunal fined the complainant for committing a “manifest abuse of proceedings” in connection with his request to recuse the Geneva judge’s handling of the case. In GAP’s opinion, in the absence of a credible system for addressing conflicts of interests by a judge, the propriety of such a fine is questionable.

⁴⁶ In judgment 2011/117, Judge Marilyn Kaman found that it “is clear that the Dispute Tribunal lacks the authority to ‘initiate punitive Action’ (subparagraph c), to hold two of the Applicant’s superiors responsible for ‘their nefarious acts ... and to make them personally liable to pay damages...’”(Para. 17)

not sanctioned, which encourages further abuses and impunity... At the same time, the Administration does not hesitate to assume all legal costs for its decision-makers' incompetent and abusive decisions.^{xcv}

It must be noted that efforts are underway to address this shortcoming in the system. In October 2011, the UN Advisory Committee on Administrative and Budgetary Questions issued a report emphasizing “the need to ensure that individuals whose actions violate the Organization’s rules and procedures and lead to a financial cost to the Organization are held accountable.”^{xcvi} Four months later, the General Assembly requested the Secretary-General to submit a report with “information on the concrete measures taken to enforce accountability in cases where contested decisions have resulted in awards of compensation to staff,”^{xcvii} so it appears that the General Assembly is reassessing the lack of individual financial accountability. At this date, however, the justice system remains structured only to address mistreatment of staff by rectifying an adverse decision or action. It is not a justice system in the conventional sense; it is not designed to punish those guilty of misconduct or crimes.^{47 48}

RECOMMENDATION: The UN should revise the UNDT and UNAT Statutes so that the system can entertain applications for the enforcement of individual financial accountability, as recommended by the Redesign Panel.

VI. Impact of the Tribunals’ Decisions

“I see the same cases over and over because there’s no downside. Managers don’t get it; there’s no detriment to what they do – no one pays. The whole purpose of a legal system on a macro level is to change behaviors... This system doesn’t change the behavior; it’s still business as usual.”
See “Improving Criminal Accountability in United Nations Peace Operations,” by the Stimson Center (Durch, William, et al) for a detailed proposal regarding the creation of a Criminal Investigations Service within OIOS and a Criminal Justice Support Division within the OAJ.
External attorney who represents UN Staff Members

See also Ladley, Andrew. "Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations." *Politics and Ethics Review* 1.1 (2005): 81-90. <<http://www.kentlaw.edu/faculty/bbrown/classes/IntlOrgSp09/PEACEKEEPERABUSEIMMUNITYANDIMPUNITY.pdf>>. Ladley suggests the creation of a UN Criminal Court to address abuses and asserts that “a properly resourced and established UN court would remove the possibility of abuse in local courts and the strain on resources or political relationships.” (p. 88)

⁴⁸ As Kathleen Jennings wrote in her 2008 report, “What is often overlooked is that the disconnect between the UN administrative rules and home legal regime holds true for civilian staff as well. That a person is fired from their UN job does not imply further action on the part of his/her home country, especially where the violation does not rise to a level of a crime in the home jurisdiction. Indeed, because there is no such thing as ‘conduct unbecoming’ or disobeying an order among civilians, they may be less likely than military personnel to see further punishment beyond the administrative sanctions meted out by the UN. Moreover, even when there is an underlying crime (such as rape, attempted rape, assault or statutory rape), it is still primarily left to the civil or military justice systems of the home country to decide whether or not to prosecute.” (p. 21)

One of GAP's initial goals in conducting this research was to determine the extent to which actions ordered by the new Tribunals to address injustice are mainstreamed into current practice in the peacekeeping missions. We wanted to assess the extent to which reforms enacted have led, in turn, to more thorough investigations, stricter adherence to due process, collaboration with national investigators or improvements in the UN's peace-keeping (and peace-building) capacity. We were hoping to find that the new justice system has promoted accountability in the peacekeeping missions.

