

PROPOSAL FOR REFORM
of the
Investigation of Misconduct in the United Nations
and the REPLACEMENT of the Office of Internal
Oversight Services

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Follow-up
from

Hearing on 'Peacekeepers: Allegations of Abuse and Absence of Accountability at the United Nations' before the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations on 13 April 2016

Executive Summary

This is a proposal for reform of the investigation of misconduct within the United Nations. It will require:

- creation of a new and totally independent body to replace OIOS;
- centralisation of all misconduct reporting; and
- direct supervision of that investigative body by a Commission made up of representatives of the Member States.

It does not address the specific requirements for comprehensive reform of the internal justice system, but takes control of the investigative process out of the hands of the Organisation, which will end many of the abuses currently encountered.

The key to deterrence from any criminal or unethical conduct is not the severity of the punishment but the likelihood of suffering some accountability. This requires consistency in dealing with reports of misconduct, and this can be addressed by centralised reporting.

For the last ten years or so, the UN has been pre-occupied with *managing the perception of misconduct* rather than actually investigating it. Of particular concern must be the practice whereby reports of misconduct, including reports of sexual exploitation and abuses, have not been investigated by OIOS because they have earlier been discredited by the Conduct & Discipline Unit of the Department of Field Support, referred to other departments or otherwise dealt with at a lower level.

Centralised reporting of misconduct reports will also give the member States an accurate indication of the level of wrongdoing within the UN system. This information has not been disclosed in the past.

OIOS was intended to be “independent” but was still an integral part of the UN Secretariat. As such, other departments were able to control material aspects of its existence until its independence was entirely compromised.

The creation of a new body, which is given the working title “NUNCIO”¹ here, will not be dependent on any other office or department of the UN, and will end the self-regulatory aspect of the United Nations altogether.

NUNCIO will be staffed by experienced investigators who are not former UN staff members and who will be ineligible for employment with the UN. In addition to full-time staff, NUNCIO will train both serving and former police and other investigators from law enforcement agencies of the Member States who can be retained to assist with investigations on a consultancy basis.

¹ An acronym for ‘New United Nations Central Investigation Organisation’

This body will operate under the supervision of a Commission, which is essentially a sub-committee of the General Assembly.

The members of this Commission will act as a pool of members who will form panels to

- supervise the intake of reports, determining which should be investigated;
- monitor and supervise investigations by NUNCIO, and
- decide on the disciplinary measures to be implemented when culpability is established.

The Commission will also be responsible for the investigation of complaints against investigators, and for protecting whistleblowers from retaliation.

Sexual assaults by peacekeepers remains a matter of concern because under the Agreements with Troop Contributing Countries, they remain subject to the disciplinary regimes of their own Armed Forces. This should not, however, be an impediment to the investigation of allegations made against them. The UN has, however, often improperly used this as an excuse in the past.

Of equal concern is the failure of OIOS to investigate financial irregularities. Again, this is due to a very strict interpretation of the OIOS mandate, which has resulted in the reasonable suspicion that there are elements within the UN who have an interest in ensuring such allegations are not properly investigated. With NUNCIO, this criticism will not arise as the decision to investigate is vested in the Member States, who should have no interest in covering up wrongdoing by UN officials. One of the rules of the Commission must be that no individual member will ever sit on a panel making a decision affecting an individual who is a national of their own country or who is known to have strong connections to their country.

The UN Secretariat has expressed no interest in any significant reform of the internal justice system and has a vested interest in maintaining the status quo. The status quo, however, is what has resulted in large numbers of rapes and sexual assaults, and allegations of financial impropriety probably amounting to hundreds of millions of dollars simply not being investigated.

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- B** List of the various investigative bodies within the UN system
- C** Illustration of proposed oversight of investigations
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1. Changing the UN culture of impunity

At present, the investigation of misconduct in the United Nations is slow, unnecessarily bureaucratic, lacking in transparency. The Office of Internal Oversight Services (“OIOS”) was established in 1994 to be independent. The events of recent years have shown that independence has been compromised and that OIOS is effectively controlled by the Senior Management Committee which, by definition, has a vested interest in denying that any such misconduct exists.

Decisions to initiate investigations have been corrupted by improper external influences and investigations tainted by bias. OIOS is itself also tainted with corruption and cannot investigate misconduct with credibility. It has therefore been rendered unfit for purpose as it is not capable of carrying out any serious or independent investigation of alleged wrongdoing by senior managers. Accordingly, it is neither a deterrent nor an efficient means of investigating wrongdoing.

Similar criticisms can be levelled against the Office of Administration of Justice and the UN tribunals. The prosecution of misconduct is riddled with injustices and the “justice” system strongly favours management. The UN Dispute Tribunal has also failed to adopt some of the doctrines generally accepted in other jurisdictions to be the founding principles of administrative law, resulting in misconduct being encouraged rather than penalised.

If there is a deterrent to fraud, waste and abuse by UN staff members, it must be in the real threat of thorough investigation and the inevitability of real accountability.

Under the current system, if the UN receives a complaint against a staff member alleging a criminal offence — such as statutory rape or a sexual assault — the UN will investigate that *only insofar as it is a breach of the Staff Rules*. That investigation and the ensuing disciplinary process is so slow that it can be as long as 5 or 6 years before the matter is finalised, and only at that point will the Secretary-General waive the immunities under the 1946 UN Convention on Privileges and Immunities to allow the matter to begin to be investigated by local law enforcement in the country concerned. By that time, it may be practically impossible to locate any of the witnesses and the UN will no longer have jurisdiction over the accused. The result of the UN’s internal procedure ensures that the chances of a successful criminal prosecution are miniscule.

Changing the culture of impunity in the UN must involve personal liability for wrongdoing because a large part of the solution lies in accountability; staff members must be held personally accountable for their misconduct or mismanagement.

Under the current leadership, accountability is at best inconsistent, and at worst conspicuously absent. Disciplinary decisions are inconsistent and are strongly influenced by bias caused by management patronage and personal connections.

Retaliation and harassment of any staff member who dares to challenge management is commonplace,

and the pervasive influence of personal connections undermines attempts to resort to the internal justice system to resolve their grievances.

Taken together therefore, the system of two-year renewable contracts with renewal dependent on favourable annual appraisals is a major element in exerting control over staff of the Organisation.

