Independent Review of the Adjudication of Claims Pertaining to Sexual Exploitation and Abuse by the United Nations Internal Justice System (UN Dispute Tribunal and UN Appeals Tribunal)

Memorandum for the Office of the Special Coordinator on Improving the UN's Response to Sexual Exploitation and Abuse (OSC-SEA) and the Office of the Victims' Rights Advocate (OVRA)

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October 2024

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I. Introduction 2
II. The role of the UN internal justice system in the handling of claims pertaining to alleged sexual exploitation and abuse 3
III. An overview of the UN regulatory framework related to SEA 4
IV. Principal research findings 6
i) A brief statistical analysis 6
ii) Interpreting different forms of sexual misconduct 8
a) Sexual abuse, child sexual abuse, and sexual exploitation 8
(i) Wide discrepancies in the interpretation of sexual exploitation 8
(ii) The meaning of “beneficiaries of assistance” 9
(iii) Confusion as to when the concept of consent is relevant 10
(iv) Too infrequent findings of sexual violence/abuse 11
(v) Unclear boundaries between sexual exploitation and sexual harassment cases 11
b) The disciplinary offence of failing to report SEA 12
(i) The failure to comply with the duty to report SEA 12
(ii) Actively hindering investigations 14
iii) Procedural aspects regarding the handling of complaints and the evaluation of evidence 16
a) The role of UNDT and UNAT in relation to the assessment of facts 16
b) Oral proceedings and the concomitant evidential weight of the prior investigative record 17
c) The victim as witness: assessment of victim statements and victim credibility 19
d) The anonymity of parties before the UNDT and UNAT 20
iv) Consequences of SEA allegations 21
a) Administrative measures during the investigation 21
b) Disciplinary measures imposed following a finding of SEA 23
c) When should “Clear Check” be ordered? 24
d) Compensation for wrongful disciplinary and/or administrative measures 25
e) Referrals to enforce accountability 26
v) A victim-centred approach 27
V. Conclusions 30

I. Introduction

1. This Memorandum is the product of a collaboration between the Office of the Special Coordinator on Improving the UN's Response to Sexual Exploitation and Abuse (OSC-SEA) and the Essex Human Rights Centre and Clinic. Students of the Essex Human Rights Centre Clinic were tasked with analysing judgments of the UN administrative justice system which involved allegations of sexual exploitation and abuse (SEA).

2. The purpose of the research was to identify trends and patterns within the cases, the adjudication process as described in the judgments, as well as the judicial findings, considering issues such as:

   - ***Access***: What kinds of claims are coming before the administrative justice system (what issues are being litigated and appealed; by what kinds of claimants) and conversely, what are the gaps in coverage by the tribunals and what might these gaps be attributed to? Are adequate measures in place to address the traditional barriers faced by victims of SEA to engage in legal proceedings?

   - ***Standards of review***: Are judges taking consistent account of UNDT's and UNAT's respective (limited) powers of review?

   - ***Evidence***: What trends can be ascertained with respect to how judges consider and apply standards of proof in administrative cases involving SEA and how do they apply principles of fairness; How do judges assess evidence related to sexual exploitation and abuse (for example, what challenges have arisen when assessing the credibility of vulnerable witnesses; In what circumstances have judges required oral evidence and from whom)?

   - ***Interpretations of relevant features of SEA***: Are concepts such as beneficiary of assistance, power imbalance, sex with a minor, and exploitative behaviour consistently construed in the judgments in harmony with relevant UN SEA policies? Are judges appropriately taking account of the inapplicability of consent in exploitation cases involving vulnerable persons or where there are significant power differentials? Have judges taken a consistent approach to misconduct associated with the non-reporting of SEA and/or staff involvement in the negotiation of "settlements"?

   - ***Administrative leave and disciplinary sanctions***: Is there consistency within the judgments with respect to the imposition of administrative leave while SEA investigations are ongoing and with respect to the ordering of disciplinary sanctions following a finding of serious misconduct? Are the ways in which judges approach mitigating and aggravating circumstances in line with relevant administrative rules and regulations? How are judges assessing and addressing claims involving entry into the Clear Check database?

3. Many of the issues listed above will be decided on the facts of the particular case and consistent with their judicial functions, judges will have a certain discretion in assessing the facts and arriving at their judicial findings. Thus, whilst this Memorandum addresses patterns, there will be variability in the outcomes given the differences in the facts and in the appropriate exercise of judges' discretion; the focus of the Memorandum is consequently on how the applicable administrative regulations and rules have been applied to "like" facts. Every effort has been made to reflect this nuance in the Memorandum.

4. It should also be noted that some of the divergences in the caselaw stem from different regulations and rules being applicable at the time the misconduct was said to have occurred (many of the regulations and rules have been updated), or because the agency in question had slightly different regulations and rules pertaining to SEA. The research underpinning this Memorandum has also sought to take these distinctions into account.

5. We are grateful to the Essex Human Rights Centre clinic students who assisted with the research: Zeynep Baysar, Dewi De Weerdt, Safa Ersan, Gülberk Gür, Keira Jones, Valeria Martinez Garcia, Thi L L Nguyen, Samruddhi Pai, Sian Posy, Vichaya Ratanajaratroj, and Rabi Remawa. We are also grateful to the Special Coordinator on Improving the UN's Response to Sexual Exploitation and Abuse (SC-SEA) and the Victims' Rights Advocate (VRA) and to their staff, particularly to Mr Anivesh Bharadwaj and Ms Ann Makome for their support and direction during this research. All errors and omissions are those of the authors.

II. The role of the UN internal justice system in the handling of claims pertaining to alleged sexual exploitation and abuse

6. The UN General Assembly established the new internal system for the administration of justice via resolution 61/261, which came into effect on 1 July 2009. The system addresses workplace disputes pertaining to current and former staff members of the UN and related entities over which the relevant tribunal has jurisdiction.[1] This internal system comprises a management evaluation function and a two-tiered adjudication process: a first instance tribunal – the UN Dispute Tribunal (UNDT) – and an appellate tribunal – the UN Appeals Tribunal (UNAT). UNDT and UNAT judgments are binding on the parties and on the UN.

7. The UNDT is where current and former staff members of the UN Secretariat, UN Funds and Programmes, UN Tribunals, UN research and training entities and some other UN entities can apply when they wish to challenge an administrative decision pertaining to their rights as current or former employees. The role of the Dispute Tribunal is to conduct a judicial review of an administrative decision to impose a disciplinary measure; it 'is not conducting a merit-based review, but a judicial review' which 'is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision'.[2] The applicant will need to demonstrate that the administrative decision at issue was not in compliance with the terms of their appointment or contract of employment.

8. The UNAT is the second level appellate review tribunal within the internal justice system. It reviews, within its specific jurisdiction, appeals against judgments rendered by the UNDT as well as appeals of judgments taken by several other dispute tribunals and standing committees operating within the UN system. UNAT's function is limited; 'for a first instance decision to be vacated or overturned, an appellant must prove that the first instance tribunal, in rendering its judgment, exceeded its jurisdiction or competence, failed to exercise jurisdiction vested in it, erred on a question of law, committed an error in procedure such as to affect the decision of the case, or erred on a question of fact resulting in a manifestly unreasonable decision.'[3]

9. Most of the SEA-related claims have been lodged by current or former staff members who have faced disciplinary measures because of a finding of serious misconduct associated with SEA. Appeals to UNAT have tended to have been lodged by those same (former) staff members when the first instance dispute tribunal confirmed the administrative decision that the (former) staff member had sought to dispute, or in a minority of cases, by the Administration, and sometimes by both parties. In a small number of cases, first instance claims have been filed with the dispute tribunal by staff members who had reported SEA or otherwise sought to address allegations of SEA or sexual harassment but took issue with the way those reports were handled (either they faced retaliation, or they argued the allegations of SEA were not followed up appropriately). Other claims

[1] For who can use the system, see: https://www.un.org/en/internaljustice/overview/who-can-use-the-system.shtml.
[2] *Sanwidi v. UNSG*, 2010-UNAT-084, para. 42.
[3] *Krioutchkov v. UNSG*, 2017-UNAT-744, para. 36. See also, Art. 2 of the UNAT Statute.

have been made by (former) staff members who faced disciplinary sanctions for their failure to comply with the policy on mandatory reporting of SEA.

10. Some cases involving SEA have been pursued and/or considered and adjudicated by the administrative tribunals as sexual harassment claims. There is some overlap in the frameworks in respect to the treatment of temporary or casual workers in particular, given the unequal power balance and the risk of sexual exploitation to secure continued or further employment. As unwelcome sexual conduct in a work environment such conduct may also constitute sexual harassment. While this Memorandum does not cover fully the caselaw on sexual harassment claims, it considers those cases where there is apparent overlap with SEA.

III. An overview of the UN regulatory framework related to SEA

11. The UN regulatory framework related to SEA has evolved over time. At the time of writing, the following rules, regulations, and related policies were in place.

12. The UN Secretary-General's 2003 Bulletin on 'Special measures for protection from sexual exploitation and sexual abuse'[4] constitutes the main legal and policy framework for the UN relating to SEA binding on all UN personnel including staff of separately administered organs and programmes of the UN, alongside the staff regulations and rules.[5] The Secretary-General's Bulletin defines key terms as follows:

    Sexual exploitation: 'any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.'

    Sexual abuse: 'the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions, including by providing definitions of this type of misconduct.'[6]

13. The 2003 Bulletin's framing of sexual exploitation is open-ended; it does not set out an exhaustive list of factual scenarios that may give rise to sexual exploitation.[7] The 2003 Bulletin also specifies that in order to further protect the most vulnerable populations, especially women and children 'Sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged.'[8]

14. It should be noted that because of their inherently unequal power dynamics, such relationships with beneficiaries of assistance are likely to fall within the definition of sexual exploitation as set out above, and where so, such an exploitative relationship is not only discouraged but prohibited. Conversely, it will not only be (potentially) those relationships between UN staff and beneficiaries of assistance that may constitute exploitation; any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes would constitute sexual exploitation whether it involves a beneficiary of assistance or any other person, in accordance with the Secretary-General's 2003 Bulletin.

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[4] ST/SGB/2003/13, 9 October 2003.
[5] Staff Regulations and Staff Rules, including provisional Staff Rules, of the United Nations Staff Regulations and Staff Rules, including provisional Staff Rules, of the United Nations, (Staff Regs & Rules), ST/SGB/2023/1, 2023.
[6] ST/SGB/2003/13, para. 1.
[7] See *Makeen v. UNSG*, 2024-UNAT-1461, para. 47.
[8] ST/SGB/2003/13, para. 3.2(d).

15. UN personnel must never perpetrate SEA; both sexual exploitation and sexual abuse are prohibited.[9] All acts that amount to sexual exploitation and sexual abuse constitute serious misconduct,[10] which gives grounds for disciplinary[11] and other measures, including termination of contract and ineligibility for future recruitment in the UN system. Some acts may also constitute crimes (such as attempted or committed rape or sexual assault, or sexual activity with a child).

16. UN staff members are also obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse.[12] Such personnel are obliged to report allegations of SEA whenever they develop concerns or suspicions or become aware of allegations of sexual exploitation and abuse, regardless of who commits such wrongs. They must report them via established reporting channels and processes, exercising due regard for confidentiality and consistent with the do no harm principle, to the relevant UN entity for the appropriate follow-up.[13] UN personnel are also required, as relevant to their functions, to 'further inform victims of their rights and of available services, and facilitate referral to such available services as requested.'[14]

17. When there are allegations of misconduct, the Secretary-General or officials with relevant delegated authority have the discretion to investigate, institute a disciplinary process and to impose a disciplinary measure.[15] If there are reasonable grounds to believe that a staff member engaged in sexual exploitation and/or sexual abuse, the staff member will be placed on administrative leave without pay,[16] pending the conclusion of an investigation into the allegations. If either the allegations of misconduct are subsequently not sustained or it is subsequently found that the conduct at issue does not warrant dismissal or separation, any pay that was withheld must be restored.[17]

18. If, following an investigation it is determined that the allegations of SEA were borne out, this would constitute serious misconduct.[18] The staff rules are imprecise with respect to what disciplinary measures should follow a finding of serious misconduct,[19] though rule 10(3)(b) stipulates that 'any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of the staff member's misconduct' and the 2003 Bulletin makes clear that as serious misconduct, SEA gives rise to 'grounds for disciplinary measures, including summary dismissal.'[20] UNDT and UNAT caselaw make clear that a sanction proportionate to the gravity of the offence would ordinarily be dismissal or separation from service, or in some cases non-renewal or non-extension of a temporary contract beyond its expiry date.[21] The staff rules further provide that no payment in commutation of the period of accrued annual leave can be made to a staff member who is dismissed under staff rule 10.2(a)(ix) for sexual exploitation and sexual abuse in violation of staff rule 1.2(e).[22]

19. Beyond the sanctions that may be administered through the Secretary-General or other mandated administrative system, agencies may record the name and details of the individual in the Clear

[9] Staff Regs & Rules, Rule 1.2(e).
[10] Staff Regs & Rules, Regulation 10.1(b).
[11] Staff Regs & Rules, Rule 10.2.
[12] Staff Regs & Rules, Rule 1.2(e).
[13] See also, UN, 'Policy on Integrating a Human Rights-Based Approach to United Nations efforts to Prevent and Respond to Sexual Exploitation and Abuse' (December 2021) para. 24.
[14] 'Policy on Integrating a Human Rights-Based Approach,' ibid, para. 25.
[15] Rule 10.1(c), Staff Regs & Rules.
[16] UN Secretariat, Administrative Instruction 'Unsatisfactory conduct, investigations and the disciplinary process,' ST/AI/2017/1, 26 October 2017, para. 11.4(a). See also, Staff Regs & Rules, Rule 10.4(c).
[17] Administrative Instruction 'Unsatisfactory conduct, investigations and the disciplinary process,' ibid, para. 11.6.
[18] Regulation 10.1(b), Staff Regs & Rules.
[19] Rule 10.2, Staff Regs & Rules.
[20] ST/SGB/2003/13, para. 3.2(a).
[21] See, e.g., *Stefan v. UNSG*, UNDT-2022-083 para. 75; *Massah v. UNSG*, 2012-UNAT-274, paras. 46-49; *AAK v. UNSG*, 2023-UNAT-1348, paras. 40, 98; *Richard Loto v. UNSG*, 2023-UNAT-1362, para. 109. This is discussed further in section IV(v)(b) below.
[22] Staff Regs & Rules, Rule 9.10(b).