On the positive side, the Secretary-General noted in his 2011 Administration of Justice report that the reformed justice system is related to:

An evolution in the area of staff-management relations. In particular, managers are becoming increasingly aware of the consequences of their decisions and want to ensure that these are made in accordance with the applicable rules and policies. This has resulted in more queries, requests for advice and guidance from programme managers for the relevant legal offices prior to the taking of decisions...

Thus, on a preliminary basis, one may state that the new system of justice is creating an emphasis on the prevention of disputes and, where these cannot be avoided, programme managers are more routinely consulting with the lawyers in order to ensure that their decisions are well informed from a legal and policy standpoint... While these emerging practices have been identified, it is also clear that not all managers have developed an acute awareness of the requirements of the new system. Thus, from a performance standpoint, more time is required in order to determine whether these emerging practices are coalescing into a trend.^{xcviii}

Although this is progress, GAP was unable to find evidence that the new justice system has promoted accountability in the peacekeeping missions specifically. Instead, rulings issued over the past two years and interviews indicate that:

- Broad policy changes affecting the organization as a whole have been made as a result of the reforms of the justice system. Respondents specifically cited improvements in the staff selection system, and their observations is validated by the Secretary-General's 2011 report on the Administration of Justice:
 - "In September 2009 as soon as the ambiguity in the provisions regarding priority consideration had been identified, the Assistant Secretary-General for Human Resources Management sent a circular to all offices clarifying the procedure for the consideration of internal candidates."
 - "In April 2010, the administrative instruction on the staff selection system was abolished and was replaced with a new administrative instruction (ST/AI/2010/3)."
 - In April 2010 "an administrative instruction entitled 'Performance Management and Development System' (ST/AI/2010/5) was issued. This issuance updates the

policies and procedures for performance evaluation and addresses issues that have led to delay in the completion of e-Pas appraisals.”

- After UNDT ruled that the placement of staff members on special leave with full pay was not appropriate when disciplinary proceedings were pending, the Administration enacted “staff rule 10.4, which specifically provides for the placement of a staff member on administrative leave pending an investigation.”^{xxcix}
- Although the UN Dispute Tribunal judges commented on problems in the handling of disciplinary cases from the peacekeeping missions, they did not recommend policy changes or reforms related directly to the peacekeeping missions.
- When GAP asked respondents if any policy changes were made as a result of Tribunal decisions, only one possible reform was identified specifically directed at misconduct in the peacekeeping missions.⁴⁹ A new capacity building exercise at MINUSTAH for the Special Investigations Unit in the handling of civilian cases has been developed, potentially as a result of criticisms of the SIU made by the Tribunal.

The majority of respondents interviewed simply did not believe that the UNDT or UNAT decisions have had a significant positive impact on the UN’s operations in the peacekeeping missions.

Study Finding: The internal justice system may decrease accountability in misconduct cases

In an unanticipated turn of events, several respondents raised concerns about negative impacts the reformed justice system may have on the peacekeeping missions. For example, respondents explained that in some cases staff in certain peacekeeping missions are not disciplined even when caught “red-handed” because managers are afraid their actions will be reversed by the UNDT. In general, an OLA staff member remarked: “[managers are] afraid to move or make any kinds of decisions because the state of the law is uncertain.” S/he described this as being particularly the case in personnel, promotion or disciplinary decisions.

A recent report of the Secretary-General on disciplinary matters substantiated these perceptions. According to that report, the justice system is indeed having an impact on how disciplinary cases are handled within the organization:

The changing judicial landscape, in particular, the higher standard of proof articulated by the Appeals Tribunal, resulted in increasingly detailed analyses and scrutiny of every aspect of each case referred for disciplinary action ... A number of factors resulted in cases that were not pursued as disciplinary matters or closed

⁴⁹ As one Conduct and Discipline Team representative told us, “no decisions that are critical of investigations conducted in a peacekeeping mission have been communicated, to me and I don’t know of any practices that have changed as a result.”