This, combined with the legal futility of challenging any manager, actively discourages anyone to report corruption or other serious wrongdoing.

Without reporting, the investigation of such wrongdoing is obviously seriously hampered.

1.1 The Investigation of Wrongdoing

The mechanisms for the investigation of both misconduct and criminality by UN personnel must encompass both the investigation of breaches of UN Staff Rules & Regulations and other procedures, which are purely administrative, as well as the investigation of what appears to be a criminal offence by someone subject to the jurisdiction of the UN.

The investigation of complaints against UN personnel must address complaints against both:

- a) UN civilian personnel, who may be employed by a variety of different funds and programs and be bound by different regulations and different Codes of Conduct, and
- b) uniformed police and military peacekeeping personnel from a variety of Troop Contributing Countries, who will be subject primarily to the disciplinary systems of their respective forces.

There is also the challenge of applying standards consistently when investigating reports of misconduct taking place in a number of jurisdictions across the world, ensuring that investigations are conducted with equal diligence, regardless wherever the locus of the offence.

UN personnel work in a large number of countries throughout the world. Some are in New York and Geneva, where there is a sound legal system to deliver justice, but others are in countries like the Central African Republic, Somalia and the Sudan, where there is not. Local law enforcement agencies in many of these jurisdictions are also dysfunctional and ineffective.

At the same time, there remains a need for the protections afforded by the 1946 UN Convention on Privileges and Immunities. Without that protection, the UN would not be able to operate in conflict torn countries without interference from a hostile government, but the convention was never intended to protect UN staff from the consequences of their own criminal actions.

A summary of what should constitute “misconduct” to be investigated within the UN, at least until such times as a more serious criminal offence is identified, is attached at Annex A.

“Wrongdoing” in the UN and other international organisations can, however be categorised as being

either:

Category 1: Serious and potentially **criminal** cases including any:

- sexual assault or harassment
- apparent criminal offence
- financial impropriety or irregularities in procurement
- complaint against an investigator or staff in any ‘internal justice’ role
- retaliation against a staff member who reported possible misconduct.

or

Category 2: Routine and **Administrative** cases including any:

- breach of Code of Ethics
- breach of Staff Rules on:
 - recruitment
 - promotion
 - staff salaries and allowances
 - staff performance

At the same time, the legal rights of staff members must be respected, no staff member should be subject to investigation — or protected from investigation — for reasons of patronage or managerial or political support.

Staff members must also be protected from malicious or bad faith complaints.

What is proposed is essentially a two-stage investigative process;

Phase		Investigation	Purpose
1	Assessment	<i>in rem</i>	To determine whether or not there is probable cause to investigate an act of wrongdoing.
2	Investigation	<i>in personam</i>	To determine whether that staff member committed that act of misconduct.

It is not really possible to determine how long an ‘assessment’ might take. In some situations, it could take several weeks or months until it is possible to establish ‘probable cause’ to believe that a particular individual committed some wrongdoing. In other cases, that determination might be made almost immediately.

As soon as the point is reached, however, where an individual is connected to an act of wrongdoing, the decision to formally investigate them must be made by the oversight body. At that point, the staff member should be advised that he is under investigation and that he has the right to seek advice from the Staff Union or legal counsel.

2. Creation of an Independent Agency

The current system has proven ineffective. Meaningful, if radical reform of the investigation and internal justice systems in the UN can only be achieved by the General Assembly taking direct control of the investigation of misconduct such as financial and procurement irregularities, procurement practices and sexual exploitation and abuse.

To be both independent and effective, these investigation functions must be taken out of the hands of the Organisation itself and carried out by an entirely independent agency reporting directly to the General Assembly.

This will entail the establishment of a new and truly independent body, which will require to be staffed with competent investigators who:

- a) cannot be former UN staff members, (especially not former OIOS staff);
- b) must be ineligible for employment by any part of the Organization in the future;
- c) are not dependent on any office of the UN for support of any kind.

At the present time, the organisations that make up the United Nations system have developed a very fragmented approach to the investigation of misconduct. A list of the various investigation bodies within the UN is attached at Annex B. This fragmentation allows staff members under investigation in one part of the organisation to continue their careers in another part of the system with an apparently clean record, and to repeat the same unethical conduct in a new environment.

To reform not just the UN Secretariat but the system as a whole, and to ensure consistency, the new and independent body would have to centralise the investigation of complaints of wrongdoing.

Below is an outline of how such an independent body; the “New United Nations Central Investigation Organisation” (provisionally described herein as “NUNCIO”) could function.

Key to this idea is that NUNCIO does not depend on the UN Secretariat for any logistical or administrative support of any kind. NUNCIO does not report to the Secretary-General, nor does it report to the General Assembly *through* the Secretary-General. It will operate under the auspices of a Commission made up of representatives of the Member States.

NUNCIO will require to be entirely independent of any body that is part of the United Nations system.

NUNCIO investigators, however, will require UN Travel Documents, and to be considered UN staff members for the purposes of the 1946 UN Convention on Privileges and Immunities.

These investigators will require unhindered access to:

- all staff members of the UN as well as of all funds & programs,

- all UN premises,
- all UN telecommunications and IT resources,
- all UN transport and other resources.

UN Staff Regulations and Rules will require to be amended to include provision for obstructing or hindering NUNCIO investigators by UN staff members to constitute misconduct.

The current practice of having the Conduct & Discipline function carry out any “*oversight of the handling of allegations of misconduct*” must be discontinued and any attempt by the UN itself to continue the practice considered an interference with the investigation and should constitute misconduct. “Assessments” of complaints, whether by the Conduct and Discipline Unit or other departments, have served to filter out complaints that could be embarrassing to the Organization.

Similarly, the practice of permitting either the Department of Safety & Security “Special Investigations Unit”, or the Police Division to investigate misconduct at the local level must cease. A staff member should only be investigated for misconduct if that investigation has been specifically authorised by an Investigations Intake Panel.

Flow charts illustrating the supervision of investigations and the disciplinary process are attached at Annexes C and D.

2.1 Staffing

‘NUNCIO’ must be staffed with competent investigators who:

- 1) cannot be former staff members of any UN agency and
- 2) after any employment with NUNCIO, must be ineligible for future employment by any part of the UN system.