Check system. Clear Check is a screening database used to share information amongst UN entities, system-wide, on individuals (former UN staff and UN related personnel) who were found to have engaged in sexual misconduct, or who resigned or otherwise separated from service while there were pending allegations against them related to, sexual harassment, sexual exploitation and sexual abuse. This process aims to prevent re-employing them within the UN system. The Clear Check database records information on, *inter alia*, i) the individuals against whom allegations of SEA, while in service of an UN entity, were substantiated following an investigation and a disciplinary process and ii) individuals who resigned or separated from a UN entity, while being the subject of a pending investigation and/or disciplinary process for SEA.[23] It should be noted that, whilst having one's name and details recorded in the Clear Check system has real consequences for the individual (and should prevent their re-employment), this measure is an administrative consequence of the disciplinary process, it does not constitute a separate or additional disciplinary sanction.[24]

IV. Principal research findings

i) A brief statistical analysis

UNDT

20. In total, 34 UNDT judgments pertaining to SEA were analysed, dating from 2010 to 2024. In all cases, the alleged perpetrators of SEA are men. In all but one case,[25] the SEA complainants/victims are women or girls. These 34 cases related to claims brought by 30 applicants (several of the applicants brought more than one application), and some claims relate to the same initial alleged misconduct because several individuals were held to have failed to report SEA incidents.[26] Of the 30 applicants, one had been given a written reprimand for having spread 'a serious, unsubstantiated rumour' of SEA[27] and one was the victim of SEA whose complaint related to the failure of the Administration to deal effectively with that alleged sexual assault.[28] Of the remaining 28 applicants, 24 were found by the Administration to have committed SEA, and 4 had been sanctioned for their failure to report SEA incidents.[29] Twenty-six out of these 28 applicants challenged the disciplinary sanction imposed by the Administration (in 14 cases, this pertained to dismissals, including summary dismissals;[30] in 10 cases, it pertained to separation from service with compensation in lieu of notice and without termination indemnity;[31] in 1 case, to separation from service with compensation in lieu of notice and with termination indemnity;[32] and in 1 case to a demotion for two years with no possibility of promotion during that period[33]). In addition to the other disciplinary measures, some applicants were also required to pay a fine, either equivalent

[23] See, Factsheet on Clear Check (as of 1 September 2024).
[24] This is made clear by Rule 10.2(b) Staff Regs & Rules.
[25] *Karkara v. UNSG,* UNDT-2020-188.
[26] *Erefa v. UNSG,* UNDT-2021-109 and *Applicant v. UNSG*, UNDT-2021-091; *Okwakol v. UNSG*, UNDT-2021-135; *Loto v. UNSG,* UNDT-2021-133; *Loto v. UNSG,* UNDT-2022-081; and *Kuya v. UNSG*, UNDT-2021-134.
[27] *Piezas v. UNSG*, UNDT-2022-128 (reprimand rescinded by the UNDT).
[28] *Ocokoru v. UNSG*, UNDT-2015-004.
[29] *Applicant v. UNSG*, UNDT-2021-091; *Okwakol v. UNSG*, UNDT-2021-135; *Loto v. UNSG,* UNDT-2021-133; *Kuya v. UNSG*, UNDT-2021-134.
[30] *Karkara v. UNSG,* UNDT-2020-188; *IK v. UNSG,* UNDT-2024-034; *Erefa v. UNSG*, UNDT-2021-109; *Kavosh v. UNSG,* UNDT-2024-020; *Liyanarachchige v. UNSG*, UNDT-2010-041; *Applicant v. UNSG*, UNDT-2013-131; *Applicant v. UNSG*, UNDT-2022-030; *Loto v. UNSG,* UNDT-2022-081; *Massah v. UNSG*, UNDT-2011-218; *Shumba v. UNSG*, UNDT-2022-103; *Diabagate v. UNSG*, UNDT-2013-009; *Gisage v. UNSG*, UNDT-2020-121; *Kazagic v. UNSG*, UNDT-2016-086; *Muteeganda v. UNSG*, UNDT-2020-050.
[31] *Makeen v. UNSG*, UNDT-2023-071; *Applicant v. UNSG,* UNDT-2022-098; *Stefan v. UNSG*, UNDT-2022-083; *Applicant v. UNSG,* UNDT-2021-164; *Applicant v. UNSG,* UNDT-2021-091; *Khamis v. UNSG*, UNDT-2020-147; *Lucchini v. UNSG*, UNDT-2020-090; *Kramo v. UNSG*, UNDT-2018-122; *Applicant v. UNSG,* UNDT-2020-204; *Haidar v. UNSG*, UNDT-2019-187.
[32] *Valme v. UNSG*, UNDT-2021-078.
[33] *Powell v. UNSG*, UNDT-2012-039.

to one month's[34] or three months'[35] of net base salary. In 7 cases, the administrative measure of administrative leave was challenged.[36]

21. Nineteen of the 34 applications to UNDT were rejected, dismissed, or denied; resulting in the disciplinary and/or administrative measure imposed by the Administration being upheld. Of these 19 applications, in 18 cases the applicant was the alleged perpetrator of SEA. In one case, the applicant was charged with having failed to report a SEA incident.[37] In one case, the application to rescind the decision to impose a separation from service was rejected but the UNDT set aside a fine of one month net-base salary imposed on the applicant.[38]

22. Accordingly, 14 applications to the UNDT succeeded and therefore the imposed disciplinary or administrative measures were rescinded and/or compensation was ordered. Of these 14 cases, in 8 cases the applicant was the alleged perpetrator. In one case, the applicant was a UN staff member who had been charged with having spread 'a serious, unsubstantiated rumour of SEA';[39] in another case the applicant was the victim.[40] In the remaining 4 cases, the applicants were UN staff members who had failed to report SEA incidents, 3 of them relating to the same alleged SEA misconduct.[41] In 5 of these judgments, at issue was not a disciplinary measure but the imposition of administrative leave. In one case,[42] the imposed administrative leave was found to be unlawful and was rescinded but in a separate case involving the same applicant, the UNDT found that the imposed disciplinary measure of dismissal was indeed lawful.[43] Consequently, of the 14 cases where disciplinary or administrative measures were rescinded and/or compensation was ordered, in 6 cases the UNDT rescinded a disciplinary measure of dismissal or separation from service (in 5 cases, the applicant was the alleged perpetrator, in the other case the applicant was alleged to have failed to report a SEA incident). Hence, in 6 of the analysed 34 cases the UNDT ordered that the disciplinary measure of dismissal or separation from service was unlawful.[44] Of these 6 cases, 3 were then overturned by the UNAT after the Administration appealed.[45]

UNAT

23. In total, 34 UNAT cases were analysed, dating from 2010 to 2024. All the alleged perpetrators of SEA were men. Of these 34 cases, 27 were appeals from UNDT cases. The remaining 7 cases were appeals from the UNRWA Dispute Tribunal. In three cases the victims were schoolboys[46] or schoolgirls[47] with the alleged perpetrators being teachers, and in one case the victims were men.[48]

24. *Appeals by the Administration* relate to UNDT judgments which rescinded the original disciplinary or administrative measure imposed by the Administration. Where these appeals succeed, the initial measure challenged may be reinstated. *Appeals by the applicant* concern disciplinary tribunal

[34] E.g., *Stefan v. UNSG*, UNDT-2022-083; *Applicant v. UNSG,* UNDT-2021-164; *Erefa v. UNSG,* UNDT-2021-109; *Haidar v. UNSG*, UNDT-2019-187.
[35] E.g., *Kazagic v. UNSG*, UNDT-2016-086.
[36] *Muteeganda v. UNSG,* UNDT-2018-009; *Gisage v. UNSG,* UNDT-2019-059; *Lucchini v. UNSG*, UNDT-2020-090; *Kuya v. UNSG*, UNDT-2021-134; *Loto v. UNSG,* UNDT-2021-133; *Okwakol v. UNSG*, UNDT-2021-135; *Kavosh v. UNSG,* UNDT-2022-032.
[37] *Loto v. UNSG,* UNDT-2022-081.
[38] *Haidar v. UNSG*, UNDT-2019-187.
[39] *Piezas v. UNSG*, UNDT-2022-128.
[40] *Ocokoru v. UNSG*, UNDT-2015-004.
[41] *Okwakol v. UNSG*, UNDT-2021-135; *Loto v. UNSG,* UNDT-2021-133; *Kuya v. UNSG*, UNDT-2021-134.
[42] *Loto v. UNSG,* UNDT-2021-133.
[43] *Loto v. UNSG,* UNDT-2022-081.
[44] In one case the applicant was deceased and hence in lieu of rescinding the decision of dismissal, his estate was compensated, *Massah v. UNSG*, UNDT-2011-218.
[45] *Makeen v. UNSG*, 2024-UNAT-1461; *AAA v. UNSG,* 2022-UNAT-1280; *Massah v. UNSG,* 2012-UNAT-274.
[46] *El-Khalek v. Commissioner-General of UNRWA*, 2014-UNAT-442; *Samer Mohammad v. Commissioner-General of UNRWA*, 2022-UNAT-1195.
[47] *Safi v. Commissioner General of UNRWA*, 2024-UNAT-1443.
[48] *Karkara v. UNSG*, 2021-UNAT-1172.

judgments that imposed disciplinary or administrative measures. Hence, a successful appeal means that a disciplinary or administrative measure is rescinded and/or the applicant is granted compensation. Half of the UNAT appeals of UNDT decisions involved the Administration challenging decisions related to administrative leave. The Administration was successful in all these appeals and the UNAT held that the imposition of administrative leave in the respective cases was lawful.

ii) Interpreting different forms of sexual misconduct

a) Sexual abuse, child sexual abuse, and sexual exploitation

25. The definitions for sexual abuse and sexual exploitation are set out in the UN Secretary-General's 2003 Bulletin on 'Special measures for protection from sexual exploitation and sexual abuse' and several other texts.

    Sexual exploitation: 'any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.'[49] Sexual exploitation is a broad term, which includes a number of acts described below, including "transactional sex", "solicitation of transactional sex" and "exploitative relationship".[50]

    Sexual abuse: 'the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions, including by providing definitions of this type of misconduct.'[51]

26. The 2003 Bulletin further provides that '*Sexual activity with children* [persons under the age of 18] is prohibited regardless of the age of majority or age of consent locally. Mistaken belief in the age of a child is not a defence.'[52] It should be noted that all sexual activity with a child will constitute sexual abuse,[53] whether it is with a family member or between a child and adult or older child from outside the family. It involves either explicit force or coercion, or circumstances where informed consent cannot be given by the victim because of their age (below 18 years).[54]

27. It might be assumed that the majority of UNDT and UNAT judgments which involve forms of sexual misconduct would necessarily evaluate, interpret, and apply the definitions for sexual exploitation and sexual abuse as set out above, and take into account the precedent of prior UNAT judgments (the principle of *stare decisis* applies).[55] Surprisingly, not all cases address the definitions directly, and some panels of judges appear to arrive at their own conclusions as to what these terms mean and the circumstances when they should apply to staff conduct. Several aspects of the caselaw are worth highlighting:

    (i) Wide discrepancies in the interpretation of sexual exploitation

28. In UNAT's *Makeen* decision, the Appeals Tribunal held that for a finding of sexual exploitation, 'there must be clear and convincing evidence that the staff member: i) abused a position of

[49] ST/SGB/2003/13, para. 1.
[50] UN Glossary on Sexual Exploitation and Abuse, Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations, Second Edition (24 July 2017) 6.
[51] ST/SGB/2003/13, para. 1.
[52] Ibid, para. 3.2(b).
[53] UN Glossary on Sexual Exploitation and Abuse, Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations, Second Edition (24 July 2017) 5.
[54] Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse, Interagency Working Group on Sexual Exploitation of Children (2016) 18-20.
[55] *Igbinedion v. UNSG*, 2014-UNAT-410, para. 24.

vulnerability for sexual purposes; ii) abused a position of differential power for sexual purposes; iii) abused trust for sexual purposes; iv) exchanged money, employment, goods or services for sex; or v) engaged in some form of humiliating, degrading or exploitative sexual behavior.'[56]

29. Nevertheless, from the UNDT and UNAT caselaw it appears clear that there is a wide variability in the standards as to what circumstances may amount to sexual exploitation and when relationships between UN officials and members of the local community would be considered exploitative. Sexual exploitation is about the actual or attempted abuse of the position of vulnerability, differential power, or trust for a sexual purpose. It does not require a showing that the alleged perpetrator used actual force, or that either the alleged perpetrator or the victim profited monetarily, socially or in some other way from the sexual act, or that the alleged perpetrator was in a position to provide a benefit.[57] In *Makeen*, UNAT makes clear that the UNDT erred when it concluded that a showing of actual undue advantage is a requirement for sexual exploitation to occur.[58] Sexual exploitation is concerned with the vulnerability or power differential and how that may have impacted on the decision of the complainant to engage in the sexual act.

30. Thus, the UNDT's consideration in a case involving the taking of sexualised pictures that 'there is no evidence to suggest that the Applicant forced these women into these pictures or that he profited monetarily, socially, or politically from taking them' appears at best irrelevant.[59] Similarly, in the *Khamis* case, the consideration that: 'neither woman was connected with the United Nations programme in which Mr. Khamis was engaged so could not have been preferentially treated by the exercise of his power over that programme,'[60] should not have been determinative of whether there was sexual exploitation, given that a showing of actual preferential treatment is not required.

