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Report of the Joint Inspection Unit on Administration of Justice: harmonization of the statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Joint Inspection Unit entitled "Administration of the Statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal" (JIU/REP/2004/3).

* A/59/150.

ADMINISTRATION OF JUSTICE :

**Harmonization of the Statutes of the United Nations Administrative Tribunal and the
International Labour Organization Administrative Tribunal**

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In accordance with Article 11.2 of the JIU Statute, this report has been "finalized after consultations among the Inspectors so as to test the recommendations being made against the collective wisdom of the Unit".

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EXECUTIVE SUMMARY

Objective: To provide a definitive opinion on the feasibility of harmonizing the statutes of the United Nations Administrative Tribunal (UNAT) and the International Labour Organization Administrative Tribunal (ILOAT) with the view to closing the gap between the two and removing the perception of inequality and discrimination in administration of justice within the United Nations family, thus strengthening the United Nations common system.

- A. The General Assembly in resolution 57/307 noted that “the staff of the United Nations secretariat and the specialized agencies are subject to two different systems of administration of justice...”. In this regard, the General Assembly requested the Joint Inspection Unit (JIU) to continue to study the possibility of harmonizing the statutes of the United Nations Administrative Tribunal (UNAT) and the International Labour Organization Administrative Tribunal (ILOAT), bearing in mind the information contained in paragraphs 39 to 42 of the report of the Secretary-General A/56/800, for consideration by the General Assembly at its fifty-ninth session.
- B. After reviewing previous reports, studies and recommendations dealing with the harmonization and possible unification of the Administrative Tribunals,¹ the Inspectors conclude that there are only three major differences between the Tribunals, they relate to:
1. Selection and appointment of members of the Tribunals;
 2. Authority of the Tribunals to order specific performance by the executive heads; and
 3. Limitations on the amount of compensation that may be awarded by the Tribunals.
- C. Eliminating these discrepancies should close the gap between the two Tribunals, removing the perception of inequality within the United Nations internal justice system and strengthening the United Nations common system with regard to administration of justice. The Inspectors are of the view that all other differences in the statutes and practices of the two Tribunals are minor and do not materially affect the administration of justice thus bringing any further harmonization of the statutes to a close.

Recommendation 1: The General Assembly should continue to keep under review the issue of selection and appointment of members of UNAT with a view to bringing these practices into conformity with the statute and practices of ILOAT.

Recommendations 2: The General Assembly should amend article 10 of the UNAT statute to bring it into conformity with the ILOAT statute and settle the issues of specific performance and compensation limitations.

Recommendation 3: The General Assembly should continue to treat, as a matter of priority, the improvement of other elements of the process of internal justice that precede the Tribunal stage of a dispute. Those processes are slow and cumbersome; expediting and improving those measures may lead to fewer cases being brought to the Tribunal and result in less costly decisions and procedures.

Recommendation 4: The Secretary-General, in his capacity as chairman of the United Nations System Chief Executives Board for Coordination (CEB), should invite the Board to develop a mechanism to enhance cooperation and facilitate professional exchange and regular dialogue between UNAT, ILOAT and other international administrative tribunals, particularly with respect to the uniform and consistent application of case law which is the primary determinant of fair and equal systems of justice.