with no measure. In many cases, the underlying investigation and supporting evidence failed to meet the higher evidential and procedural standards articulated by the United Nations Appeals Tribunal and the United Nations Dispute Tribunal... In some cases, the length of time taken to conduct an initial investigation and/or to obtain clarifications and additional evidence, at the disciplinary stage, and the resultant delay in the process, led to closure of the case. In some cases, the comments of the staff member were obtained following referral of the case and, based on an assessment of those comments, a decision was made that the staff member's actions did not amount to possible misconduct ... In some cases, because of managerial or administrative action taken in relation to the staff member, at the office, the departmental or the mission level, it was decided not to initiate a disciplinary process.^c

According to the Secretary-General's report, of the 152 cases completed from July 1, 2011 until June 30, 2012, 39 (25.6 percent) were not pursued, meaning that the staff member was not charged with misconduct. In total, only 67 cases (44 percent) resulted in some sort of administrative or disciplinary measure, including dismissal.⁵⁰ In comparison, for the last reporting period prior to the launch of the new justice, 301 cases were completed and there were only 15 (5 percent) in which no action was taken due to the case not being pursued. In total, 141 cases (46 percent) resulted in some sort of administrative or disciplinary measure, including dismissal, which is slightly higher than in the 2011-2012 reporting period.^{ci}

It appears therefore that the Administration is now more cautious in pursuing disciplinary cases as a result of the higher evidentiary and procedural standards set by the Tribunals. This is a double-edged sword, reflective of a transition in the overall justice system. On the one hand, there appears to be an increased awareness of the due process rights of staff members. On the other, at this point, the reforms seem to allow a certain impunity for staff members and managers. The reforms in the Tribunals, absent effective reforms in disciplinary procedures and investigations, will exacerbate problems of misconduct in the peacekeeping missions, since 63% of cases received by the Office of Human Resources Management for action from July 1, 2011 until June 30, 2012 involved field staff.^{cii} **Ironically, it appears that the reformed justice system, without corresponding reforms in the UN's internal "law enforcement" functions may be decreasing accountability.**

It should be noted, however, that according to the Secretary-General's 2011 report on the Administration of Justice, "the disciplinary cases appealed to the Tribunals relate to cases reviewed by the Office of Human Resources Management on the basis of the jurisprudence and criteria set by the Administrative Tribunal. It therefore remains to be seen how many of the cases received and completed after 1 July 2009, under the new system, will be appealed and how they will be disposed of."^{ciii}

⁵⁰In addition to cases that were "not pursued" there were other cases that did not result in a disciplinary measure including 16 cases that were closed with no measure (after charging with misconduct) and 29 in which the staff member left prior to the completion of the disciplinary process.

Significantly, the reformed justice system may also be influencing the reporting of misconduct. The 2010 UN Ethics Office Activity report noted a substantial decrease in the number of requests for protection against retaliation compared to the previous reporting cycle. The report explained that part of the decrease could be attributed to the new system of administration of justice as “staff are carefully following the developments in the system and may delay seeking protection until this jurisprudence is more settled.”^{civ} In fact, the Director of the Ethics Office observed in April 2012 that staff may be “waiting to see” how the justice system handles whistleblower issues before coming forward.

VII. Progress Made on the Communication of the Tribunals’ Decisions

The way in which UNDT and UNAT decisions are conveyed to managers is an important aspect of judicial effectiveness. It seems elementary, but if an order is not accurately and promptly communicated to an affected manager, the ruling will have little impact. This aspect of the new system will be especially relevant to the peacekeeping missions, which operate far from the centers where the justice system deliberates. According to the Secretary-General’s reports and/or interviews with the staff of OLA:

- The Department of Management prepares “lessons learned” guides for managers that contain updates about the latest Tribunal jurisprudence. These guides, which are reportedly circulated to the heads of all offices and departments, are designed to enhance managers’ understanding of the internal justice system and their awareness of their responsibilities when making administrative decisions. Many respondents had seen copies of it.⁵¹ However, the guide is not available to the public and was not made available for analysis to GAP.
- The 2011 Secretary-General’s report on the Administration of Justice mentions instances in which the Administration distributed guidance concerning: non-renewal of fixed-term appointments, staff selection processes, and staff evaluation procedures (e-Pas).^{cv}
- It is uncertain whether the Administration effectively communicates Tribunal decisions to field supervisors whose practices may be affected. According to OLA, the Department of Management and Field Support was “implementing a lot of decisions” and the MEU has developed a “lessons learned” guide that is circulated in the field.
- The General Assembly is consistently made aware of shortfalls in UN policies or practices identified through the Tribunal’s jurisprudence through reports from the Office