(ii) The meaning of "beneficiaries of assistance"

31. As part of a non-exhaustive list of circumstances that may be exploitative, the UN Secretary-General's 2003 Bulletin provides that 'sexual relationships between United Nations staff and beneficiaries of assistance, since they are based on inherently unequal power dynamics, undermine the credibility and integrity of the work of the United Nations and are strongly discouraged.'[61] The Head of Department, Office or Mission may apply discretion in the application of this standard, in light of the circumstances of the case, provided the beneficiary is over 18.[62] Thus, the Bulletin does not outlaw sexual relationships with beneficiaries of assistance though there is a recognition of the risk of such relationships being or becoming exploitative, and evidence of such relationships is often used to demonstrate exploitation – given the typical position of vulnerability, differential power, or trust, of the beneficiary vis-à-vis the UN staff person.

32. The regulatory framework is complicated by certain (though not all) agencies directly incorporating the notion of "beneficiaries of assistance" into their definitions of sexual exploitation, for instance, at the time some of the cases were decided, this included UNHCR and UNRWA. Thus, some of the cases frame "sexual exploitation" as <u>only</u> capable of taking place when the sexual relationship is with a beneficiary of assistance; this of course is a much narrower understanding of sexual exploitation than what the Secretary-General's Bulletin provides for. It

[56] *Makeen v. UNSG*, 2024-UNAT-1461, para. 48.
[57] Note, however the *Lucchini* case, where UNAT surprisingly considers there was no basis for the complainant to believe that Mr Lucchini had authority over her employment 'He was in no position to exchange a new contract for sex' [*Lucchini v. UNSG*, 2021-UNAT-1121, para. 48]. While recognising that the rules turns on the appreciation of the facts, what arguably should have been most relevant was the victim's perception of Lucchini's power, the power differential between them (taking into account that she was on a temporary, short-term contract due to expire), that she had told Mr Lucchini that her contract was about to expire, and that he told her that he would let her know if he heard about any job opportunities.
[58] *Makeen v. UNSG*, 2024-UNAT-1461, para. 47.
[59] *Massah v. UNSG*, UNDT-2011-218, para. 41 (overturned on appeal).
[60] *Khamis v. UNSG*, 2021-UNAT-1178, para. 86.
[61] ST/SGB/2003/13, para. 3.2(d).
[62] Ibid, para. 4.5.

also produces some confusion in the caselaw.[63] Additionally, some UNDT and UNAT decisions have framed "beneficiaries of assistance" narrowly – a person who has actually received direct services from the agency in question.[64] whereas in other cases there is the recognition of the need for a much wider approach. There may be logic in having some variability – one might imagine that when UN personnel are operating in a war zone, a humanitarian or health emergency a wider framing which recognises that members of the local community should all be considered beneficiaries of assistance; a UN office providing long-term in-country specalist development assistance or advisory services, it may be less appropriate to have such a wide framing. The UNDT and UNAT cases do not all have an overriding logic to this issue of breadth and variability, which adds to confusion and potentially, arbitrariness.

33. For example, in *Diabagate*, which involved allegations directed at a security officer working with MONUC in Kamina, Southeast DRC, UNDT held that the victim needed to be able to show that the security officer 'used his position as a staff member to obtain sexual favours from vulnerable local women who depended on UN assistance. Such vulnerable women may include refugees and others living under UN food and medical assistance and physical protection.'[65]

(iii) Confusion as to when the concept of consent is relevant

34. From the definitions above, it is clear that an individual can never consent to sexual exploitation. The circumstances of vulnerability, differential power, or trust, vitiate any ability for the person concerned to "consent" to the sexual act. This is made clear by UNDT in *Applicant-2021-164*, which involved a staff member in an intimate relationship with a local woman from a poverty-stricken family who served as his housekeeper and who relied on the income as a housekeeper to pay for her studies. In finding that the Applicant's actions amounted to sexual exploitation, UNDT held that: 'It is irrelevant for the purpose of applying the internal framework on sexual exploitation whether those intimate relations were consensual or not.'[66] For similar reasons, it is not possible for a child - a person below the age of 18 years, to consent to a sexual relationship or any sexual act and for such "consent" to vitiate the misconduct.

35. However, a different approach was taken by the UNDT in *Makeen*, which involved a sexual relationship with a young person (alleged to be a child) in South Sudan, who had occasionally provided unpaid domestic services. Mr Makeen impregnated her, and subsequently agreed to marry her ostensibly to avoid a rape charge under domestic law. In that case UNDT found that the sexual intercourse between the young person and Mr Makeen was 'fully consensual',[67] and as there were no 'undue disadvantages', also taking into account the 'fortuity' of a pregnancy, the birth of a child, and a marriage, this matter related to the parties' private life and had no link to Mr Makeen's status as a UN staff member and there could be no finding of sexual exploitation.[68] These findings were reversed in full on appeal.[69]

36. Similarly, in the *Khamis* case, which involved in part, a sexual relationship between JA, a 24 year old local woman who was paid by Mr. Khamis for housekeeping services and a 54 year old UN official, UNDT (which failed to consider sexual exploitation because of its contention that it was

[63] See, e.g., *Khamis v. UNSG*, UNDT-2020-147 para. 37, where it is stated that 'Neither JA nor TA were refugees, or beneficiaries of UNHCR assistance or fell within the prohibitions stipulated in staff rule 1.2(e). The Tribunal does not agree with the Respondent that unsubstantiated and scandalous allegations made against a staff member are conclusive evidence that the staff member is responsible for the reputational damage caused thereby to the Organization.'

[64] E.g., *Diabagate v. UNSG*, UNDT-2013-009, para. 84, where the UNDT determined that to demonstrate sexual exploitation the 'Respondent actually needed to make a showing that the Applicant had used his position as a staff member to obtain sexual favours from vulnerable local women who depended on UN assistance. Such vulnerable women may include refugees and others living under UN food and medical assistance and physical protection.'

[65] *Diabagate v. UNSG*, UNDT-2013-009, 23 January 2013, para. 84.

[66] *Applicant v. UNSG*, UNDT/2021/164, para. 108.

[67] *Makeen v. UNSG*, UNDT/2023/071, para. 70.

[68] Ibid, para. 68.

[69] *Makeen v. UNSG*, 2024-UNAT-1461, paras. 44-62.

not applicable because the women were not refugees or beneficiaries of UNHCR assistance), noted nevertheless that 'the undisputed findings from the investigation were that the Applicant was engaged in consensual, romantic relationships with JA who lived in Kitgum'.[70] UNAT held, in relation to claims of sexual exploitation that: 'There was not such an imbalance of power between Mr. Khamis, and JA and TA, that these could be termed abusive or manipulative relationships. Neither woman was connected with the United Nations programme in which Mr. Khamis was engaged so could not have been preferentially treated by the exercise of his power over that programme.'[71]

(iv) Too infrequent findings of sexual violence/abuse

37. Acts of sexual violence may be proven by demonstrating that they took place in a coercive environment, or without an unequivocal and voluntary agreement. As the CEDAW Committee held in *Vertido v The Philippines*, 'there should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.'[72] Article 36 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) provides a definition of sexual violence, including rape, which holds that 'consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.'[73]

38. UNDT and UNAT have rarely found sexual abuse, other than in circumstances of inherent violence such as rape and where the victim clearly articulates their lack of consent, or where children are involved. This is despite the clear international good practice referred to above which recognises the relevance of a coercive environment to determinations of consent. It is also despite the wide array of circumstances in which acts of a sexual nature that may amount to sexual violence if they are carried out without consent or against a person who is unable or unwilling to give genuine, voluntary, and specific consent, may occur. Relevant to UNDT and UNAT caselaw, the *Hague Principles on Sexual Violence*[74] have included in their non-exhaustive list of acts of a sexual nature which go beyond rape and may amount to sexual violence or abuse: disseminating or producing images, footage, or audio recordings of a person in a state of nudity or partial undress or engaged in acts of a sexual nature,[75] including through online communication or social media; inspecting someone's genitals, anus, breasts, or hymen without medical or similar necessity,[76] or making physical contact with a person, including by touching a sexual body part.[77]

(v) Unclear boundaries between sexual exploitation and sexual harassment cases

39. The Secretary-General's 2003 Bulletin does not limit the definition of sexual exploitation to cases involving persons who are from a local community or potentially, beneficiaries of assistance. It can often be the case that persons who are in a significantly inferior pay grade or with a short-term,

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[70] *Khamis v. UNSG*, UNDT/2020/147, paras. 35, 37.
[71] *Khamis v. UNSG*, 2021-UNAT-1178, para. 86.
[72] *Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008 (1 September 2010) para. 8.5. See also, CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GC/35 (26 July 2017) para. 29(e).
[73] Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) [2011] CoE Treaty Series, No. 210.
[74] Available at: https://4genderjustice.org/ftp-files/publications/The-Hague-Principles-on-Sexual-Violence.pdf.
[75] See, e.g., *Salloum v. UNSG*, UNDT-2024-027 (UNDT finds serious misconduct however does not consider the applicability of sexual abuse/assault).
[76] See, e.g., *Al Fararjeh v. Commissioner-General of UNRWA*, 2021-UNAT-1136, para. 31 (correctly identified as sexual assault/abuse).
[77] See, e.g., *Haidar v. UNSG* 2021-UNAT-1076, para. 47 (where UNAT determined that touching the Applicant's breasts amounted to sexual harassment constituting serious misconduct, though it did not make a finding about sexual violence/abuse). See also *IK v UNSG*, UNDT-2024-034 (where the allegations were that the Applicant asked for a kiss, touched the complainant on her breast and forced her hand to feel his penis) amounted to sexual harassment; there was no consideration of the applicability of sexual abuse/assault.

temporary contract may be exploited sexually for the purposes of gaining a particular work advantage or extending a temporary role. It is also foreseeable that both sexual exploitation and sexual harassment may apply to a single set of facts, and that one form of misconduct would not necessarily make another form of misconduct inapplicable. The Secretary-General's 2019 Bulletin on Sexual Harassment makes this clear: 'Sexual harassment is prohibited under staff rule 1.2 (f) and may also constitute sexual exploitation or abuse under staff rule 1.2 (e).'[78] However, certain agencies' policy frameworks may make a fixed distinction between workplace sexual harassment and sexual exploitation, or they fail to recognise the possibility of workplace sexual exploitation[79] despite its prevalence in practice.

40. The UNDT recognised the potential for both sexual harassment and sexual exploitation to apply to a single set of facts in the *Stefan* case. Here, it noted that the reference to sexual exploitation being applicable to sexual relations which exploit systemic inequality, such as between peacekeepers and local population, and particularly where transactional exchange is involved 'cannot be the basis for exclusion of intra-staff sexual exploitation from the rule's application. The Tribunal did not make a positive finding that the rule was only applicable to non-staff/United Nations staff sexual exploitation complaints.'[80] In contrast, in the *Haidar* case, UNDT did not find sexual exploitation, holding that 'it considers it applicable to sexual relations exploiting systemic inequality, such as between peacekeepers and local population, and particularly where transactional exchange is involved. Conversely, workplace relation between two staff members, even of uneven positions, are addressed under staff rule 1.2(f) [harassment].'[81] This finding was not reversed on appeal.[82]

b) The disciplinary offence of failing to report SEA

(i) The failure to comply with the duty to report SEA

41. UN staff members 'are obliged to create and maintain an environment that prevents [SEA],'[83] as set out in the staff rules and the UN Secretary-General's 2003 Bulletin. The failure to report SEA contributes to an environment where SEA can persist.[84]

42. Staff rule 1.2(c) provides that staff members 'have a duty to report any breach of the Organization's regulations and rules to the officials who are responsible for taking appropriate action.'[85] The failure to do so also violates staff regulation 1.2(b) (failure to uphold the highest standards of integrity).[86] The failure to report SEA can therefore qualify as misconduct and lead to disciplinary measures.

43. Where a staff member 'develops concerns or suspicions regarding [SEA] by a fellow worker, whether in the same agency or not and whether or not within the United Nations system, he or she must report such concerns via established reporting mechanisms.'[87] Accordingly, staff members have a broad obligation to report any 'concern' or 'suspicion' regardless of whether or not they

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[78] UNSG, 'Secretary-General's bulletin Addressing discrimination, harassment, including sexual harassment, and abuse of authority,' UN Doc. ST/SGB/2019/8 (10 September 2019) para. 1.7.

[79] See, e.g., UNESCO, Policy on the Protection from Sexual Exploitation and Abuse (PSEA), Administrative Circular AC/HR/77, 19 November 2020 (last updated 20 April 2023) para 4. See also UNRWA General Staff Circular No. 07/2010 entitled 'Sexual exploitation and abuse complaints procedure' (20 August 2010) which clarifies the distinction between SEA and sexual harassment, 'SEA complaints being those made by Agency beneficiaries, not covering complaints of sexual harassment made by a person employed in any capacity by the Agency against another person employed by the Agency.' (Referred to in *Samer Mohammad v. Commissioner-General of UNRWA*, 2022-UNAT-1195, para. 49).

[80] *Stefan v. UNSG*, UNDT-2022-083, 20 September 2022, para. 22.

[81] *Haidar v. UNSG*, UNDT-2019-187, para. 78.

[82] *Haidar v. UNSG*, 2021-UNAT-1076, para. 58.

[83] Staff Regs & Rules, Rule 1.2(e); ST/SGB/2003/13, para. 3.2(f).

[84] *Loto v. UNSG*, UNDT-2022-081, para. 27.

[85] Staff Regs & Rules, Rule 1.2(c). Previous versions of the staff rules contained a similar provision, see, e.g., Staff Regulations and Rules of the United Nations, Secretary-General's bulletin, ST/SGB/2018/1, Rule 1.2(c).

[86] See, e.g., *Okwakol v. UNSG*, 2023-UNAT-1354, para. 124.