I. BRIEF OVERVIEW OF THE MAIN DIFFERENCES BETWEEN THE TRIBUNALS

1. UNAT is the independent organ competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the United Nations Secretariat or of their terms of appointment as well as applications alleging non-observance of the regulations and rules of the United Nations Joint Staff Pension Fund, arising out of decisions by the Fund. The Tribunal was established by the General Assembly in its resolution 351A (IV) of 24 November 1949 by the adoption of its Statute.² The UNAT Statute was amended by resolution 782B (VIII) on 9 December 1953, by resolution 957 (X) on 8 November 1955, by resolution 50/54 on 11 December 1995, by resolution 52/166 on 15 December 1997, by resolution 55/159 on 31 January 2001 and by resolution 58/87 on 9 December 2003.
2. The competence of the Tribunal extends to the secretariats of associated funds and programmes that are financed from voluntary contributions, such as the United Nations Children's Fund, United Nations Development Programme, United Nations Population Fund, United Nations High Commissioner for Refugees and the United Nations Relief and Works Agency for Palestine Refugees in the Near East, as well as the International Maritime Organization, International Civil Aviation Organization, International Seabed Authority and the registries of the International Court of Justice and the International Tribunal for the Law of the Sea.³
3. ILOAT is the successor of the League of Nations Tribunal. The International Labour Conference adopted the Statute of ILOAT in 1946 and undertook amendments in 1949, 1986, 1992 and 1998. It hears complaints from serving and former officials of the International Labour Organization (ILO) or one of the other international organizations that recognise its jurisdiction. The Tribunal is competent to hear complaints against more than forty international organizations, including the majority of the United Nations specialized agencies (see Annex I).
4. While there are many differences between the statutes and practices of the two Tribunals, the Unit has been able to identify only three discrepancies that may be perceived as having the potential to materially affect the consistency and uniformity of the case law within the United Nations system. They relate to:

i) Selection and appointment of UNAT members and ILOAT judges

Article 3 (1) of the Statute of UNAT states: *“The Tribunal shall be composed of seven members, no two of whom may be nationals of the same State. Members shall possess judicial or other relevant legal experience in the field of administrative law or its equivalent within the member’s national jurisdiction...”*

Article III (1) of the Statute of ILOAT states: *“The Tribunal shall consist of seven judges who shall all be of different nationalities.”*

The International Labour Conference appoints ILOAT judges, after nomination by the Director-General of ILO and following consultations with the Officers of the Governing Body (representing all the tripartite constituents of the

Organization, namely Governments, Employers and Workers); these nominations are subsequently endorsed by the ILO Governing Body, for submission to the ILO Conference, where they are approved. By contrast, Governments nominate UNAT members, and their election in the Fifth Committee is confirmed by the General Assembly.

The procedure of selection and appointment of UNAT members might potentially be perceived as diminishing the independence, quality and experience of that Tribunal in comparison to ILOAT and other international administrative tribunals. As the judges at ILOAT are professional judges and therefore bound by strict professional ethics, usually from the highest national courts, they are generally perceived as being more independent and experienced and this positively influences staff confidence in that Tribunal.

ii) The authority of the Tribunals to order specific performance by the executive heads

Article 10 (1) of the statute of UNAT states: *“If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time⁴ the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case...”*.

In other words, UNAT must automatically fix, as part of its original judgement, an amount of compensation to be paid to the applicant, leaving it to the Secretary-General to decide, whether, “in the interest of the United Nations”, he prefers to comply with the order for rescission or performance, or to pay the amount indicated by the Tribunal. In practice, until recently, the Secretary-General has almost always chosen to pay the compensation rather than to rescind the contested administrative decision.

With regard to ILOAT, it is the Tribunal itself that decides whether rescission or performance “is not possible or desirable”, in which case it awards the applicant monetary compensation. It is worth mentioning however, that rarely and in respect of lower-level officials (those not directly appointed by the Executive Heads of the Organizations), has the ILOAT required specific performance without giving the respondent organization the choice of paying compensation.

The fact that it is the Secretary-General and not UNAT who decides whether, in the interest of the United Nations, to comply with the order for rescission or performance, or to pay the amount indicated by the Tribunal,⁵ undermines staff confidence in the Tribunal and raises questions regarding the independence and fairness of the process. It also creates an impression that ILOAT enjoys greater authority than UNAT. UNAT itself has stated that this specific gap “represents a glaring example of injustice and discrimination between the two categories of staff members working under the United Nations system.”⁶

iii) Compensation limitations

The statute of the ILO Administrative Tribunal does not provide a specific limit on the monetary compensation that may be awarded to a claimant. However, article 10 of the UNAT statute provides that in normal circumstances the amount of compensation should be limited to two years net base salary of the claimant. The Inspectors note that in the past five years this limit was rarely exceeded. Moreover, in practice the ILOAT awards very rarely exceed UNAT limits. For example, in the case of ILO itself, there have been no cases in the past five years that exceeded this limit (see Annex III). Nevertheless, the existence of these caps contributes to a perception of a more limited authority of UNAT vis-à-vis ILOAT, as observed earlier.