⁵¹ According to the 2011 report of the Secretary-General on the Administration of Justice (A/66/275), the MEU has helped the USG compile a “lessons-learned guide for managers and guidance notes that are circulated to all heads of offices and departments. The lessons-learned guide for managers includes a review of the jurisprudence of the Dispute and Appeals Tribunals and examines how they interpret and apply the internal rules of the Organization.” (para. 13)

of Administration of Justice and Secretary-General, and through meetings before the Fifth Committee (Administrative and Budgetary), Sixth Committee (Legal) and Advisory Committee on Administrative and Budgetary Questions (ACABQ).

- The Secretary-General's reports to the General Assembly on the justice system have been the subject of informed concern. A Tribunal judge remarked that "[about a] third of the last Secretary-General report on Administration of Justice was inaccurate." This view is corroborated by the UN Dispute Tribunal President's October 2011 letter to the General Assembly: "[T]he judges are concerned about what appears to be an attempt in the report of the Secretary-General to undermine the integrity of the Tribunal and its independence by presenting a misleading and one-sided account of the Dispute and Appeals Tribunals' case law."^{cv}^{vi}

Indeed, GAP identified a fundamental error related to whistleblowing cases in such a report. According to the 8 August 2011 Report of the Secretary-General on Administration of Justice at the United Nations: "as the Dispute Tribunal has not yet issued a final judgment addressing the issue of whether a determination made by the Ethics Office regarding retaliation constitutes an administrative decision, the Appeals Tribunal has not yet pronounced itself on that issue."^{cv}^{vii} This statement is factually inaccurate. In April 2011 UNDT Judge Vinod Boolell ruled that UNDT *can* review Ethics Office decisions and that it would be "absurd" to deny staff members this right.^{cv}^{viii} The error in the Secretary-General's report was particularly significant when one considers that in paragraph 280 of that same report, the Secretary General recommended that the General Assembly amend the UNDT Statute so that such cases would no longer be receivable. This error suggests that the Secretary-General's reports to the General Assembly on this matter may be biased. Fortunately, the judges themselves noticed many of these errors and raised their opposition to amending the statute.⁵² Doing so, they declared, would be "tantamount to allowing these entities to exercise power without accountability" and would "raise serious concerns regarding the respect for the rule of law within the Organization."^{cv}^{ix}

VIII. Summary of Recommendations

While many of those interviewed by GAP for this study were critical of the impact of Tribunal reforms (or lack of impact), many also provided suggestions about potential improvements to the internal justice system. Those recommendations are outlined in depth in Annex II (pages 4-7). Although only a few of the recommendations from these Annexes are mentioned in the body of this report, GAP supports many of them, especially: enfranchising staff associations to file claims before the Tribunals; increasing the independence of the judges and the registrars;

⁵² As Flaherty and Campos pointed out in "*The Reform of the UN Internal Justice System: The 'Lampedusa' Syndrome*," the "latest report by the Secretary-General to the GA on the administration of justice at the United Nations contains very specific ideas geared to roll back the UN justice reform to make it look like a twin sibling of the 'outmoded, dysfunctional and ineffective' prior one."

increasing equality of arms; awarding appropriate legal fees and damages; increasing resources for the system; and incorporating Redesign Panel recommendations not yet implemented.⁵³

While the new justice system was predicated on the far reaching recommendations of the Redesign Panel, in its final form it did not incorporate several of the major recommendations. The new system was supposed to be monitored and revised after a couple of years, but this has been delayed. Therefore, it is recommended that there be a review of the Statute and Rules of Procedure of the Tribunals by a balanced and impartial panel. This panel should consider incorporating recommendations made by the Redesign Panel that were not included in the new justice system and addressing some of the concerns raised in Annexes I and II of this report.