[87] ST/SGB/2003/13, para. 3.2(e).

have specific information about the alleged SEA incident. If an incident has already been reported, e.g., by the victim, this does not relieve a staff member from their respective duty to report.[88]

44. UNAT found in several cases that the breach of the duty to report SEA is established when a staff member was told about such an incident by the victim, the alleged perpetrator, or a third party.[89] First hand or direct knowledge, objective facts, or sufficient evidence to support a concern or suspicion of SEA is not required for the duty to report to arise.[90] UNAT overturned several UNDT decisions where UNDT had erroneously held that a staff member had insufficient knowledge to be held liable for a failure to report SEA, for example because they did not hear about the SEA incident from the victim or perpetrator directly. In one case, a staff member accompanied the alleged perpetrator of rape of a minor to local criminal court proceedings. For the UNDT, this did not constitute sufficient knowledge for the staff member to be obligated to report the misconduct as the staff member had not entered the court room but only 'heard from another person who attended court.'[91] This was overturned by UNAT on appeal; the obligation to report SEA had indeed been triggered and the failure to do so constituted misconduct.[92]

45. The – incorrect – higher knowledge threshold applied by the UNDT appears to stem from an erroneous application of section 4.5 of the Administrative Instruction 'Unsatisfactory conduct, investigations and the disciplinary process'[93] which provides that:

> 4.5 Information received from either a staff member or a non-staff member alleging unsatisfactory conduct should contain sufficient details for it to be assessed under the present instruction, such as:
> (a) A detailed description of the unsatisfactory conduct;
> (b) The names of the implicated staff member(s);
> (c) Where and when the unsatisfactory conduct occurred;
> (d) The names of potential witnesses to the unsatisfactory conduct; and
> (e) All available supporting documentation.

46. Referring to this provision, UNDT held in several cases that staff members' failure to report did not amount to misconduct because the staff member did not have sufficient knowledge to establish all five categories.[94] According to UNAT in the 2022 *AAA* appeal, the Administrative Instruction 'clearly outlines that the information "should contain sufficient details" for it to be assessed and then provides *examples* of information that would assist in assessing the conduct.'[95] Thus, section 4.5 does not impose a requirement on the staff member who heard about a SEA incident to have detailed information for all categories,[96] or indeed for any categories. All UNDT decisions which misapply section 4.5 predate UNAT's *AAA* judgment which clearly sets out how this section should be interpreted.

47. Despite UNAT's clear holding that no specific knowledge of the SEA is required for staff members to be obliged to report SEA, both tribunals occasionally still consider in detail the knowledge the staff member had of a specific incident. This arguably causes confusion. UNDT and UNAT have also both noted that the Secretary-General's 2003 Bulletin which refers to concerns and suspicions, does not require a staff member to report 'mere allegations that come to their attention.'[97] It is not clear what the difference between concerns, suspicions, or mere allegations is. This may lead to

[88] *Okwakol v. UNSG*, 2022-UNAT-1293, para. 61.
[89] See, *Okwakol v. UNSG*, 2023-UNAT-1354, paras. 108-9.
[90] E.g., *AAA v. UNSG*, 2022-UNAT-1280, paras. 51-52; *Okwakol v. UNSG*, 2023-UNAT-1354, para. 110.
[91] *Applicant v. UNSG*, UNDT/2021/091, paras. 43; 51.
[92] E.g., *AAA v. UNSG*, 2022-UNAT-1280, paras. 51-52; *Okwakol v. UNSG*, 2023-UNAT-1354, para. 110.
[93] UN Secretariat, Administrative Instruction 'Unsatisfactory conduct, investigations and the disciplinary process,' ST/AI/2017/1, 26 October 2017.
[94] For example, in *Applicant v. UNSG*, UNDT/2021/091. See also, *Okwakol v. UNSG*, UNDT-2021-135, paras. 46-56.
[95] *AAA v. UNSG*, 2022-UNAT-1280, para. 56, emphasis added.
[96] *AAA v. UNSG*, 2022-UNAT-1280, para. 56.
[97] *Loto v. UNSG*, 2022-UNAT-1292, para. 67; *Loto v. UNSG*, UNDT-2021-133, para. 52.

confusion among staff members about when the threshold is reached for them to be duty-bound to report. It will also produce variable caselaw on the duty to report. In another case, UNAT considered whether the staff member had a 'sufficient degree of confidence in the veracity of what had been reported to him to have triggered his obligation to report his belief or suspicion.'[98]

48. The reporting requirement fails in its purpose of contributing to the UN's zero-tolerance policy if staff members are uncertain whether specific details about an alleged SEA incident are required to trigger their obligation to report it. Further, staff members should not be penalised for reporting information they believe is relevant to SEA, regardless of its veracity. No staff person should ever be disciplined when trying to comply with their reporting obligations for 'disseminating an unsubstantiated rumour of sexual exploitation involving a senior official'[99] unless there is evidence that the person knew the information to be false; making a report or providing information that is intentionally false or misleading would constitute misconduct.[100] In overturning the disciplinary measure, the UNDT referred to section 4.5 of the Administrative Instruction and held that the applicant did not disseminate a rumour but was rather seeking 'additional details or evidence that would inform a proper report of the alleged SEA to the relevant authority.'[101] This shows that a misapplication of section 4.5 can create the impression among staff members that they need specific knowledge before they can report an incident. Causing staff members (who are not trained investigators) to investigate allegations on their own before reporting them may also confuse any later investigations by the Administration and may impede criminal investigations and prosecutions where these are instituted by producing tainted or contradictory records which fail to meet evidentiary thresholds.[102] It may also place victims at risk. Furthermore, staff rule 1.2 (c) and section 4.1 of the Administrative Instruction provide that any staff member reporting a breach of the UN's regulations and rules 'shall not be retaliated against for complying with these duties.'

49. Most cases in which staff members fail to report do not come to the attention of the UNDT or UNAT; unless the victim persists with a complaint, those cases tend not to result in investigations and thus no disciplinary process ensues (either for the alleged SEA or for any non-reporting of SEA). For example, in the *Haidar* case (which was not about the misconduct of non-reporting), the UNDT in its summary of the facts notes that the victim told several staff persons about the incidents –the Staff Counsellor, the Force Commander and others, in the four months between the alleged incident and her decision to file a formal complaint. There is no indication that any of these persons reported the possible SEA in the intervening months;[103] indeed it is suggested that Lebanese Armed Forces officials had suggested she drop the matter.[104] There is no indication that the Organization took any action against any of the individuals concerned over which it had authority for their apparent failure to report SEA.

(ii) Actively hindering investigations

50. Staff members may also face disciplinary measures when they prevent, hamper, or obstruct investigations into SEA misconduct, or conceal SEA allegations by pressuring victims to withdraw complaints or not to report an incident.

[98] *Loto v. UNSG*, 2023-UNAT-1362, para. 94.
[99] *Piezas v. UNSG*, UNDT/2022/128, para. 2.
[100] UNSG, Secretary-General's bulletin, 'Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations,' UN Doc. ST/SGB/2017/2/Rev.1 (28 November 2017) para. 2.3.
[101] *Piezas v. UNSG*, UNDT/2022/128, para. 49. See also, paras. 50-51.
[102] 'Even well-intentioned efforts to collect information for use in accountability processes have the potential to detrimentally affect the usability of the information as evidence in future proceedings. This applies, in particular, to the questioning of persons.' [ICC, 'Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations' (2022) 7].
[103] *Haidar v. UNSG*, UNDT/2019/187, paras. 27-35.
[104] Ibid, para. 65.

51. As with the duty to report, the prohibition on pressuring victims to withdraw a SEA allegation may be inferred from the obligation to 'create and maintain an environment that prevents [SEA]'.[105] It is also considered a violation of staff regulation 1.2(b) - failing to uphold the highest standards of efficiency, competence and integrity.[106]

52. **Engaging in settlement negotiations which involve the withdrawal of complaints and/or otherwise pressuring victims to withdraw their complaints**: A victim may be pressured by the alleged perpetrator or a third party to withdraw their complaint.[107] In some cases, this occurs with the connivance of staff members, including staff members with considerable authority which can create a coercive environment for the victim. In the tribunal cases pertaining to the rape of a service vendor at MONUSCO by a UN volunteer, several staff members set up a meeting to pressure the victim to withdraw her complaint. One of the staff members – Mr Okwakol, who was at the time the Chief Resident Auditor with the Office of Internal Oversight Services (OIOS) with MONUSCO with a P-5 grade, arranged a meeting with the alleged perpetrator, the victim, two other individuals, and himself.[108] Mr Okwakol then pressured the victim to withdraw her complaint in the course of the meeting, in the presence of the alleged perpetrator.[109] The meeting participants then discussed a compensation payment of USD 2,000 to the victim by the alleged perpetrator in exchange for withdrawing her complaint.[110] UNAT held that Mr Okwakol was complicit in attempting to persuade the victim to withdraw her complaint, a kind of pressure that can be exercised even without obvious threats.[111] Mr Okwakol 'repeatedly and in a persisting manner' told the victim of the 'dire consequences' the rape complaint would have on the alleged perpetrator if it proceeded.[112] In another case, it was determined that a staff member attempted to persuade the victim to withdraw her complaint 'through the medium of one of [the alleged perpetrator's] own security guards.'[113]

53. In some cases, exerting pressure on a victim to withdraw a complaint was held to constitute an interference with the administration of justice.[114] UNAT, for example, has held that a promise to pay USD 2,000 to a victim would, at least, incentivise her to withdraw her claim and, in engaging in such a negotiation, a staff member 'actively participated in the scheme of interfering with the administration of justice and concealing the SEA allegation.'[115]

54. **Failing to cooperate with investigations**: Staff members may also face disciplinary measures for failing to cooperate with investigations, pursuant to staff rule 1.2(c) which, in addition to the duty to report, sets out that 'Staff members shall cooperate with duly authorized audits and investigations.'[116] Section 6.2 of the Administrative Instruction 'Unsatisfactory conduct, investigations and the disciplinary process' provides that 'Failure to cooperate may be considered unsatisfactory conduct that may amount to misconduct.'[117]

55. A failure to cooperate is usually found when staff members withhold or tamper with evidence, withhold or fail to disclose facts material to an investigation, provide false information during an investigation, or refuse, without justification, to participate in interviews by investigative bodies

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[105] Staff Regs & Rules, Rule 1.2(e); section 3.2(f) UNSG's 2003 Bulletin, ST/SGB/2003/13. See, e.g., *Loto v. UNSG*, UNDT/2022/081; *Okwakol v. UNSG*, 2023-UNAT-1354, para. 124.
[106] Held, e.g., in *AAK v. UNSG*, 2023-UNAT-1348, para. 97 (g), where a staff member attempted to persuade a victim to withdraw her SEA complaint.
[107] E.g., perpetrator: *AAK v. UNSG*, 2023-UNAT-1348; third party: *Loto v. UNSG*, UNDT/2021/133.
[108] *Okwakol v. UNSG*, 2023-UNAT-1354, para. 112.
[109] *Okwakol v. UNSG,* 2023-UNAT-1354, para. 115.
[110] *Okwakol v. UNSG,* 2023-UNAT-1354.
[111] *Okwakol v. UNSG,* 2023-UNAT-1354, para. 118.
[112] *Okwakol v. UNSG,* 2023-UNAT-1354, para. 119.
[113] *AAK v. UNSG*, 2023-UNAT-1348, para. 8.
[114] *Loto v. UNSG*, 2022-UNAT-1292, para. 83; *Applicant v. UNSG*, UNDT/2021/164. Also, Staff Regs & Rules, Rule 1.2(g).
[115] *Loto v. UNSG*, 2022-UNAT-1292, para. 83.
[116] See also s. 4.1 of Administrative Instruction ST/AI/2017/1.
[117] ST/AI/2017/1.

such as the OIOS.[118] If a staff member is on certified sick leave, maternity or paternity leave, the investigative and disciplinary processes should normally proceed.[119]

iii) Procedural aspects regarding the handling of complaints and the evaluation of evidence

a) The role of UNDT and UNAT in relation to the assessment of facts

56. The competences and scope of UNDT and UNAT are set out in the UNDT and UNAT statutes[120] and rules of procedure.[121] In addition, UNDT and UNAT judges are required to comply with the Code of Conduct for the Judges of the UNDT and UNAT,[122] which sets out the basic standards of comportment of independence, impartiality, integrity, propriety, transparency, fairness in the conduct of proceedings, competence and diligence.

57. The bulk of the cases involving SEA which arrive at the UNDT are applications to appeal an administrative decision imposing a disciplinary measure. The UNDT statute provides that in such cases, the role of the UNDT is to conduct a judicial review.[123] The UNDT statute provides in a revised Article 9.4 introduced in December 2023, that:

> in conducting a judicial review, the Dispute Tribunal shall consider the record assembled by the Secretary-General and may admit other evidence to make an assessment on whether the facts on which the disciplinary measure was based have been established by evidence; whether the established facts legally amount to misconduct; whether the applicant's due process rights were observed; and whether the disciplinary measure imposed was proportionate to the offence.[124] (emphasis added)

58. Judicial review of a disciplinary case requires the UNDT to consider the evidence adduced and the procedures utilised during the course of the investigation by the Administration and to determine whether the facts on which the sanction was based were established, whether those facts qualify as misconduct, and whether the sanction is proportionate to the offence.[125] When assessing the validity of the Administration's discretionary authority to impose a disciplinary sanction, the role of UNDT is to determine if the administrative decision was 'legal, rational, procedurally correct, and proportionate.' It can consider 'whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse.'[126] Conversely, it is not the role of UNDT to 'consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him' or otherwise 'substitute its own decision for that of the Secretary-General.'[127]

59. UNDT cases involving SEA generally recognise the limited role for the UNDT in respect of judicial review.[128] Nevertheless, in several cases, panels have held that there is a different test. In

[118] E.g., *Applicant v. UNSG*, UNDT/2021/091, para. 10(b). See also, *Kavosh v. UNSG*, UNDT/2024/020.
[119] ST/AI/2017/1, s. 6.20. See, *AAA v. UNSG*, 2022-UNAT-1280, para. 68.
[120] See, *Statute of the UNDT*, UNGA res 63/253, 24 December 2008, as amended (last amended 22 December 2023); *Statute of the UNAT*, UNGA res 63/253, 24 December 2008, as amended (last amended 23 December 2016).
[121] See, Rules of Procedure of the UNDT, adopted at the First Plenary Meeting of Judges in New York and approved by UNGA res 64/119, 16 December 2009, as amended (last amended 30 December 2022); Rules of Procedure of the UNAT, adopted by UNGA res 64/119, 16 December 2009 as amended (last amended 24 December 2021).
[122] https://www.un.org/en/internaljustice/pdfs/Code_judges_(EN).pdf.
[123] Statute of the UNDT, Art. 9(4).
[124] Ibid. See further, UNGA, Administration of justice at the United Nations, UN Doc. A/RES/78/248 (28 December 2023).
[125] *Kavosh v. UNSG*, UNDT/2024/020.
[126] *Sanwidi v. UNSG*, 2010-UNAT-084, para. 40.
[127] *Sanwidi*, ibid, para. 40.
[128] See e.g., *Applicant v UNSG*, UNDT-2022-098; *Stefan v. UNSG*, UNDT-2022-083; *Applicant v. UNSG*, UNDT-2021-164; *Loto v. UNSG*, UNDT-2022-081.