The Organisation of NUNCIO cannot follow traditional UN practices. Investigative authority of NUNCIO personnel should be vested in the office of “agent” and not their rank; any NUNCIO agent should have jurisdiction to interview any UN official, regardless of their rank or seniority.

In addition to ‘human source’ investigators, NUNCIO will require forensic IT specialists.

NUNCIO should be able to function with a relatively small number of investigators, as much of the work can be carried out by sworn police officers on secondment from Law Enforcement Agencies of Member states, supported when necessary by ‘auxiliary’ agents, being properly vetted former law enforcement investigators with the necessary investigative experience engaged on a per diem consultancy basis.

NUNCIO will also require a Support Wing, to carry out the following functions:

- | | |
|---------------|--|
| Security Team | <ul style="list-style-type: none"> • to provide physical protection to NUNCIO investigators • to assist with investigations as necessary |
| Legal Team | <ul style="list-style-type: none"> • to advise on offences to be investigated • to represent NUNCIO before the Disciplinary Panel, the UN Tribunals or any other legal forum |
| Training Team | <ul style="list-style-type: none"> • to provide briefings and training, primarily to auxiliary personnel |
| Admin Team | <ul style="list-style-type: none"> • To provide administrative support • To facilitate the oversight functions of the Investigations Oversight and Disciplinary Commission |
| Finance Team | <ul style="list-style-type: none"> • To manage the budget, including payroll • To recover the cost of investigations from subject departments |

A schematic Organisational Chart is attached at Annex E.

2.2 Responsibilities

To enforce standards of conduct and ensure genuine accountability, this body must, in time, assume responsibility for the investigation of allegations of Category I misconduct currently handled by all of the investigative offices listed at Annex B.

From the outset, NUNCIO can assume responsibility for the intake of all reports of misconduct from within the UN system, regardless of whether the subject is employed by the UN Secretariat or in one of the Funds and Programmes that have their own investigative arm.

Operationally, NUNCIO must begin by replacing the investigative functions of OIOS and investigating reports of misconduct by staff of the UN Secretariat and peacekeeping personnel, then expand to assume the functions of:

- 1) the Office of Audit and Investigations (OAI) for the investigation of misconduct by staff of UNDP;
- 2) the Office of Internal Audit (OIA) for the investigation of misconduct by staff of UNICEF, and
- 3) the Inspector General's Office (IGO) for the investigation of misconduct by staff of UNHCR.

Given the numbers of UN personnel deployed in field missions, those are the departments that should be investigating most of the reports of Sexual Exploitation and Abuse.

2.3 Budget

NUNCIO will require its own budget voted by the General Assembly and paid directly out of the UN Regular Budget, to cover the salaries of NUNCIO full-time staff and the operating costs of the office.

In addition, the operating costs of investigations by NUNCIO should be defrayed by having priority access to funds recovered as a result of investigations into fraud or other financial impropriety.

The Oversight Commissioner's salary and the cost of running the Commission will have to be provided for, but these costs should be minimal as the administrative support required can largely be provided by the administrative team in NUNCIO.

3. Oversight

To ensure independence and impartiality of NUNCIO investigations, and to make decisions on any disciplinary matters, it should report to a sub-committee of the General Assembly and not to the Secretary-General or any other senior official of the UN.

A common pool of perhaps fifty persons appointed by the Permanent Missions will form the '**Investigations Oversight and Disciplinary Commission**', from which members will convene on an ad hoc basis to act as either:

- a **Complaints Intake Panel**,
- an **Investigation Oversight Panel**, or
- a **Disciplinary Panel**.

This Commission will require a secretariat composed of one full-time Oversight Commissioner and a small personal staff.

Selected members of the Commission will be convened, ideally selected at random by a simple balloting mechanism, to ensure that someone who has already sat on one panel and been involved in any decision affecting a particular staff member will not sit on another panel making a second decision on the same individual.

No member of any panel should ever be involved in making a decision on an individual who is a national of their own country or who is known to have strong connections to their country.

3.1 Complaints against Investigators

The '**Investigations Oversight and Disciplinary Commission**' must play a direct role in investigating complaints against NUNCIO investigators, whether received from subjects in investigations or from other investigators.

In the event of any complaint against a NUNCIO investigator being upheld, the matter should be

referred to the Oversight Commissioner and a special Disposal Committee formed to recommend appropriate action.

Any finding of dishonesty or malice on the part of a NUNCIO investigator must result in immediate termination of their employment.

3.2 Approval of Investigative Policy and Guidance on Questions of Ethics

Investigators seeking guidance on investigative procedures or guidance on questions of ethics relating to investigations should have the right to present these questions to the Oversight Commissioner.

3.3 Whistleblower Protection

Whistleblower protection in the UN is currently the responsibility of the Ethics Office.²

That mechanism is ineffective because it is discretionary. A staff member who suffers retaliation as a consequence of co-operating with an investigation is, at present, dependent on protection being granted by senior management of the Organisation. Given that the staff member will, in most cases, have suffered retaliation by senior management or by others who enjoy their patronage, this arrangement is clearly unsatisfactory, as is evidenced by the minuscule number of applications where the Ethics Office have even recognised retaliation to have taken place.

If a staff member who has either reported misconduct to NUNCIO or who has otherwise assisted NUNCIO with an investigation should suffer retaliation as a result, the determination of whether or not there appears to be a causal connection between NUNCIO's investigation and the staff member's retaliation cannot remain the responsibility of the UN itself.

The decision that an individual is entitled to 'whistleblower protection' should therefore be made by the Oversight Commissioner, who can direct the Secretary-General to take immediate steps to suspend the retaliators and ensure the staff member is not disadvantaged.

Retaliation under such circumstances will constitute Category I misconduct. Once such corrective action has been taken, the question of retaliation can be discussed at the next sitting of the Complaints Intake Committee and a separate NUNCIO investigation initiated into the retaliation if appropriate.

3.4 Complaints Intake Panels

This panel should meet (probably on a weekly basis) to

- 1) consider the Assessment Reports submitted for a decision in order to determine if there is probable cause to investigate an identified individual,

² See ST/SGB/2005/21

- 2) whether those matters to be investigated should be classed as Category I (serious or potentially criminal wrongdoing), or Category II (routine administrative misconduct).
- 3) whether the investigation should be carried out by NUNCIO or whether it should be referred to another body for a proxy investigation.
- 4) review all new misconduct reports received through the centralised reporting portal, and
- 5) monitor progress of all pending assessments.