Throughout this report, GAP has made additional, specific recommendations for revisions to UNDT and UNAT Statutes. Specifically we have suggested that both Statutes be revised to:

- Grant the judges the authority to award the relief necessary to make the successful complainant whole. The judges should also be allowed to award costs for successful litigants, including reasonable legal fees and travel expenses.
- Allow Member States or other third parties to raise claims “based on the alleged responsibility of United Nations officials, e.g. within the framework of peace-keeping operations.”⁵³
- Entertain applications for the enforcement of individual financial accountability, as recommended by the Redesign Panel.

Other recommendations made in the body of this report include:

Reporting mechanisms: Encourage whistleblowers from the field missions to transmit their disclosures directly to OIOS or headquarters. If a whistleblower assigned to a small office fears retaliation, OIOS should consider conducting an audit or an investigation that is not obviously based on a whistleblower’s disclosures, in order to protect the whistleblower from retaliation.

Whistleblower protection policy: Revise the UN protection against retaliation policy (ST/SGB/2005/21) and the corresponding policies in the funds, programmes and agencies to include protections against retaliation for:

- Those who testify before UNDT and UNAT.
- Those who use the internal justice system.
- Contractors, police officers, UN peacekeepers, victims and any other person who provides information about misconduct that could undermine the United Nation’s mission.
- Those who suffer retaliation from contractors, sub-contractors or member states.
- Anyone who reports misconduct of any kind involving UN operations.
- Individuals who are perceived as whistleblowers (even if mistaken), or as “assisting whistleblowers,” and individuals who are “about to” make a disclosure.

⁵³ Annex IV to this report (pages 4-6) contains Respondents’ suggestions regarding improvements in the handling of disciplinary and misconduct issues in the peacekeeping missions.

- Those who make disclosures to their supervisors and/or the Conduct and Discipline Unit/Team.

Section 6.2 of the policy should also be revised to require the Secretary-General to either adopt or reject an Ethics Office recommendation within 30 days and to notify the complainant and other relevant parties of the decision. If the Secretary-General fails to respond within that time period, then the recommendations of the Ethics Office should become permanently effective.

OSLA: OSLA should be required to provide counsel to field staff who request it in cases challenging disciplinary measures or retaliation for protected whistleblowing activities.

Other policy revisions: Issue a legally binding policy that clearly establishes “each of the steps to be taken following the investigation and before a staff member is found guilty of misconduct and a disciplinary or non-disciplinary measure imposed.”^{cx1}

The peacekeeping missions: The UN should take steps to ensure that victims have the right to remedy. This should include:

- The prosecution of alleged perpetrators.
- Access to the internal justice system or an analogous legal system for those who have been victimized by anyone acting under the UN banner.⁵⁴
- Creating a public sanctions list of countries prohibited from contributing troops to the peacekeeping forces of the UN because of their failure to prosecute peacekeeping cases referred to them. At the very least, a list of all countries that have failed to take action on such referrals should be made publicly available.

Investigations: As recommended by the Joint Inspection Unit, all investigations in the UN Secretariat, as well as the UN funds, programmes and agencies, should – at the very least – be consolidated into the internal oversight entity of each organization. Heads of other Departments or Offices should not be allowed to conduct investigations or designate people to conduct them. Ideally, there should be a single United Nations system Investigation Unit that handles all investigations according to the same procedures, including investigations in the field. Having only one body could improve economies of scale, increase independence and external oversight, and establish uniform professional investigative practices. This body should be as external and independent as possible.