II. RECOMMENDATIONS

5. The Unit considers that the issue of harmonization of the statutes of UNAT and ILOAT has been on the agenda of the United Nations for too long and over the years has become unnecessarily complicated to the detriment of the administration of justice at the United Nations. The Inspectors strongly recommend that this matter be finalized and that decisive steps be taken to eliminate the three most important remaining discrepancies between the statutes of UNAT and ILOAT. In this context, it is recommended that the statute of UNAT be amended to conform to that of ILOAT, particularly as regards the selection and appointment of members of the Tribunal, specific performance and compensation limitations. Noting the potential of each of these issues to affect the uniformity of case law, the relevant amendments to the UNAT statute is considered a priority.

i) Selection and appointment of members

The Inspectors are of the view that the appointment, in consultation with all interested parties, of professional judges from national courts with relevant experience in labour law and administrative law would undoubtedly be ideal for UNAT. However, they are also aware that this process may take time and would therefore concur, as an interim measure, with the General Assembly's approach to strengthen UNAT through the recent amendment of its statute, which provides that "*Members shall possess judicial or other relevant legal experience in the field of administrative law or its equivalent within the member's national jurisdiction...*"⁷ The General Assembly should continue to pay attention to the level of qualifications of members of UNAT with the view to ensuring the appointment of professional judges and the high standards of the Tribunal.

ii) Authority of the Tribunals to order specific performance by the executive heads

The discrepancy between the statutes regarding specific performance should be addressed immediately. The JIU does not share the view that the appropriate modification of the UNAT statute would affect the prerogatives of the Secretary-General as Chief Administrative Officer of the Organization. In this regard the Unit notes that the executive heads of the organizations that

recognize the jurisdiction of ILOAT do not appear to have such a concern, despite the fact that the final decision in respect of rescission or performance rests with the Tribunal.

The Secretary-General recently expressed his willingness to reconsider his position on specific performance.⁸ The JIU welcomes this readiness and recommends that consideration be given to adopting an approach similar to that of ILOAT regarding specific performance.

iii) Compensation limitations

The Inspectors recommend that the two-year net base salary limit on award for claimants should be eliminated and that the approach of ILOAT and other international administrative tribunals should be followed. This will not have significant financial implications provided the processing period for cases before UNAT is reduced from the current five years (including hearings of the Joint Appeals Board) to around one year, which is the norm in other international organizations. It is expected that the Office of Internal Oversight Services' management review of the appeals process, requested by the General Assembly in its resolution 57/307, will contribute to reducing the processing period and ensuring greater efficiency in this regard.⁹ If the processing period is not likely to be reduced in the near future, the Unit recommends that the Secretary-General's proposal to increase the amount of compensation to three years net base salary be adopted as an interim measure.¹⁰

6. Until now, the case law of UNAT and ILOAT has been surprisingly uniform and consistent, largely because the bases for decision-making in international administrative law are generally universal. In spite of this, there have been some discrepancies in case law that could be avoided with better cooperation between the Tribunals.¹¹ It is recommended that a mechanism be developed to enhance cooperation between UNAT and ILOAT as well as with other international administrative tribunals such as the Tribunals of the World Bank, International Monetary Fund, Organization for Economic Cooperation and Development, Council of Europe, Organization of American States, etc. The Inspectors note, for example, that the European Space Agency is developing a database of case law of all international administrative tribunals, which could be a base for further cooperation between tribunals. The United Nations System Chief Executives Board for Coordination should consider this at one of its sessions.