This Committee may also review matters summarily dismissed by NUNCIO for lack of jurisdiction.

The Intake Commissioner should attend these meetings but is not a member of the panel and accordingly should not have a vote.

3.5 Investigation Oversight Panels

If a matter is assessed by NUNCIO and the Complaints Intake Panel approve the investigation of a staff member, three members of the Commission will be selected to oversee the investigation.

As far as possible these members should be selected by ballot, subject to the rule that members of the Commission may not sit on a panel where the subject is an individual who is a national of their own country or who is known to have strong connections to their country.

On completion of the investigation, this panel will review the report and decide whether:

- a) the case against the subject should be dismissed and closed, or
- b) recommend that the staff member be dismissed or face other disciplinary action.

In the event that the NUNCIO investigation establishes reasonable grounds to believe that the staff member has committed a criminal offence, an enhanced Investigations Oversight Panel will be convened. This will comprise the three original panel members and two others, to review that finding and approve the decision to refer the matter for investigation by local law enforcement agencies of the Member State where the alleged criminal offence took place.

The Investigations Oversight Panel should also have the discretion to grant someone immunity from prosecution in exchange for testimony of sufficient importance in another investigation; thus giving a staff member the opportunity to “turn state’s evidence” where it may be useful in the investigation of a more serious case.

3.6 Disciplinary Panels

Where an Investigations Oversight Panel has considered an Investigation Report and declared themselves satisfied with it, different members of the Commission will be selected to sit as a Disciplinary Panel.

The Disciplinary Panel will consider the report, and upon being satisfied of the culpability of the staff member, hear any defence or pleas in mitigation they may wish to offer and decide on the appropriate disciplinary measure to be imposed.

The Disciplinary Panel will then direct the Secretary-General to impose those recommended disciplinary measures, and the Secretary-General shall be obliged to comply.

An illustration of proposed oversight of the investigation function is attached at Annex C.

4. Intake of Complaints

It is of paramount importance that all reports of possible misconduct by UN personnel must be reported centrally, through a single portal.

OIOS has already acquired the ‘GoCASE’ software for this purpose. That technology was developed by the UN Office of Drugs and Crime for the law enforcement market. It records the reports being received and, most importantly, prevents the convenient loss or diversion of reported instances of misconduct that might be embarrassing to senior management.

At present, misconduct investigations in the UN are not handled consistently. Apart from the multiplicity of investigation bodies across the UN system³, the rules and procedures differ, and even within the Secretariat, many reports are ‘assessed’ and prejudicially dismissed. Minor complaints are given priority and investigated, while very serious allegations are ignored. Also, many complaints that should be reported to OIOS are investigated at the mission level by the Security Branch. This is in addition to the ‘forum shopping’ element of cases being inappropriately referred to other departments who will not investigate them impartially.

All complaints and reports of possible misconduct must be directed to NUNCIO and all such reports **assessed** by NUNCIO investigators who are independent and who, by definition, have no vested interest in the dismissal of complaints against their own department.

The only reason for NUNCIO to summarily dismiss a report at this stage should be for a clear lack of jurisdiction; meaning either that it involves a complaint over which the new investigative body has no power, such as a complaint against an employee of the European Union, or an agency of one of the member states or an NGO. Those complaints should, wherever possible, be passed to the appropriate authority.

All such dismissals will, however, be subject to review by the Intake Committee.

4.1 Assessment

The assessment phase involves an in rem enquiry intended to look at the report of possible misconduct,

³ See Annex B

to determine whether or not there is probable cause to initiate an investigation into an identified staff member, and if so:

- a) what rule *appears* to have been breached, and
- b) the identity of the alleged perpetrator,

During this assessment phase, the assigned investigator may make a decision on the basis of existing documents or may wish to interview witnesses.

The assessment could take several weeks before it is possible to determine there is probable cause to believe that a particular individual committed some wrongdoing. In other cases, that determination might be made almost immediately.

The determination whether or not the case should be investigated should be made with reference to a published list of criteria, but that list should be for guidance purposes only, and will not be binding on the Complaints Intake Panel

On completion of the assessment, a report would then be drawn up and sent to the Complaints Intake Panel for a decision.

Even before the Assessment is completed, however, the fact that it is still pending at the *in rem* stage must be visible to the Complaints Intake Panel, and a note of assessments still pending should be presented at the regular meetings of that Panel.

In the event that the assessment takes longer than a month to complete, a progress report should be made to the Oversight Commissioner, but all assessment files should be visible to the panel members, even if the assessment is still ongoing.

4.2 Intake Panel Decision Options

The Complaints Intake Panel has discretion to act (or not to act) on any Assessment Report regardless of any recommendations either contained therein or made by the Oversight Commissioner.

The panel may elect not to investigate any matter if they consider there are not reasonable grounds to investigate it. If so, the information will still be recorded and will remain on the record for possible future use.

If the complaint has been assessed as credible and the Complaints Intake Panel agrees, they can then authorise the investigation of that the matter, classifying it as either:

- **Category I. (Serious / Criminal)**, which will require it to be investigated by NUNCIO, or
- **Category II. (Routine / Administrative)**, where there it can either be investigated by NUNCIO or referred to another competent body.

Once the Complaints Intake Panel determines there is probable cause to initiate an investigation, an Investigation Oversight Panel should be appointed to oversee the investigation.

Category I investigations should be carried out under the supervision of an Investigation Oversight Panel composed of five members, whereas Category II investigations can have a panel of only three.

The staff member should also be advised in writing that he or she:

- 1) is under investigation,
- 2) should not communicate with or seek to influence any witnesses,
- 3) should not leave the jurisdiction without consent of NUNCIO, and
- 4) is entitled to seek legal advice or guidance from the Staff Union.

4.3 Investigation of 'Category I' Complaints

Complaints of criminal activity must be investigated promptly and professionally. Criminal cases must always take precedence over civil or administrative proceedings, and UN disciplinary procedures cannot be permitted to protect UN staff members from the consequences of their own iniquity.