AAC v. UNSG (a sexual harassment case) the UNAT panel held in respect to the scope of a UNDT review, that it 'contemplates a wide appeal or merits-based review in which the disputed facts of the alleged misconduct are required to be established by the UNDT through the admission and evaluation of evidence anew.'[129] This reasoning was applied in *Shumba v. UNSG* (a SEA case), where UNAT held that the 'UNDT Statute contemplates a wide appeal or merit-based review in which the UNDT is required to establish the disputed facts of the alleged misconduct through a de novo process of the admission and evaluation of evidence.'[130] These cases predate the December 2023 amendment to the UNDT statute which introduced the new Article 9.4, referred to above, and this will hopefully make the jurisprudence more consistent going forward.

60. UNAT is competent to hear and decide appeals filed against UNDT judgments which assert that the UNDT exceeded its jurisdiction or competence, failed to exercise its jurisdiction, erred on a question of law, committed an error in procedure such as to affect the decision of the case or erred on a question of fact, resulting in a manifestly unreasonable decision.[131] Article 2(5) of the UNAT statute makes clear that UNAT is not a trier of fact. UNAT can only receive additional evidence 'in exceptional circumstances' and if it is in the interest of justice and the efficient and expeditious resolution of the proceedings, where the 'the facts are likely to be established with documentary evidence, including written testimony.' In all other cases, or where the Appeals Tribunal determines that a decision cannot be taken without oral testimony or other forms of non-written evidence, the matter should be remanded back to the UNDT.

61. Similarly, the role of UNAT is not to hear cases *de novo*, but rather to verify whether the lower court exceeded its jurisdiction, failed to exercise it, erred in law, erred in fact, resulting in a manifestly unreasonable decision, or erred in procedure, such as to affect the decision. The appeals process is, therefore, of a corrective nature.[132]

b) Oral proceedings and the concomitant evidential weight of the prior investigative record

62. The UNDT statute does not impose a requirement on all parties to present particular kinds of evidence or to appear in person before the Tribunal. Article 9(1) provides that the Dispute Tribunal 'may order production of documents or such other evidence as it deems necessary' and Article 9(2) provides that it 'shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings' (emphasis added). The UNDT rules of procedure similarly provide that the 'Dispute Tribunal may make an order requiring the presence of any person or the production of any document' (Article 17(1)) and 'may, if it considers it appropriate in the interest of justice to do so, proceed to determine a case in the absence of a party' (Article 17(2)).

63. The UNDT has broad discretion under its Rules of Procedure to determine the admissibility of any evidence and the weight to be attached to such evidence.[133] In the *Al Fararjeh* case (concerning procedures before the UNRWA Dispute Tribunal), UNAT determined that:

> In the present case, the UNRWA DT indicated that it considered this was a case 'the record before the Tribunal, compiled during the investigation, is sufficient to render a decision without the need for an oral hearing'. Without an oral hearing, the determination was based entirely on the documentary evidence and written submissions before the UNRWA DT. In view of the adequacy and the consistency of the evidence on file, we find the UNRWA DT's decision not to hold an oral hearing was reasonable and was not an error of procedure 'such as to affect the decision of the case' as per Article 2(1)(d) of the Statute of the Appeals Tribunal.[134] […]

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[129] *AAC v. UNSG*, 2023-UNAT-1370, para. 38.
[130] *Shumba v. UNSG*, 2023-UNAT-1384, para. 64.
[131] Statute of the UNAT, Art. 2(1).
[132] *Safi v. Commissioner-General of UNRWA*, 2024-UNAT-1443, para. 70.
[133] *Al Fararjeh v. Commissioner-General of UNRWA*, 2021-UNAT-1136, para. 24 (referring to the UNRWA Dispute Tribunal).
[134] *Al Fararjeh*, ibid, para. 41.

64. Finally, due process does not always require that a staff member defending a disciplinary action of separation can confront and cross-examine his accusers. This is particularly the case when, as in the *Al Fararjeh* case, the accusers and witnesses are young children or vulnerable people where it may be inadvisable for such a confrontation to occur. In this instance, the Appellant's request to "face his accusers" must give way to the need to protect vulnerable witnesses from the emotional distress the confrontation would entail if the Appellant was afforded the fair and legitimate opportunity to defend his position. Due process rights of staff members are complied with as long as staff members have a meaningful opportunity to mount a defence and to question the veracity of the statements against them.[135]

65. UNAT has also adopted this position when it indicated in *Applicant v. UNSG (2013)* that disciplinary cases are not criminal cases and liberty is not at stake. Cross-examination is not an absolute right, and it is not always necessary for a complainant to be present in court. Indeed, there are cases in which it is impossible, or inadvisable, for a witness to attend court. The attendance of a witness can be dispensed with so long as the Tribunal is satisfied that the staff member accused of misconduct is given a fair and legitimate opportunity to defend his position.[136] Nor should the absence of oral testimony necessarily diminish the credibility of a witness statement.[137] Similarly, in *Mbaigolmem v. UNSG* (a sexual harassment case), UNAT indicated that 'there will be cases where the record before the UNDT arising from the investigation may be sufficient for it to render a decision without the need for a hearing. Much will depend on the circumstances of the case, the nature of the issues and the evidence at hand.'[138]

66. Nevertheless, there is a line of SEA judgments which focuses on parallels with criminal procedure (though the UNDT procedure is administrative and gives rise to different rights[139]). The UN Secretary-General has decried this recent tendency of UNDT judgments to discount 'investigation reports by OIOS, including attached sworn witness statements, unless the victims and witnesses testified.'[140] This line of cases suggests that OIOS transcripts and other investigative records entered into UNDT proceedings as evidence for the truth of their contents are unreliable as "hearsay", a common law rule which does not feature in the provisions of the statutes or rules of the tribunals (the UNDT rules of procedure simply allow the tribunal to exclude evidence which it considers irrelevant, frivolous, or lacking in probative value (Article 18(5)). For example, in *Shumba*, the UNDT held that the complainant's 'recollection of the events is very clear and detailed; the victim's accusation provided is in itself convincing evidence of the facts.'[141] However, before UNAT, despite UNDT's factual findings, it was held that the reliance on the written record while failing to accord Mr Shumba an oral hearing made the basis for the finding of serious misconduct unsound.[142] This suggests (though it is not clearly articulated in the judgment) that the UNAT is requiring some form of corroboration for sexual exploitation and abuse cases, even where the complainant has been judged to be fully credible. This goes against good practice in cases involving sexual violence. UNAT has emphasised: 'all the witnesses relied upon by the OAIS

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[135] *Al Fararjeh*, ibid, para. 43.
[136] *Applicant v. UNSG*, 2013-UNAT-302.
[137] *Majut v. UNSG*, 2018-UNAT-862, para. 88 (an assault case).
[138] *Mbaigolmem v. UNSG*, 2018-UNAT-819, para. 28.
[139] *Liyanarachchige v. UNSG*, UNDT-2010-041, para. 54: 'all the rights that an accused enjoys in the course of a criminal trial may not necessarily be available to a person who is subjected to disciplinary proceedings. The exercise that the Tribunal should undertake in such a situation is an analysis of whether the basic interests of a staff member were safeguarded in the light of the nature of the charges, the nature and complexity of the investigation, the need to afford protection to witnesses, whether the absence of confrontation is so detrimental to the interest of the staff member, whether the absence of witnesses so weakens the evidence in support of the charges that it cannot be relied upon and whether overall the proceedings were fair.'
[140] UNSG, Special measures for protection from sexual exploitation and abuse, UN Doc. A/78/774, (14 Feb. 2024) para. 35.
[141] *Shumba v. UNSG*, UNDT-2022-103, para. 50; See also para. 66 where the UNDT notes that while for two incidents 'there is no witness corroboration [… the victim's] testimony is detailed and quite specific in describing the events.'
[142] *Shumba v. UNSG*, para. 62 et seq.

investigators were not direct witnesses to the incidents but obtained their evidence and information from the Complainant.'[143] But of course, the Complainant was herself a direct witness.

67. In *Applicant v. UNSG (2022)*, a case involving alleged sexual exploitation and abuse by a UNISFA facilities manager of cleaning staff working for the Mission, UNAT holds that 'the failure to call witnesses by the Secretary-General and the denial to the applicant of an opportunity to cross-examine his or her accusers, especially in serious cases, may very well result in a finding that the Secretary-General has failed to meet his burden of proof leading to a rescission of the contested decision.'[144] The UNAT goes on to emphasise that:

> The Secretary-General's approach and his failure to call these witnesses was akin to a prosecutor in a criminal trial simply handing in a written report of the police recommending a prosecution on a criminal charge, without calling the investigating officer or any of the relevant witnesses to the crime. It is inconceivable that any court could return a conviction on so incomplete an evidentiary basis. The failure to call the witnesses made it impossible for the UNDT to assess the credibility or reliability of the testimony of the complainants, the OIOS investigator and interpreter who took down the hearsay statements, or the other witnesses who had insight into the situation, with reference to their demeanour, and the calibre and cogency of their performance in the witness box in relation to the alleged sexual misconduct and the possibility of an ulterior motive. There has simply not been a trial of the issues.[145]

68. The UNDT had occasion to take account of the new Article 9(4) of the UNDT Statute as well as the UN Secretary-General's call to ensure victims' rights are upheld in proceedings of the internal justice system[146] in the *Kavosh* case.[147] It will be important to see how this caselaw develops, also before the UNAT.

c) The victim as witness: assessment of victim statements and victim credibility

69. Sexual exploitation and sexual abuse, like most sexual violence offences, occur behind closed doors. It is usual that the victim is a principal source of evidence, if not the only person who was a direct witness to the events (other than the alleged perpetrator). However, assuming the victim provides credible and reliable testimony, there is no need for that testimony to be corroborated.[148] The victim's own testimony can be sufficient evidence of the commission of sexual violence, in the absence of any other corroboration from witnesses, documents, medical reports, photos, or any other potentially corroborative evidence.[149] Corroboration can strengthen a case, but the absence of corroboration does not mean that the evidence of what is alleged will be insufficient. This is the rule with respect to criminal prosecutions which have a higher standard of proof than the "clear and convincing" standard for cases involving allegations of serious misconduct before UNDT and UNAT. The UNDT and UNAT took this approach in the *Hallal* case (concerning sexual harassment).[150]

70. Given the importance of victims' statements to the factual determination of allegations of sexual exploitation and abuse, judges will carefully consider the credibility of victims and the reliability of their statements when assessing the evidence. It is important, however that no inappropriate inferences are drawn about victims' credibility, for instance on the basis of a victim's prior

[143] *Shumba v. UNSG*, para. 69.
[144] *Applicant v. UNSG*, 2022-UNAT-1187, para. 59.
[145] *Applicant v. UNSG*, ibid, para. 70.
[146] UNSG, Special measures for protection from sexual exploitation and abuse, UN Doc. A/78/774, (14 Feb. 2024) para. 35.
[147] *Kavosh v. UNSG*, UNDT/2024/020.
[148] See, e.g., Rule 63(4) of the Rules of Procedure and Evidence of the ICC.
[149] See the UNAT's decision in *Shumba*, where the judges appear to discount the complainant's testimony because Mr Shumba categorically denies it [*Shumba v. UNSG*, 2023-UNAT-1384, para. 67].
[150] *Hallal v. UNSG*, UNDT-2011-046, para. 55; 2012-UNAT-2007, para. 30.

experience of harassment.[151] Equally, no adverse inferences should be made on the basis of gender stereotypes related to how victims "should" respond to sexual exploitation or sexual abuse.[152] For example, there should be no need for a complainant to communicate in a 'tone of vulnerability' after an encounter amounting to sexual exploitation.[153] UNAT articulates this in the *AAE* case, where it provides a clear explanation as to why the gender stereotypes the Applicant raises as to why the victim "consented" to sex are simply wrong in fact and in law.[154] Nor should adverse inferences be made about the reliability of their statements (for example, a delay in disclosing an assault, or small inconsistencies in how a victim recollects traumatic events will not be signs of unreliability;[155] conversely, they can be typical responses to the passage of time, or to responses to trauma and would not undermine the reliability of a victim's overall statement).[156] This point is made by UNAT in the *Al Othman* case,[157] and by UNDT in IK.[158] It is also made by UNDT (and affirmed by UNAT) in the *Haidar* case, where the judges failed to consider the arguments presented by Mr. Haidar concerning the victim's supposed past work-related issues, poor relations with colleagues, poor communication skills and earlier involvement in similar misunderstandings, and failed to consider the contention that the Complainant was not credible because she continued working with a man who allegedly had sexually harassed her.[159]

71. Judges would be applying inappropriate gender stereotypes when their starting point is that women are often untruthful, or when they assume that due to shame and stigma women will not admit to having had consensual sex outside of marriage and thus will lie, saying such premarital or extramarital sex was non-consensual, or ideas that women easily make allegations of rape when they want to cause harm or seek revenge.[160] While there may be instances when a victim has an ulterior motive to make an allegation, this would need to be positively demonstrated by the evidence.[161] Yet, this negative starting point appears to be where judges commence in the *Khamis* case, where UNDT refers to rape allegations as 'unsubstantiated and scandalous'.[162] There is little consideration by the Tribunal as to why that allegation of rape was not deemed credible by the investigators.