III. GENERAL OBSERVATIONS ON THE FINANCIAL IMPLICATIONS OF HARMONIZATION

7. In the context of broader financial issues, the Inspectors explored the possible budgetary implications that would result from harmonization of the statutes of the UNAT and ILOAT or the elimination of the three main outstanding differences between these statutes. Based on this review it is apparent that there would most likely be no significant budgetary implications.

8. An amendment regarding specific performance should have a positive impact, since presumably it will lead to a reduction in the number of cases in which compensation is granted in lieu of rescission of the contested administrative decision. The removal of the cap on the amount of compensation that may be awarded to claimants can have some limited financial implications. However, it should be noted that in exploring the practice of other international administrative tribunals that do not impose limits on compensation the Inspectors found that the United Nations standard is rarely exceeded.
9. The Inspectors are convinced that the elimination of UNAT's two-year net base salary cap must be accompanied by a reduced, timelier processing period for cases. It is recalled that the average processing period for cases in the United Nations recourse procedure is five years while at ILO it is around one year.

IV. CONCLUDING COMMENTS

10. The JIU considers that a single internal justice system is a desirable future goal of the United Nations system. However, such a goal should not simply involve the unification of the two Tribunals. Indeed, such unification does not appear to be achievable in the short term for a number of reasons, including the strong opposition to it by staff of both the United Nations and the ILO. Neither would such unification achieve, as has been stressed in previous reports, any significant benefits or efficiency gains. Should the creation of a single tribunal for the whole United Nations system continue to be a consideration, it is likely that a separate entity would have to be established, incorporating the best practices of UNAT and ILOAT as well as other international administrative tribunals. Upon the request of the General Assembly, the JIU would be willing to continue to explore the modalities for the establishment of any such tribunal.

End Notes

¹ Report of the Secretary-General on Administration of Justice in the Secretariat (A/56/800), 13 February 2002; Report of the Secretary-General on the Feasibility of Establishing a Single Administrative Tribunal (A/42/328), 15 June 1987; Study on Administrative Tribunal: Procedures and Unification, initiated by the Administrative Committee on Coordination (ACC) and undertaken by the consultant, Gurdon Wattles (CCAQ/PER/R.107, Annex II); and Reports of the Joint Inspection Unit (A/41/640, A/55/57 and A/57/441)

² UN Office of Legal Affairs, Secretariat of the United Nations Administrative Tribunal (<http://untreaty.un.org/ola-internet/unat.htm>)

³ Comprehensive Report on the Activities of the United Nations Administrative Tribunal (A/58/680), 14 January 2004, para.10

⁴ Bold type added for emphasis

⁵ Report of the Secretary-General on the Feasibility of Establishing a Single Administrative Tribunal (A/42/328), 15 June 1987, para.50

⁶ Letter dated 8 November 2002 from the President of the United Nations Administrative Tribunal addressed to the Chairman of the Fifth Committee (A/C.5/57/25), 20 November 2002, Annex II, para.2

⁷ General Assembly Resolution on Administration of Justice at the United Nations (A/RES/58/87), 9 December 2003

⁸ Report of the Secretary-General on Administration of Justice in the Secretariat (A/56/800), 13 February 2002, para.42

⁹ General Assembly Resolution on Administration of Justice in the Secretariat (A/RES/57/307), 15 April 2003, paras.8-11,

¹⁰ Report of the Secretary-General on Administration of Justice in the Secretariat (A/56/800), 13 February 2002, para.43

¹¹ In 1978, the Director-General of ILO, on the basis of an advisory opinion given by the ILOAT judges, took an administrative decision with regard to the remuneration of General Service staff of that Organization which differed from recommendations of the International Civil Service Commission as approved by the General Assembly. This prompted the General Assembly to adopt resolution 33/119 in which it requested the Secretary-General to study the feasibility of establishing a single administrative tribunal for the entire common system.