Investigations can be complex and it is not possible to establish a time limit on how long a particular case should take to investigate. After the 'probable cause' decision and the investigation *in personam* is formally initiated, however, progress should be reported to the members of the designated Investigations Oversight Panel at regular intervals, so as to ensure the matter is investigated as expeditiously as possible.

The Investigations Oversight Panel for Cat. II investigations should be composed of three persons.

4.4 Investigation of 'Category II' Complaints

Where a complaint is classed as 'Cat II', the Intake Committee may either approve the initiation of a NUNCIO investigation or may refer it to another agency to be investigated by proxy by their own resources.

In the event of it being so referred, NUNCIO will retain an interest in the matter.

- 1) A NUNCIO investigator will be assigned to monitor progress of the proxy investigation, and the agency to which it is referred shall be required to report progress to NUNCIO at regular intervals,
- 2) NUNCIO shall review the report of the proxy investigation report when completed, and
- 3) the report will be submitted to an Investigations Oversight Panel to make a decision.

There should be a presumption *against* the referral of any complaints alleging misconduct by senior staff members, being a staff member of P-5 rank and above.

The Investigations Oversight Panel for Cat. II investigations should be composed of three persons.

4.5 Investigation of Military Personnel

The investigation of complaints against military personnel on UN peacekeeping duties is complicated slightly by the terms of the Status of Forces Agreement entered into between the Secretary-General and the Troop Contributing Country. However, the model of such Memoranda of Understanding⁴ provides, in Article 7, for the United Nations to take the initiative and conduct an investigation where the Troop Contributing Country does not do so.

This requires to be reinforced, such that the Commanding Officer of peacekeeping units can be held accountable for any failure of military personnel to co-operate with the UN investigation, or if the matter is not investigated to the satisfaction of the UN.

Where NUNCIO receives a complaint against peacekeeping personnel, it should be assessed in the same manner as any other. If ‘probable cause’ is established to believe that a misconduct has been committed (whether or not a criminal offence is involved) a decision on the matter will be made by the Complaints Intake Panel. Thereupon, the Oversight Commissioner shall immediately advise the Permanent Mission of the Troop Contributing Country;

- 1) that a report of possible misconduct has been received, with an outline of the allegation;
- 2) that the military authorities of the Troop Contributing Country are requested to take all necessary steps to preserve evidence and ensure that all potentially implicated personnel remain in the jurisdiction and are made available to be interviewed as part of the investigation,
- 3) that the military authorities of the Troop Contributing Country are requested to liaise with NUNCIO to either;
 - a) conduct a joint investigation into the allegations, or
 - b) invite NUNCIO investigators to observe the military investigation and subsequent disciplinary process.

The Secretary-General should also be advised that a report alleging misconduct by peace-keeping personnel has been received and that the Troop Contributing Country has been advised accordingly.

An Investigation Oversight Panel should also be appointed, and should review the report on completion of the investigation, communicating their satisfaction or otherwise to the Troop Contributing Country.

⁴ Attached to the Report of the Special Committee on Peacekeeping Operations, dated 11 June 2007. UN Document A/61/19 (Part III).

4.6 Referral of Criminal Cases to local Law Enforcement Agencies

Where NUNCIO are investigating allegations against a UN civilian staff member, and the investigation reaches a point where the assigned investigators consider there are **reasonable grounds to believe that a criminal offence may have taken place**, a meeting of the Investigations Oversight Panel must be convened immediately and, if the panel agree, the necessary decisions taken to:

- 1) report the matter to the Member State in whose jurisdiction the offence took place;
- 2) request that Member State to notify NUNCIO of the law enforcement agency investigating the offence, and the officer in charge the investigation, who shall be NUNCIO's designated point of contact for operational purposes, and
- 3) advise the Secretary-General that the matter has been so reported.

While primary responsibility for the criminal investigation will pass to the Member State, NUNCIO will offer to assist the relevant law enforcement agency of that Member State with their investigation.

When such a criminal investigation of a UN staff member is initiated, the Secretary-General should immediately place that staff member on administrative leave, and should, wherever possible, remove them from any environment where there is perceived to be a risk that they may seek to influence witnesses.

The Member State investigating the criminal offence should be at liberty to impose a 'Hold Departure Order' on the subject if the Secretary-General does not make satisfactory arrangements to ensure his return to that jurisdiction to assist local law enforcement.

4.6.1 Privileges and Immunities of UN Civilian Staff

The question of 'waiving' immunities in most criminal cases, particularly in respect of Sexual Exploitation and Abuse, should be recognised as a misnomer. There was never any intent in the 1946 Convention to protect UN staff from prosecution for criminal actions that were not related to their activities representing the Organization, and there are no circumstances where the immunity can legitimately be used to protect any individual from a charge of a sexual assault. The idea that the Secretary-General should formally 'waive' the immunity in such circumstances is therefore perverse.

If a *prima facie* case of a criminal offence is established, the determination to be made is whether or not the *actus reus* element of that alleged offence was committed in the course of that staff member's duties as a UN staff member. This decision can be made by the Investigations Oversight Panel.

For example, if a UN Staff Member were to cause a road traffic accident (even if driving under the influence of alcohol) when engaged in the course of his employment, there is an argument that he might be entitled to protection under the 1946 Convention, because to do otherwise would allow the authorities of the host nation to use criminal charges to obstruct and harass UN personnel.

If the alleged criminal offence is overtly criminal, such as a sexual assault, this must be recognised as clearly being outside the scope of the functional immunity. This decision can be made by the Investigations Oversight Panel after consultation with the Oversight Commissioner.

Whenever the question of privileges and immunities arises in respect of an alleged criminal offence, the burden of proof should be on the Secretary-General to show why immunity should be invoked. To that end, the legal counsel for the Secretary-General must have the right to be heard by the Investigations Oversight Panel prior to any determination being made. The investigation of the criminal offence should not, however, be delayed.

4.6.2 Ongoing Role for NUNCIO

If a matter is referred to local law enforcement for criminal prosecution, NUNCIO will remain seized of the matter to assist with their investigation as this may involve interacting with UN staff members and obtaining documentary evidence from the Organization. This would require a joint investigation with the national authorities or at the very least maintain a watching brief over the investigation to identify any other wrongdoing by UN staff.