Office of the Administration of Justice: OAJ should:

⁵⁴ The recent cholera epidemic in Haiti demonstrates the importance of this recommendation. According to the Institute for Justice & Democracy in Haiti (IJDH), “overwhelming evidence has established that reckless disposal of human waste by a United Nations peacekeeping base in Mirebalais poisoned Haiti’s rivers with a particularly deadly strain of cholera bacteria and created the epidemic. Now, despite even UN Special Envoy to Haiti Bill Clinton’s acknowledgment that the UN was the ‘proximate cause’ of the epidemic, the UN has failed to accept responsibility and control cholera in Haiti.” Although this epidemic has sickened almost 600,000 people and taken more than 7,500 lives, the victims have been denied recourse. IJDH has filed 5,000 claims with the UN seeking compensation for the victims, a public apology and the installation of national water and sanitation systems, but the UN has been unresponsive. The failure to provide a recourse mechanism that can review these claims undermines victims’ human rights. This matter should be urgently addressed.

- Release a list of the oldest cases pending before the Tribunals and the subject matter of these cases in order to determine if certain politically sensitive cases are purposefully delayed. The resolution of cases that are more than two years old must be prioritized.
- Prominently post statistics on its website and in its reports regarding the number of accountability referrals, orders and recommendations made by the judges and the subsequent action taken by the Secretary-General in those cases. This information should also appear in its reports to the General Assembly.

Management Evaluation: The statute of limitations for submitting a request for Management Evaluation should be revised to be at least six months. If the UN wishes to meet best standards in international law, then it should be revised to one year.

Training: The offices within the informal and formal justice system should continue to conduct training sessions in the field.

The Secretary-General: The Secretary-General and his representatives should commit to:

- Taking prompt action to enforce accountability referrals made to him.
- Adhering to orders and judgments issued by the Tribunals and to enforcing the rule of law embodied in the UNDT and UNAT Statute.

In conclusion, we note that scholars have predicted increasingly serious challenges to the immunities of Intergovernmental Organizations in national courts in the years to come.^{cxii} If the United Nations wishes to maintain its immunity in employment cases, it must ensure that its internal justice system is independent and provides effective recourse to those who have grievances against the organization.⁵⁵ Given the results of our interviews, it appears that the new justice system does not currently meet this standard (see Annex I). The organization should take action to address these concerns or, alternatively, waive its immunities. The United Nations should also take the actions outlined above in order to promote accountability and improve its operations in peacekeeping missions. Doing so will enhance its credibility and its ability to deliver on its crucial humanitarian mission.

⁵⁵ It should be noted that the Redesign Panel recommended that “any other person performing personal services under contract with the United Nations” including “consultants and locally recruited personnel of peacekeeping missions” should have access to the justice system. (A/61/205, para. 20) To date, contractors and consultants do not have access to justice. Although an expedited arbitration procedure has been proposed for these cases, it has not yet been implemented (see A/RES/66/237 para. 38). If these parties are not given access to some recourse when their rights are violated, then the UN may jeopardize its immunities. For example, the U.S. District Court of Appeals recently ruled that an Intergovernmental Organization (the Inter-American Investment Corporation, the private sector lending arm of the Inter-American Development Bank) did not have immunity in a case of unjust enrichment brought by an independent consultant. See <http://www.whistleblower.org/blog/31-2010/179-jorge-vila-v-inter-american-investment-corporation> for more information.

List of Annexes

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ANNEX VI: UN Dispute Tribunal Judgment Chart from July 1, 2009 – June 30, 2011 (each year has a separate tab)

ANNEX VII: UN Appeals Tribunal Judgment Chart from July 1, 2009 – June 30, 2011

ANNEX VIII: UN Administrative Tribunal Judgment Chart from July 1, 2007 – December 31, 2009

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- ^{xii} UNDT/2010/056, para.8 .7.10 - 8.7.27, 9.1.
- ^{xiii} UNDT/2010/36, para. 4.1, 8.1.
- ^{xiv} UNDT/2011/106, para. 10, 180, 187.
- ^{xv} UNDT/2011/123, para. 12, 123, 132.
- ^{xvi} UNDT/2011/83, para. 7, 32.
- ^{xvii} UNDT/2010/41, para. 56.
- ^{xviii} UNAT/2010/87, para. 2. See <http://www.un.org/en/oaj/appeals/judgments.shtml> for all UN Appeals Tribunal decisions.
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^{xxi} Ibid, para. 24.

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