d) The anonymity of parties before the UNDT and UNAT

72. The names of accused persons are routinely included in judgments of the UN internal justice system 'in the interests of transparency and accountability, and personal embarrassment and discomfort are not sufficient grounds to grant confidentiality.'[163] Deviation from this usual practice is warranted only if there are exceptional circumstances.[164]

73. In cases involving allegations of sexual exploitation and sexual abuse, it is common for the complainants of the exploitation and abuse to be granted anonymity from the public (their names and identifying features typically do not appear in the public judgments). This was underscored in

[151] *Ramos v. UNSG*, UNDT-2021-082, paras. 22-23 (a sexual harassment case).
[152] *Vertido v. The Philippines*, UN Doc. CEDAW/C/46/D/18/2008 (1 September 2010).
[153] See, *Lucchini v UNSG*, 2021-UNAT-1121 para. 49.
[154] *AAE v. UNSG*, 2023-UNAT-1332, paras. 127-135.
[155] *Ramos v. UNSG*, UNDT-2021-082, para. 24. See also, IK v. UNSG,
[156] See generally, International Commission of Jurists, Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice, 2015).
[157] Al Othman v. Commissioner-General of UNRWA, 2019-UNAT-972, paras. 71-75.
[158] *IK v. UNSG*, UNDT/2024/034, paras. 31-27, where the Tribunal refuses to countenance the various arguments used by IK to call into question the victim's credibility.
[159] *Haidar v. UNSG*, 2021-UNAT-1076, para. 25.
[160] International Commission of Jurists, Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice, 2015) 11.
[161] Some of these features appear relevant to *Applicant v. UNSG*, UNDT-2020-204.
[162] *Khamis v. UNSG*, UNDT-2020-147 para. 37.
[163] *Buff v. UNSG*, 2016-UNAT-639, para. 21. See also, Art. 11.6 of the Statute of the UNDT; Art. 20(2) of the Rules of Procedure of the Appeals Tribunal. This has been applied directly in *Kavosh v. UNSG*, UNDT/2022/032, para. 17 (involving allegations of sexual exploitation and abuse).
[164] *Buff*, ibid, para. 23.

the *Oh* case, where the UNAT panel indicated that 'we think it is the victims of misconduct who need anonymity. As the purpose of anonymity is to protect the privacy of victims of misconduct, and also to ensure their safety … This is not the situation for Mr. Oh.'[165] Thus, decisions to grant anonymity to victims have proved quite uncontroversial[166] and indeed have been framed as appropriate to preserve victims' privacy and to protect against any negative repercussions, and to be consistent with the UN's other policies on the provision of assistance to victims of sexual exploitation and abuse.[167] It would be less obvious for an alleged perpetrator of SEA to benefit from anonymity, unless revealing the name of the alleged perpetrator would unavoidably make clear the name of the victim,[168] or if there were any other exceptional reasons at issue to justify anonymity.

74. Nevertheless, in several judgments, judges granted anonymity to defendants, simply because of the reputational risks associated with public exposure of their names (without such publication causing any evident risks to victims considered in the judgments). For example, in *Applicant v. UNSG* (2021), the UNDT held that '[p]ublic interest, transparency, scrutiny and accountability are not impaired by the removal of the Applicant's name from the public domain. On the contrary, the Applicant's family and his own reputation may be severely affected by a public exposure of his personal details.'[169] In the *AAE* case involving a senior staff member – at the time of the incident the UNFPA Representative to the African Union and UN Economic Commission for Africa at the D-1 level, after a careful review of the caselaw, a UNAT majority simply chooses not to take the caselaw into account. It held that:

> good cause has been shown in these circumstances as an exception to the general and established principle that parties' names should be included in the Judgment. The circumstances that support the exception include that: albeit extremely serious, the evidence is that this was a single act of established misconduct as opposed to a known pattern of misconduct, and that the Appellant otherwise had a long and unblemished career having worked in the Organization since 1992, there is no evidence that the Appellant will re-offend or needs to be deterred in the future, and the gravity of a finding of sexual assault or rape would undoubtedly have a negative impact on his family, who are blameless in this matter.[170]

75. This reasoning is problematic, given the lack of transparency and accountability it engenders, particularly when the allegations involve the highest-grade staff members with many years' service; the risks of appearance of bias are significant.

iv) Consequences of SEA allegations

a) Administrative measures during the investigation

76. After an allegation of misconduct and pending the completion of the disciplinary process, a 'staff member may be placed on administrative leave'[171] with pay (ALWP), with partial pay (ALWPP), or without pay (ALWOP). A staff member can be placed on ALWOP by an authorised official when there are exceptional circumstances that warrant the placement on ALWOP because the misconduct is of such gravity that it would, if established, warrant separation or dismissal and there is information before the authorized official about the unsatisfactory conduct that makes it more

[165] *Oh v. UNSG*, 2014-UNAT-480, paras. 22, 23.
[166] Note however that there are several instances in which victims' names are published, possibly accidentally. See, e.g., *Powell v. UNSG*, UNDT/2012/039, para. 6.
[167] *Muteeganda v. UNSG*, UNDT-2020-050, paras. 21, 22.
[168] This was possibly at issue in *Applicant v. UNSG*, UNDT/2022/098, though the rationale for anonymity of the alleged perpetrator was simply stated as 'for privacy reasons' [para. 1].
[169] *Applicant v. UNSG*, UNDT-2021-164, paras. 26, 27. See, similarly, *Applicant v. UNSG*, UNDT-2020-204, para. 22.
[170] *AAE v. UNSG*, 2023-UNAT-1332, para, 156.
[171] ST/AI/2017/1, s. 11.1.

likely than not (preponderance of the evidence) that the staff member engaged in the said conduct,[172] or, where there are 'reasonable grounds to believe (probable cause) that the staff member engaged in sexual exploitation and sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay'[173] (emphasis added).

77. Thus, if there is probable cause that an individual committed sexual exploitation or abuse, the administrative leave "shall" be without pay; there is no discretion to place the person on administrative leave with pay or with partial pay. This follows the clear wording of the Administrative Instruction ST/AI/2017/1 and has been replicated in Rule 10.4(c) of the Staff Regulations and Rules. UNAT in the *Muteeganda* case recognises this lack of discretion:

> Under the new Staff Rule 10.4(c), probable cause of sexual misconduct is a jurisdictional fact or condition precedent to a mechanical power to place a staff member on ALWOP. If there are reasonable grounds to believe sexual misconduct has occurred, the administrative leave will be without pay and, unlike in other instances of misconduct, the Secretary-General will have no discretion in that regard.[174]

78. Nevertheless, while recognising that the research team is basing its analysis on the records of the public judgments only (it has no access to the investigative reports or other evidentiary materials underpinning those judgments), not all persons who would appear to fall clearly within the category of persons who should be placed on non-discretionary ALWOP were so placed.

79. This is the case with *Makeen*, where Mr Makeen impregnated a young person alleged to be a child in March 2021. In end April 2021, OIOS opened an investigation and began to interview witnesses and in May 2021, Mr Makeen was placed on administrative leave with pay. In August 2021, OIOS issued its investigative report in which it finds that there were reasonable grounds to conclude that Mr. Makeen had sexual intercourse with the young person (indeed he admitted to this fact, there was simply a dispute as to the number of times this occurred).[175] In a memorandum of allegations of misconduct dated 30 September 2021, the Assistant Secretary-General for Human Resources informed Mr. Makeen that, on the basis of the evidence and findings contained in the Investigation Report, a variety of allegations of misconduct were issued against him which if established, would amount to sexual exploitation and/or abuse. In July 2022, he was advised that he would be separated from service, with compensation in lieu of notice and without termination indemnity. Despite these developments there is no indication that the ALWP was ever changed to ALWOP.[176] While later, there were problems with respect to how UNDT characterised sex with a young person alleged to have been a minor (these are discussed in Section IV(ii)(a) above in this Memorandum), there is no explanation as to why Makeen was not placed on ALWOP at the least from 30 September 2021, the date upon which the Organization informed Makeen that his conduct would amount to SEA and the July 2022 decision on separation of service.

80. The *Makeen* case is not an anomaly; there are other cases where ALWOP was simply not instituted despite the applicable regulatory framework.[177]

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[172] The ability for the Administration to place a staff member on ALWOP or ALWPP in exceptional circumstances may be relevant for cases where a staff member fails to report SEA, prevents effective investigation, or attempts to persuade a victim to withdraw their complaint. See, e.g., *Loto v. UNSG*, 2022-UNAT-1292; *Okwakol v. UNSG*, 2022-UNAT-1293.
[173] ST/AI/2017/1, s. 11.4. This provision is replicated in Rule 10.4(c) of the Staff Regs & Rules. See, e.g., *Muteeganda v. UNSG*, 2018-UNAT-869, para. 32.
[174] *Muteeganda v. UNSG*, 2018-UNAT-869, para. 32.
[175] *Makeen v. UNSG*, 2024-UNAT-1461, para. 14(i).
[176] *Makeen v. UNSG*, 2024-UNAT-1461, paras. 7-20.
[177] Other recent cases where ALWP was imposed in the face of credible SEA allegations and were never shifted to ALWOP when arguably the evidence reached the necessary evidentiary threshold include *Samer Mohammad v. Commissioner-General of UNRWA*, 2022-UNAT-1195, paras. 5-14; *AAE v. UNSG*, 2023-UNAT-1332, para. 50; *Applicant v. UNSG*, UNDT/2022/030, para. 21.

81. There may not always be reasonable grounds to believe that an individual committed sexual exploitation and abuse upon the commencement of an investigation, though this situation may change as an investigation progresses. There are instances when ALWOP was put in place at later stages of an investigation,[178] which on the reading of the rules is appropriate if there is fresh material which comes to light subsequently that has substantially changed the circumstances of the initial rationale for refraining from placing a staff member on ALWOP. If there is a request to extend ALWOP beyond the initial period for which it was instituted, the appropriateness of the decision to extend would likewise take into account any fresh material that has come to light.[179]

82. The legal framework on ALWOP as amended, is 'aimed at zero tolerance for sexual misconduct by imposing ALWOP on staff members where there is a reasonable basis for inferring sexual misconduct.'[180] Such leave serves as a deterrent for staff members from engaging in SEA and also protects the interests of the Organization by upholding its integrity and reputation.[181] Administrative leave is not considered as a disciplinary measure[182] though ALWOP and ALWPP are recognised to cause hardship.[183] UNDT has referred to ALWOP as a 'draconian measure' whose impact 'may be as onerous as summary dismissal but without the fundamental contractual procedural fairness protections.'[184]

83. Given the hardship it causes, the caselaw recognises that, while there is no arbitrary maximum time that a person can be placed on ALWOP, any decision to extend ALWOP must be reasonable and proportional. As UNAT found in the *Gisage* case, 'Much will depend on the circumstances, including any practical challenges at the duty station, the nature of the allegations, the complexity of the investigation and the need to follow due process. In the present case, the length of time required for the investigation and the subsequent disciplinary process was not unreasonable. The investigation was completed within three months and it established cogent reasons to believe that the prohibited conduct had occurred. The further delays related to the completion of the disciplinary process.'[185]

84. If a staff member is placed on ALWOP and at the end of the disciplinary process the allegations of misconduct are not sustained, or it is determined that the conduct at issue does not warrant dismissal or separation, any pay withheld under the ALWOP shall be restored.[186] The Organization may also decide not to restore any pay withheld for the period during which the staff member was placed on ALWOP if the staff member separates from the Organization prior to the completion of the investigation or disciplinary process, and the matter cannot be pursued without their cooperation.

b) Disciplinary measures imposed following a finding of SEA

85. If the conclusion of a disciplinary process results in a finding of SEA, this would constitute serious misconduct.[187] While there is some discretion with respect to which sanction should be applied following a finding of serious misconduct, rule 10(3)(b) stipulates that 'any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of the staff member's misconduct' and the 2003 General Measures Bulletin makes clear that SEA gives rise to 'grounds for disciplinary measures, including summary dismissal.'[188]

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[178] E.g., *Shumba v. UNSG*, 2023-UNAT-1384, para. 13.
[179] *Gisage v. UNSG*, 2019-UNAT-973, para. 30. See also, *Kavosh v. UNSG*, UNDT/2022/032.
[180] *Kavosh v. UNSG*, UNDT/2022/032, para. 23.
[181] *Kavosh*, ibid, para. 25.
[182] ST/AI/2017/1, s. 11.1.
[183] *Muteeganda v. UNSG*, 2018-UNAT-869, paras. 28-29. See also, *Okwakol v. UNSG*, 2022-UNAT-1293, paras. 51-53.
[184] *Kuya v. UNSG*, UNDT/2021/134, para. 48.
[185] *Gisage v. UNSG*, 2019-UNAT-973, para. 40.
[186] ST/AI/2017/1, s. 11.6.
[187] Regulation 10.1(b), Staff Regs & Rules.
[188] ST/SGB/2003/13, para. 3.2(a).

86. UNDT and UNAT caselaw make clear that a sanction that would be proportionate to the gravity of the offence would ordinarily be dismissal or separation from service, or in some cases non-renewal or non-extension of a temporary contract beyond its expiry date.[189] UNAT has found that the most important factors to be taken into account in assessing the proportionality of a sanction include, among other things, the seriousness of the offence, the length of service, and the disciplinary record of the employee.[190]

87. The Administration is entitled to take into consideration aggravating and mitigating factors in arriving at the appropriate disciplinary measure. However, given that SEA constitutes serious misconduct, it is not usual for mitigating factors to be so significant to avoid a dismissal or separation from service. Given the discretion afforded to the Administration to determine the appropriate disciplinary measure, there are rarely successful appeals of disciplinary measures of dismissal, separation from service or non-renewal of contract which all result in the cessation of the employment relationship.