Ongoing involvement by NUNCIO would be separate from, and in addition to, any ongoing involvement by the Office of Staff Legal Affairs or other legal entity concerned with protecting the legal rights of the subject.

4.6.3 Ongoing Role for the Secretary-General

Upon being notified that a criminal investigation is underway, the Secretary-General may liaise with the law enforcement agency of the Member State now investigating the matter, to ensure that the staff member is:

- 1) afforded legal representation,
- 2) not subjected to any abuses of his Human Rights in the course of the criminal investigation, and
- 3) made available to be interviewed by law enforcement and to face a criminal trial in that jurisdiction.

If a matter is referred to the national authority of a Member State to investigate, the staff member should be suspended from duty immediately and removed from any UN Field Missions environment.

If the staff member is permitted to leave the jurisdiction in which the offence took place, the Secretary-General can liaise with the Member State of which the staff member is a national to ensure that they assume responsibility for returning the staff member to the locus of the offence to assist local law enforcement with their enquiries or face criminal trial.

On resolution or dismissal of the criminal charges against a UN staff member without a finding of guilt, his position with the UN must be reconsidered by a Disciplinary Panel who shall be under no

obligation to approve their reinstatement. Any finding of guilt in a criminal case should result in recovery of any monies owed to the Organisation and termination of his contract of employment.

4.6.4 Referral to a home state

It is possible that situations may arise where a NUNCIO investigation identifies possible criminal activity and an investigation is then carried out by the host nation, but where, because of applicable national legislation, the home state of the UN staff member would also have universal jurisdiction to prosecute that offence.⁵

In such a case, the state of which the UN staff member is a subject may seek agreement of the other country to have that individual return to his home state to be prosecuted there.

4.6.5 Referral to a ‘failed’ state

Special arrangements will have to be made for cases such as Somalia where there is no functioning legal system to handle any referred investigation. Such decisions can be made on a case-by-case basis by the Investigations Oversight Panel after consultation with the Oversight Commissioner.

Given that the investigation *in personam* phase will have been reached by that point, the staff member should be legally represented and should have the right to present a case to the Investigations Oversight Panel on that referral decision.

5. Oversight of Investigations

NUNCIO investigations should be carried out subject to the supervisory authority of an Investigations Oversight Panel.

Such a panel should be designated for every investigation, and should be responsible for

1. ensuring that the investigation is carried out diligently, expeditiously and fairly,
2. preventing any unreasonable pressure being applied to the subject,
3. hearing any complaints made against the assigned investigators,
4. considering any requests for widening the scope of the investigation,
5. referring a matter to a Member State for criminal investigation,
6. deciding on whether or not the subject of any referral should be protected under the 1946 UN Convention of Privileges and Immunities,

⁵ Sexual offences against children, for example, can be prosecuted in England under the Sexual Offences Act 2003, Section 72 even though the offence was committed overseas. The Fraud Act 2006 and the Bribery Act 2010 also contain similar extraterritorial provisions.

7. granting the subject of an investigation immunity from prosecution in exchange for evidence against a third party, and
8. approving the final report of the investigation.

Investigations Oversight Panel decisions should be made on a simple majority basis.

The Oversight Commissioner must maintain a watching brief over all current investigations, and may attend meetings of any Investigations Oversight Panel and act in an advisory capacity, but decisions must be made by the Investigations Oversight Panel.

5.1 Expansion of the Scope of the Investigation

If, during the conduct of their enquiries, the assigned investigators establish either

- a) reasonable grounds to believe there have been different and/or additional acts of misconduct or criminality committed; or
- b) further staff members are likely to have been engaged in the misconduct under investigation;

they shall immediately submit an Assessment Report, through the Investigations Oversight Panel for a decision to be made at the next sitting of a Complaints Intake Panel.

The decision to expand the scope of the investigation to include investigation of those individuals or additional allegations should be taken by the Complaints Intake Panel, then the original investigation continue as before.

5.2 Immunity from Prosecution

It is sometimes important to take a pragmatic approach to the investigation of misconduct, and appreciate that it is of greater importance that a more serious offence be investigated, even where that involves sacrificing the investigation of a lesser one. For that reason, NUNCIO must have the ability to leverage a relatively minor investigation as a means of identifying more serious wrongdoing.

For that reason, NUNCIO must have the discretion to grant someone immunity from prosecution in exchange for testimony of sufficient importance in another investigation.

Such a decision, however, would have to be approved by an Investigations Oversight Panel after consultation with the Oversight Commissioner.

5.3 Approval of Investigation Reports

All investigation reports shall be submitted to the members of the designated Investigations Oversight Panel for review.

If the panel is satisfied that the investigation has proved that the subject committed misconduct, a Disciplinary Panel must be convened. The Disciplinary Panel will again review the report, will hear any defence or mitigation offered by the subject and if culpability is agreed, will direct the secretary-General to impose a disciplinary measure.

Investigation Reports must be available to all members of the Investigations Oversight and Disciplinary Commission, and a summary of each case included in an annual report to all Member States.

5.4 Clearance

If, after thorough investigation, the investigators conclude that no wrongdoing can be established, this should be reported to the Investigations Oversight Panel whose approval is required to close the investigation.

The staff member should be notified within seven days that he has been cleared.

6. Disciplinary Decisions

At present, internal disciplinary proceedings are decided by the Assistant-Secretary-General of the Office of Human Resource Management, which leaves the decision to recognise a finding of misconduct against a particular staff member in the hands of the Organisation itself. This decision must similarly be taken independently, and handled by a sub-committee of the General Assembly.

Similar to the Investigations Oversight Panel, a **Disciplinary Panel** should be formed, consisting of five members in the case of a ‘Category I’ investigation and three members in the case of a ‘Category II’ investigation.

No one should ever sit as a member of the Disposal Panel to participate in making a decision on a matter they were previously involved in when sitting as a member of a Complaints Intake Panel or an Investigation Oversight Panel.

When an Investigation Report is approved by an Investigations Oversight Panel, a Disciplinary Panel must then be convened to consider that report and to decide on the appropriate disciplinary measure. The Disciplinary Panel may also question the investigators if they consider it necessary.

All staff members named in the investigation report, including the complainant and any witnesses, must also have a right to be heard, and to be represented by counsel, prior to any decision being made by the Disciplinary Panel.

The Disciplinary Panel’s options are to either:

- 1) find that the Investigation Report has failed to establish misconduct by the staff member and

dismiss the case against him,

- 2) find that the Investigation Report has failed to adequately establish misconduct by the staff member and adjourn the hearing pending further information from the investigation, either by NUNCIO or any other investigators, or
- 3) find that the Investigation Report has established misconduct by the staff member and direct the Secretary-General to impose a disciplinary measure, which could be either a:
 - a) reprimand,
 - b) demotion,
 - c) deferment of eligibility for promotion,
 - d) suspension without pay for a period,
 - e) monetary fine, or
 - f) dismissal.

Any staff member wishing to challenge the decision of the Disposal Panel should have the right to appeal that decision direct to the UN Appeals Tribunal.

Peter A Gallo
7 May 2016

Annex A

Definition of 'misconduct' within the UN system

Defining Misconduct

Misconduct should be specifically defined in the governing statute to include (but not be limited to) actual or attempted:

1. Fraud, embezzlement, theft, larceny or any other misappropriation of property;
2. Soliciting or accepting bribes, corruption;
3. Sexual exploitation and sexual abuse;
4. Possession, sale or transportation of illegal substances;
5. Smuggling of any item across an international border in violation of applicable local legislation;
6. Driving under the influence of drink or drugs;
7. Abuse of United Nations privileges and immunities, including misuse of a United Nations Laissez-Passer;
8. Acts or behaviour in any context, whether connected to work or not, that would discredit the United Nations or put the reputation of the Organization into disrepute;
9. Breach of confidentiality (whether internal or external to the Organization);
10. Discrimination, harassment, including sexual harassment, and abuse of authority;
11. Failure to comply with financial disclosure obligations or private legal obligations;
12. Abuse of supervisory authority and retaliation against any individual who has cooperated with a NUNCIO investigation;
13. Failure to cooperate with a duly authorized investigation;
14. Failure to disclose a conflict of interest or perceived conflict of interest;
15. Failure to report an act that was either (a) reasonably believed to constitute a widely-recognised criminal offence, or (b) misconduct;
16. Gross negligence;
17. Insubordination;
18. Knowingly or recklessly making false reports or allegations of misconduct;
19. Misrepresentation, forgery, or false certification on or in connection with any United Nations document, including failure to disclose a material fact;
20. Misuse of office;
21. Misuse or mishandling of United Nations property or resources, including, but not limited to, information and communication technology resources;

22. Physical or verbal abuse, including domestic abuse, or threats against another individual;
23. Violation of national or local laws (whether civil or criminal).

Where the above refers to a criminal offence, this would automatically be considered as a Category I matter and would ordinarily to be investigated by NUNCIO.

The determination of whether other reported cases should be Category I or Category II will be made by the Complaints Intake Panel, who will consider the facts and the level of the alleged misconduct in each case.

Mental Component

Misconduct normally requires a mental element showing more than simple mistake or unintentional error. Where applicable, this element may be established through evidence that the staff member:

- a) acted deliberately, intentionally or willfully;
- b) consciously disregarded a risk that was likely to cause harm, regardless of whether the staff member envisaged the resulting harm (recklessness); or
- c) exhibited an aggravated or extreme failure to exercise a reasonable standard of care with respect to a reasonably foreseeable risk (gross negligence).

Misconduct may include actions carried out by an agreement of two or more people. Misconduct may also include helping, encouraging, facilitating, contributing to, or otherwise aiding or abetting another staff member to commit misconduct.

Annex B

List of the various investigative bodies within the UN system

List of the various investigative bodies within the UN system

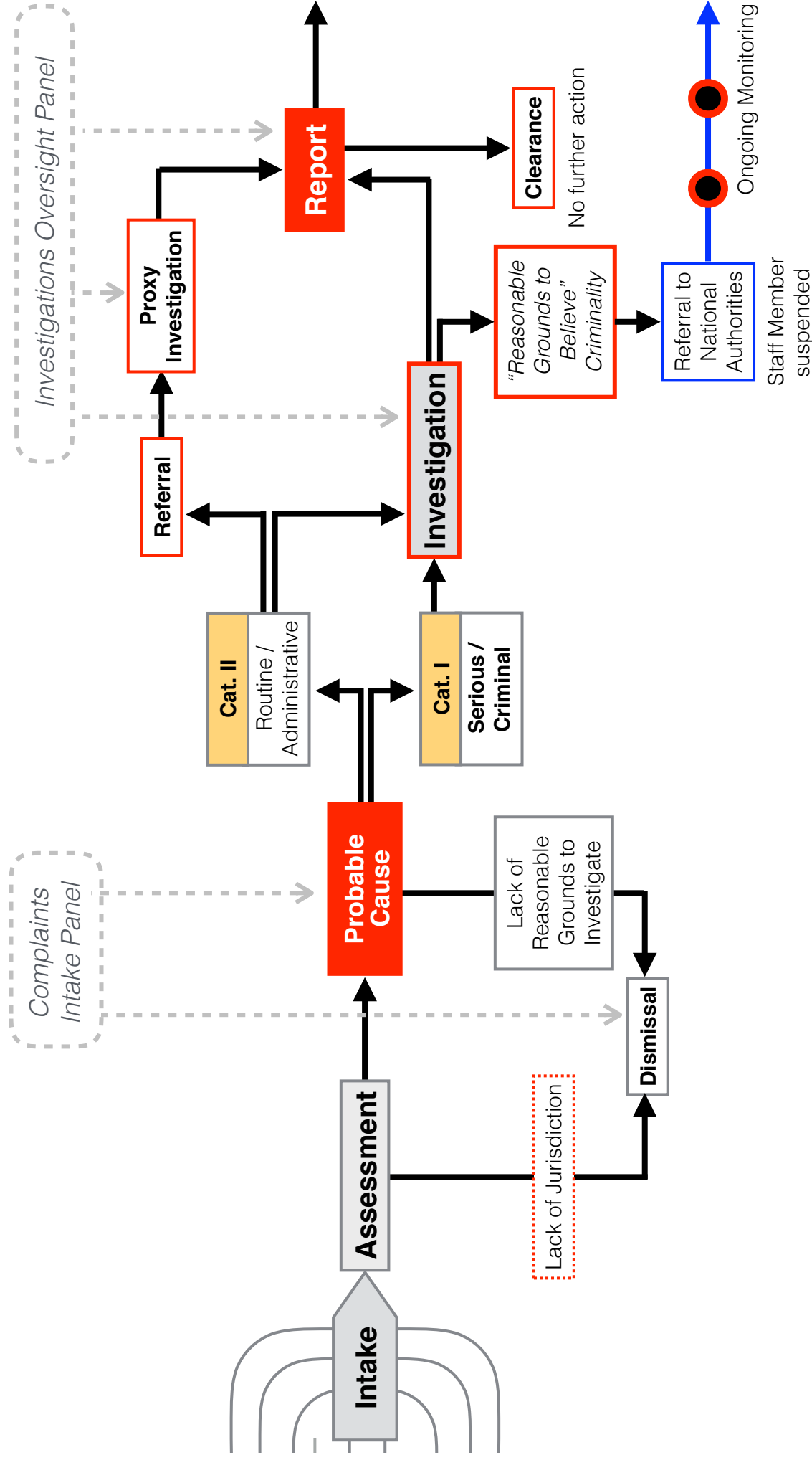
UN Secretariat	Office of Internal Oversight Services (OIOS)
UNDP	Office of Audit and Investigations (OAI)
UNFPA	Division of Oversight Services (DOS)
UNICEF	Office of Internal Audit (OIA)
UNHCR	Inspector General's Office (IGO)
UNRWA	Department of Internal Oversight Services (DIOS)
UNOPS	Internal Audit & Investigations Group (IAIG)
WFP	Oversight Services (OS)
ILO	Investigation and Audit Office (IAO)
FAO	Office of the Inspector General (AUD)
UNESCO	Internal Oversight Services (IOS)
ICAO	Evaluation & Internal Audit Office
WHO	Internal Oversight Services (IOS)
UPU	Internal Audit
ITU	Internal Audit
WMO	Internal Oversight Office (IOO)
IMO	Internal Oversight Section (IOS)
WIPO	Internal Audit and Oversight Division (IAOD)
UNIDO	Internal Oversight Services (IOS)
IAEA	Office of Internal Oversight Services (OIOS)