88. **Dismissal**: In the *Safi* case, the UNRWA Dispute Tribunal found summary dismissal to be a proportionate measure in light of the nature and gravity of the serious misconduct, taking into account the Complainant's vulnerability as a 14-year-old girl, and that she was placed in a position where she suffered retaliation and ostracism in her community.[191] A similar approach was taken by UNAT when reviewing the UNRWA Dispute Tribunal's upholding of the measure of summary dismissal in the *Al Othman* case. Here, the disciplinary measure was found to be a reasonable exercise of the Administration's discretion, taking into account that this was a case about a teacher intentionally abusing and exploiting sexually a woman, beneficiary of assistance whom he placed in a potentially harmful position where she could suffer from retaliation in her community.[192] In *Kavosh*, factors which were taken into account by UNHCR to underscore the gravity of the misconduct include the fact that sexual exploitation goes to the heart of UNHCR's protection mandate; Mr Kavosh was an assistant protection officer 'which carries a heightened necessity of integrity in dealing with refugees' and the conduct was particularly serious on account of his 'position as manager, which carries a specific obligation to act as a role model.'[193]

89. **Separation from service with compensation in lieu of notice**, constitutes the second most strict measure. In the *Ramos* case, the UNDT notes that 'the general trend is that in sexual harassment cases, the perpetrator has either been dismissed or separated with compensation in lieu of notice.' It finds this category of less severe cases an appropriate exercise of the Administration's discretion.[194] Similarly, in the *Kramo* case, which involved using a UN laptop to access pornographic materials and having recourse to prostitutes, the UNDT determined that separation from service with compensation in lieu of notice was an appropriate exercise of the Administration's discretion in imposing a disciplinary measure.[195]

c) When should "Clear Check" be ordered?

90. As set out in Section III, above, Clear Check is a screening database used to share information amongst UN entities, system-wide,[196] on individuals (former UN staff and UN related personnel) who were found to have engaged in sexual misconduct, or who resigned or otherwise separated from service while there were pending allegations against them related to, sexual harassment,

[189] See, e.g., *Stefan v. UNSG*, UNDT-2022-083 para. 75; *Massah v. UNSG*, 2012-UNAT-274, paras. 46-49; *AAK v. UNSG*, 2023-UNAT-1348, paras. 40, 98; *Richard Loto v. UNSG*, 2023-UNAT-1362, para. 109.
[190] *Rajan v. UNSG*, 2017-UNAT-781, para. 48, referred to in *Makeen v. UNSG*, 2024-UNAT-1461, para. 64.
[191] *Safi v. Commissioner-General of UNRWA*, UNRWA/DT/2023/011, para. 125, referred to in 2024-UNAT-1443, para. 41.
[192] *Al Othman v. Commissioner-General of UNRWA*, 2022-UNAT-1196, para. 88.
[193] *Kavosh v. UNSG*, UNDT/2024/020, para. 188.
[194] See, e.g., *Ramos v. UNSG*, UNDT/2021/082, para. 16.
[195] *Kramo v. UNSG*, UNDT/2018/122, para. 45.
[196] Entities of the UN system Chief Executive Board for Coordination (CEB) and agencies, funds and programmes have joined the Clear Check system as of October 2022 are listed here: https://www.un.org/preventing-sexual-exploitation-and-abuse/sites/www.un.org.preventing-sexual-exploitation-and-abuse/files/list_of_participating_un_entities_clear_check.pdf.

sexual exploitation and sexual abuse. This database is managed by the UN's Department of Management Strategy, Policy and Compliance, One HR Service.

91. The purpose of the Clear Check system is to prevent re-employing UN personnel dismissed for substantiated allegations of sexual exploitation and abuse, or who left the Organization while an investigation was pending, from being deployed or re-employed within the system.

92. The Clear Check database records information on, *inter alia*, i) the individuals against whom allegations of SEA, while in service of an UN entity, were substantiated following an investigation and a disciplinary process and ii) individuals who resigned or separated from a UN entity, while being the subject of a pending investigation and/or disciplinary process for SEA.[197] It should be noted that, whilst having one's name and details recorded in the Clear Check system has real consequences for the individual (and should prevent their re-employment), this measure is an administrative consequence of the disciplinary process, it does not constitute a separate or additional disciplinary measure.[198]

93. Entry on the Clear Check database is not a disciplinary measure that the Administration has the discretion to impose; it should be an automatic outcome of certain disciplinary processes. This is affirmed by the UN Secretary-General: 'All final determinations by the Organization that a staff member has perpetrated sexual exploitation and abuse as defined in my bulletin on special measures for protection from sexual exploitation and sexual abuse result in the perpetrating staff member being dismissed or separated from service and included in Clear Check.'[199] Consequently, it is for the Administration to cause the relevant staff members to be added automatically to this database when those individuals have been determined to meet the criteria for inclusion.

94. As an automatic outcome, UNAT and UNDT judges should not have a role in deciding whether the decision to add a staff member to the database was lawful or proportionate. The only role the administrative justice system has in relation to Clear Check is if they are asked to adjudicate in a case involving the failure of the Administration to place onto the database a staff member who fits the criteria, or in cases of judgments that find that a particular staff member was wrongly disciplined for sexual exploitation and abuse. In such cases, the judgments would appropriately call for the entry into Clear Check to be voided as the reason for the entry would no longer apply.[200]

95. There are no known cases in which the Secretary-General has raised in an appeal the failure of the Administration to automatically place a staff member onto Clear Check when the criteria for so doing have been met, nor are there any known cases in which the UNDT or UNAT have queried the "proportionality" of a decision to place a staff member onto Clear Check, which would clearly be outside the competence of those tribunals.

d) Compensation for wrongful disciplinary and/or administrative measures

96. When the UNDT or UNAT determine that a disciplinary measure adopted by the Administration was wrongful or unlawful, the disciplinary measure would normally be rescinded. The staff member may receive compensation for moral harm suffered and/or compensation for reputational damage.[201] Generally, the tribunals only award compensation for damages if the staff member can provide evidence of the harm suffered.[202] The compensation 'shall normally not exceed the equivalent of two years' net base salary' of the applicant,[203] which is the case in the caselaw

[197] See, Factsheet on Clear Check (as of 1 September 2024).
[198] This is made clear by Rule 10.2(b) Staff Regs & Rules.
[199] UNGA, 'Special measures for protection from sexual exploitation and abuse,' UN Doc. A/76/702 (15 Feb. 2022, para. 38.
[200] *Valle v. UNSG*, UNDT/2024/032, para. 38; *Stefan v. UNSG*, 2023-UNAT-1375, paras. 92-93.
[201] *Piezas v. UNSG*, UNDT/2022/128; *Powell v. UNSG*, UNDT/2012/039.
[202] Statute of the UNDT, Art. 10(5)(b); Statute of the UNAT, Art. 9(1).
[203] Statute of the UNDT, Art. 10(5)(b); Statute of the UNAT, Art. 9(1).

reviewed. In exceptional cases, UNDT and UNAT could also award a higher compensation. If the staff member is deceased, the compensation is to be paid to the staff member's estate.[204]

97. The research team did not note any major anomalies associated with decisions to compensate.

e) Referrals to enforce accountability

98. UNDT and UNAT have the power to refer appropriate cases to the Secretary-General or the executive heads of separately administered UN funds and programmes for possible action to enforce accountability.[205] The purpose of this power is to give the tribunals a formal tool to make substantial breaches of procedure and due process rights or other severe wrongdoings on the part of managers immediately known to the Secretary-General and others as appropriate, so as to enable them to review the matter and take appropriate action.[206] The exercise of this power of referral for accountability is intended to be exercised sparingly and only where the breach or conduct in question exhibits serious flaws.[207]

99. The tribunals make referrals for accountability infrequently. There have been referrals for accountability in cases involving the manipulation of recruitment test results,[208] for managerial behaviour said to be scandalous and to exhibit personal bias,[209] corruption,[210] managerial bad faith[211] and harassment.[212]

100. There have also been referrals in cases involving abuse of authority and serious misconduct, both potentially highly relevant to SEA cases. In the *Dettori* case, which involved Ms. Dettori's concern about UNICEF's failure to take action on her report of abuse of authority against her supervisor, the Tribunal ordered the referral of the Chief of Investigations of the Office of Internal Audit and Investigations (OIAI) of UNICEF for accountability.[213] Another case, the *Kaddoura* case, concerned the decision to refer the former Commissioner-General of UNRWA for offering an individual the option of resigning and receiving a positive recommendation, instead of being terminated, which would violate the UN's core values in cases of serious misconduct:

> If a staff member has committed serious misconduct, he/she must be separated from the Agency in accordance with the Agency's regulatory framework. Under no circumstances should this staff member be provided with a positive recommendation, thus allowing him/her to pursue his/her international career within the United Nations system.[214]

101. However, the *Kaddoura* decision was reversed on appeal,[215] based on a mixture of issues linked to apparent "hearsay," a wider problem the research team identifies in Section IV(iii)(b) of this Memorandum, and the fact that the former Commissioner-General was no longer employed by the Organization.

102. The ability for UNDT or UNAT to make a referral for accountability applies and should be resorted to in appropriate cases involving SEA. Many of the judgments reviewed by the research team involved cogent information that staff members (who were not formally the subject of administrative justice proceedings) had not complied with their obligations to report SEA. These

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[204] *Massah v. UNSG*, UNDT/2011/218.
[205] Art. 10(8) UNDT Statute; Art. 9(5) UNAT Statute.
[206] *Dettori v. UNSG*, 2022-UNAT-1200, paras. 32, 36 and 38.
[207] *Cohen v. Registrar of the International Court of Justice*, 2017-UNAT-716, para. 46.
[208] *Chhikara v. UNSG*, 2020-UNAT-1014.
[209] *Haroun v. UNSG*, 2019-UNAT-909.
[210] *Maiga v. UNSG*, 2016-UNAT-638.
[211] *Tadonki v. UNSG*, 2014-UNAT-400.
[212] *Dawas v. UNSG*, 2016-UNAT-612.
[213] *Dettori v. UNSG*, 2022-UNAT-1200, paras. 32, 36 and 38.
[214] *Kaddoura v. Commissioner-General for UNRWA*, UNRWA/DT/2020/066, para. 164.
[215] *Kaddoura v. Commissioner-General for UNRWA*, 2021-UNAT-1185, paras. 107-109.

could have formed the basis of referrals for accountability, and should have been, in line with the Secretary-General's zero-tolerance policy. A referral for accountability was made in the *Karkara* case, where the Executive Director of UN Women apparently disclosed and discussed details of the case in an all staff meeting.[216] Referrals for accountability could have also been used in other cases, such as the *Ocokoru* case, which involved a staff member who applied to UNDT because her fixed-term contract was not renewed after she had reported a sexual assault incident which was not investigated by the administration. UNDT held that due to animosity and bias against her, 'the responsible CDU, SIU and OIOS officers at the mission all defied the procedures […] for dealing with reports of misconduct.'[217] A referral for accountability could have led the Administration to investigate the alleged sexual assault case and investigate the conduct of the CDU, SIU and OIOS officers who were seemingly negligent in their handling of the incident. Instead, the UNDT only ordered the Administration to reinstate Ms Ocokoru (or alternatively to pay compensation of two years' net base salary)[218] and compensate her for the substantive and procedural irregularities.[219]

v) A victim-centred approach

103. As the administrative justice system deals only with disputes involving current and former staff persons, victims of SEA have only a limited role. This is unless they are current or former staff persons,[220] though as discussed in Section IV(ii)(a)(v) of this Memorandum, many of those SEA cases would be pursued under sexual harassment, and the number of victim complainants in sexual harassment cases is also low.[221]

104. The UN Policy on Integrating a Human Rights-Based Approach to United Nations efforts to Prevent and Respond to Sexual Exploitation and Abuse recognises the importance of human rights to achieve the zero-tolerance policy and to eradicate sexual exploitation and abuse,[222] and this also features in the Victims' Rights Advocate's Statement adopted by the Office of the Victims' Rights Advocate in 2023.[223] Nevertheless, victims' rights within the administrative justice system are not explored in any detail. A victim-centred approach which recognises victims' human rights requires the administrative justice system to:

105. **Treat victims with compassion and respect for their dignity**: Victims are entitled to be treated with compassion and respect for their dignity, considering individual victims' personal situations and immediate and special needs, age and gender. There is a positive obligation to ensure that interactions with victims are carried out in a safe environment; every care should be taken to avoid re-victimisation and re-traumatisation, to ensure privacy is respected and to minimise inconvenience.[224] The first principle of the Victims' Rights Advocate's Statement is the right to be treated with respect: 'You will be treated with courtesy, compassion, professionalism and fairness.'[225] It is also recognised that particularly vulnerable individuals such as child victims

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[216] *Karkara v. UNSG*, 2021-UNAT-1172, para. 87.
[217] *Ocokoru v. UNSG*, UNDT/2015/004, para. 129.
[218] *Ocokoru v. UNSG*, UNDT/2015/004, paras. 131 to 132.
[219] *Ocokoru v. UNSG*, UNDT/2015/004, para. 133.
[220] *Ocokoru v. UNSG*, UNDT/2023/109.
[221] E.g., *Ular v. UNSG*, UNDT/2020/221 (sexual harassment); *Jackson v. UNSG*, UNDT/2019/120 (sexual harassment).
[222] UN, 'Policy on Integrating a Human Rights-Based Approach to United Nations efforts to Prevent and Respond to Sexual Exploitation and Abuse' (December 2021).
[223] OVRA, 'Your Rights As a victim of sexual exploitation or abuse committed by United Nations staff or related personnel', 2023, https://www.un.org/sites/un2.un.org/files/ovra-victims-rights-statement-en.pdf.
[224] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res'n 40/34, 29 November 1985; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res'n 60/147, 16 December 2005.
[225] OVRA, 'Your Rights As a victim of sexual exploitation or abuse committed by United Nations staff or related personnel', 2023, 1(a).

should have access to procedures and forms of support that have been adapted specifically to their needs.[226]

106. The code of conduct for the judges of the UNDT and UNAT provides that judges must not conduct themselves in a manner that is racist, sexist or otherwise discriminatory. They must not by word or conduct unfairly discriminate against any individual or group of individuals, or abuse the power and authority vested in them.[227] The use of gender stereotypes in judicial decision-making and the use of other pre-conceived notions about victims' limited credibility or reliability is discriminatory and contrary to the code of conduct. Consequently, it should not be tolerated in the UN system of the administration of justice. A victim's credibility and reliability should only be called into question on the basis of clear evidence.

107. Every effort should be taken to ensure that victims are not required to present their evidence on multiple occasions for different audiences. Where the investigative record is clear on its face, it should not be required that victims be re-examined. Re-examination should only be necessary where there are specific gaps or problems in the investigative record that re-examination of the victims can alleviate. Judgments such as *Shumba* where UNAT decides that the evidence before it is inadequate but refrains from sending the matter back to the UNDT because it is 'more than doubtful that the witnesses are still available' and would not be in the interests of justice (though apparently without first verifying whether victims would be available and without considering the impact on the victims of the absence of accountability) give pause for reflection.[228]

108. Judges should also avoid over-neutralising victims' experiences in a way that denies the harms they suffered. Some of the overly neutral language stems from the language of the Secretary-General's 2003 Bulletin such as 'sexual activity with children', which is and should be recognised as sexual assault or sexual abuse. Words like "activity" deny that the conduct was wrongfully done to the child. Similarly, to write 'they had sexual relations' in the context of a case involving the rape of a child is deeply minimising of that experience.[229]

109. **Ensure victims are protected from threats to their security and reprisals**:[230] The Victims' Rights Advocate's Statement underscores the importance of this principle: 'Any harassment, intimidation, and retaliation for reporting what happened to you, faced by you or those close to you, or any witnesses on your behalf, are unacceptable.'[231] The tribunals already do so by ensuring that victims' identities are shielded from the public and that threats and reprisals meted out against them are recognised as aggravating factors in the determination of appropriate disciplinary measures. However, the Victims' Rights Advocate's Statement also sets out that 'The United Nations will do everything possible to protect you from any contact with the alleged offender during any process or proceedings conducted by the United Nations.'[232] The suggestion by some benches of the need for victim evidence to be corroborated or for the claimants to be afforded the ability to confront their accusers[233] would not align with this principle from the Victims' Rights Advocate's Statement.

110. As threats and reprisals may constitute criminal matters and present ongoing risks to victims, judges should consider making referrals for accountability and for ongoing protection in appropriate cases. Judges should also take note that acceding to senior officials by granting them

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[226] Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Res'n 2005/20.
[227] Code of conduct, para. 6(b) https://www.un.org/en/internaljustice/pdfs/Code_judges_(EN).pdf.
[228] *Shumba v. UNSG*, 2023-UNAT-1384.
[229] *Erefa v. UNSG*, UNDT/2021/109.
[230] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res'n 60/147, 16 December 2005.
[231] OVRA, 'Your Rights As a victim of sexual exploitation or abuse committed by United Nations staff or related personnel', 2023, 8(a).
[232] Ibid, 8(b).
[233] *Shumba v. UNSG*, 2023-UNAT-1384, paras. 62-69.

anonymity or refraining from ordering ALWOP when the circumstances provide for it, further emboldens those officials, and fosters a sense of impunity that places all victims and potential future victims of SEA and sexual harassment at risk.

111. **Recognise victims' right to be informed about the progress of cases that concern them, should they wish to be so informed**. Victims have the right to be informed of, and to be engaged in, legal proceedings that affect them.[234] The Victims' Rights Advocate's Statement recognises this right, providing that 'You have the right to be informed about the status of the investigative process and any other proceedings. You also have the right to be informed about your role and the choices you have in participation in the investigation and any other proceedings. The United Nations will help you obtain and fully understand this information.'[235] That victims may be vulnerable, disenfranchised, and hard to reach should serve as a challenge to find the most suitable modalities for information-sharing and participation. It should not be assumed that there will be other agencies dealing with victim's well-being or informing them about ongoing disciplinary cases. Neither the disciplinary process nor the system of administration of justice are currently geared to victims of SEA, and there is a general failure to see such victims as stakeholders with rights to information or support. This must change. Criminal law systems which are geared to adjudicating the criminal wrongdoing of defendants have long recognised the need to incorporate victim services including victims' access to information and to participate, directly into their structures. There is no reason administrative justice systems cannot do the same.

112. **Victims have a right to participate in legal proceedings that concern them.**[236] Victims who lodged SEA complaints with the competent officials of the Administration should have a right to seek access to the Administration, and failing that, to the administrative justice system to register any concerns they have about the progress of the investigations. This exceeds the rules and the entire tenor of the administrative justice system as they stand today, though it is generally consistent with the right to access to justice and accountability, the right to decide how involved to be in United Nations processes, the right to be heard and the right to complain of the treatment received, all set out in the Victims' Rights Advocate's Statement.[237] There is no recourse at present for victims of SEA who are not current or former staff persons, who file complaints with the competent bodies of the Organization which are not followed up, or which are followed up poorly, other than to approach the media.[238] This is not a system which recognises victims' fundamental rights, nor will it contribute to zero-tolerance.

113. **Victims of SEA have a right to support and assistance**, **as well as to reparation for the harms they suffered**.[239] It should be recalled that several disciplinary cases have involved child sexual abuse, some resulting in pregnancy. While it is noted that the administrative justice system is not presently mandated to award reparation to victims, this should be a feature in future, such as incorporating compensation payments to victims in lieu of, or as part of monetary fines.

114. The Victims' Rights Advocate's Statement recognises that offenders of SEA are individually responsible for acts of sexual exploitation and abuse and victims have the right to seek remedies

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[234] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res'n 40/34, 29 November 1985, para. 6.
[235] OVRA, 'Your Rights As a victim of sexual exploitation or abuse committed by United Nations staff or related personnel', 2023, 5(c).
[236] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res'n 40/34, 29 November 1985, para. 6.
[237] OVRA, 'Your Rights As a victim of sexual exploitation or abuse committed by United Nations staff or related personnel', 2023, 3, 4, 6, 10.
[238] See, e.g., Sam Mednick and Joshua Craze, 'Alleged sex abuse by aid workers unchecked for years in UN-run South Sudan camp', *The New Humanitarian* (22 September 2022).
[239] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res'n 60/147, 16 December 2005.

from them that acknowledge the harm they suffered and help to repair it.[240] While this is an important statement of principle, it fails to acknowledge that the Organization plays a crucial role through its relationship with States, and via its contractual relationship with its offending employees, to ensure that remedies from individual offenders can be achieved.

115. Furthermore, the Victims' Rights Advocate's Statement fails to recognise that in certain circumstances the Organization will bear institutional responsibility for the SEA (separate from and in addition to the responsibility of the individual offenders, for example where it can be shown that a UN institution or agency failed in its obligation to take adequate measures to comply with the Organization's zero-tolerance policy and/or to protect vulnerable persons from the foreseeable risks of SEA emanating from UN personnel. Accordingly, in appropriate cases the tribunals should consider making referrals for accountability with a view to enabling the Secretary-General to take measures to ensure that relevant agencies who arguably bear institutional responsibility for the SEA put in place adequate and effective reparations measures, complementary to the support and assistance such agencies occasionally choose to provide to vulnerable victims.

V. Conclusions

116. The greatest challenge with the judgments is their lack of consistency. There are strong decisions which carefully apply the applicable rules and procedures, also some problematic ones which could better reflect norms and standards related to the adjudication of sexual violence and could afford much greater respect for SEA victims' inherent dignity and rights. Some of the problematic judgments have been overturned on appeal, however this has not addressed fully the challenges for two reasons. First, the principle of *stare decisis* has not been applied uniformly before the tribunals and consequently there continue to be outlier judgments which do not take account of UNAT precedents. Second, as set out in this Memorandum, UNAT is not immune from the production of problematic arcs in the caselaw (e.g., related to the application of the hearsay rule to the written investigative record, see Section IV(iii)(b) above). While this particular line of cases is likely to be capped following the introduction of the new Article 9(4) of the UNDT Statute, it is possible that another like challenge occurs in future.

117. Greater adherence to the applicable rules and procedures and greater harmony in the caselaw could potentially be achieved by involvement of the UNAT President and Vice-Presidents and UNDT President as appropriate in encouraging judicial dialogue to aid with harmonisation, stronger chambers' legal support, and ad hoc specialist advice in key areas such as SEA and sexual harassment cases. Additionally, greater use of practise directives and caselaw subject-specific factsheets (such as is the practise before the European Court of Human Rights[241]) may assist with the development of a clearer evolution in the jurisprudence. Furthermore, judgments that have been overturned on appeal should be listed as no longer in force so that there is less risk of disharmony.[242]

118. Given the mandates of the UNDT and UNAT, the main kinds of claims coming before them are claims lodged by alleged wrongdoers pertaining to the imposition of disciplinary measures as a result of findings by the Administration of serious misconduct amounting to or associated with sexual exploitation and abuse. For the most part, the tribunals are not hearing claims associated with faulty or ineffective investigations of SEA because the majority of victims (who are not employees or former employees) have no standing to bring such claims. Victims of SEA have no

[240] OVRA, 'Your Rights As a victim of sexual exploitation or abuse committed by United Nations staff or related personnel', 2023, 9(a).
[241] E.g., Violence against women (European Court of Human Rights, March 2024) https://www.echr.coe.int/documents/d/echr/FS_Violence_Woman_ENG.
[242] See, e.g., *Kurt v. Austria*, App. no. 62903/15, 4 July 2019, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-194187%22]}, 'This case was referred to the Grand Chamber which delivered judgment in the case on 15/06/2021.'

recourse to an independent adjudication process when the allegations they raise are not taken forward or taken forward ineffectively. This must be rectified as a matter of urgency.

119. Owing in part to a regulatory framework that is vague and confusing in parts, the caselaw of the tribunals is inconsistent in its interpretation of the requirements for sexual exploitation, largely due to different understandings of "beneficiaries of assistance," the extent of the power differentials needed to make sexual relationships exploitative and the (ir)relevance of consent. Sexual abuse or violence have been found only in relation to overly narrow sets of circumstances and numerous judgments have avoided findings of sexual exploitation and abuse in workplace contexts when sexual harassment may also be applicable.

120. Very few instances of failing to report SEA result in disciplinary sanctions and ultimately arrive before the tribunals given as already indicated, the lack of standing of persons who are not current or former employees. Of the cases that do arrive before the tribunals, there appears to be confusion (as a result of different readings of section 4.5 of the Administrative Instruction 'Unsatisfactory conduct, investigations and the disciplinary process'[243]) as to what knowledge is required to ground a finding of the failure to report. While this appears to have been clarified in recent UNAT judgments,[244] it is important for the Administrative Instruction to be updated or for an explanatory directive to be issued so that all staff of the Organization can be well apprised of their correct reporting obligations.

121. The need for "clear and convincing evidence" to ground a finding of serious misconduct has led to confusion about the standards of review, and how deeply the respective tribunals should be scrutinising the evidence which led to an administrative finding of serious misconduct. This is another area where an administrative instruction or practice guidance appears warranted to harmonise the caselaw going forward and to ensure that the investigative record receives due weight before the tribunals, and that victims of SEA are not made to repeat their testimonies unless doing so is absolutely necessary for the proper administration of justice. The confusion has led to certain poor practices entering into the caselaw such as basing SEA victim credibility on gender stereotypes about how victims of SEA "should" behave and seemingly requiring that allegations of sexual exploitation and abuse are corroborated.

122. While there is relative consistency within the judgments on the disciplinary sanctions imposed as a result of findings of serious misconduct, there is less consistency in the decisions to impose administrative leave while SEA investigations are ongoing. The regulations are clear that where there are reasonable grounds to believe that the staff member engaged in SEA, the staff member shall be placed on administrative leave without pay.[245] Even so, the tribunals have often failed to address circumstances when an alleged perpetrator has not been placed on Administrative Leave or has been placed on Administrative Leave with Pay. Similarly, in general the caselaw recognises that transparency and accountability are important and consequently the anonymity of alleged perpetrators is not permitted outside exceptional circumstances. Nevertheless, there are several problematic cases where alleged perpetrators – particularly those of high grade within the Organization, have been granted anonymity.

123. The framework on zero-tolerance for SEA makes clear that SEA victims should be treated as rights holders, and that their entitlement to be treated with dignity and respect, to be protected from reprisals, and to receive support and assistance must be assured in all proceedings which concern them. Furthermore, it is recognised that victims should be informed about the progress of investigations and of cases that concern them. This is necessary so that they can exercise their rights to express their views and concerns about proceedings that concern them. The Victims'

[243] UN Secretariat, Administrative Instruction 'Unsatisfactory conduct, investigations and the disciplinary process,' ST/AI/2017/1, 26 October 2017.
[244] *AAA v. UNSG*, 2022-UNAT-1280, para. 56.
[245] ST/AI/2017/1, s. 11.4; Rule 10.4(c) of the Staff Regs & Rules.

Rights Advocate Statement further recognises SEA victims' right to a remedy and reparation, though restricts this to recourse against individual perpetrators, which is both legally limiting and practically ineffective.

124. These rights are generally applicable to SEA victims within the UN system, and it is important that they are incorporated to a limited extent in the UNDT and UNAT judges' code of conduct and the Victims' Rights Advocate Statement. Nevertheless, it must be recognised that they have very little bearing before the UNDT and UNAT which have virtually no structures in place to address victims' rights or needs.

125. As a priority it is recommended that the tribunals make much greater use of their ability to make referrals to enforce accountability in SEA cases. Furthermore, the UNSG and other relevant UN bodies and entities should consider how to ensure that SEA victims can access effective recourse when their complaints of SEA are not followed up or are followed up ineffectively.

126. Equally, it is crucial to address the procedural and practical lacunae associated with SEA victims' access to a remedy and reparation. Given the lack of standing of most SEA victims before the UNDT and UNAT, these tribunals will have at most a partial role, though further consideration should be given to introducing a victim compensation element to the disciplinary measures that the Administration can impose, and by extension the measures the tribunals can sanction. Beyond this, the UNSG and other relevant UN bodies and entities should institute a consultation process to consider further the additional measures that can be taken to ensure SEA victims obtain adequate and effective redress.