Annex C

Illustration of proposed oversight of investigations

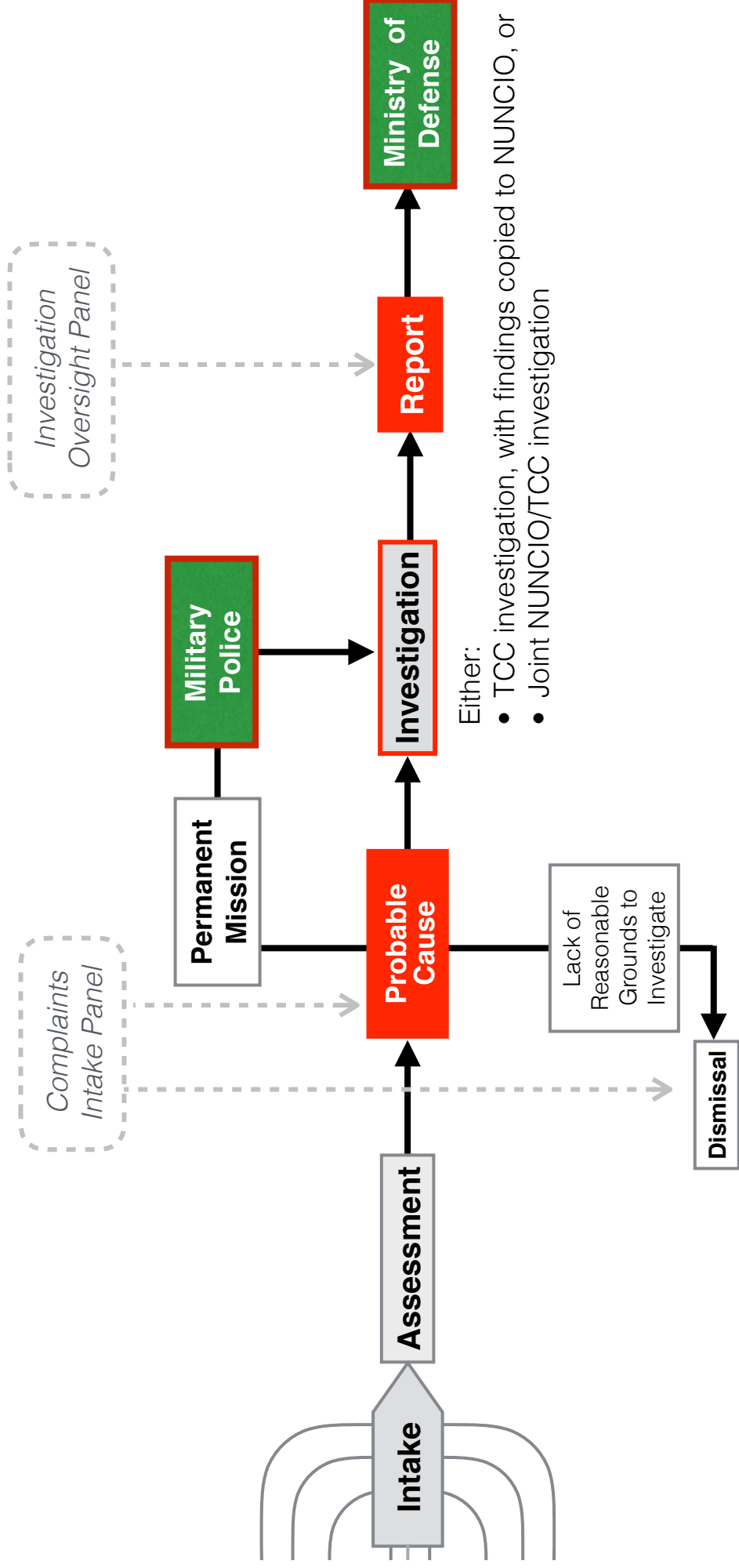
Proposal for Reform of UN Oversight Mechanisms

Investigation of Misconduct & Criminality - Civilian Personnel



Proposal for Reform of UN Oversight Mechanisms

Investigation of Misconduct & Criminality - Military Personnel

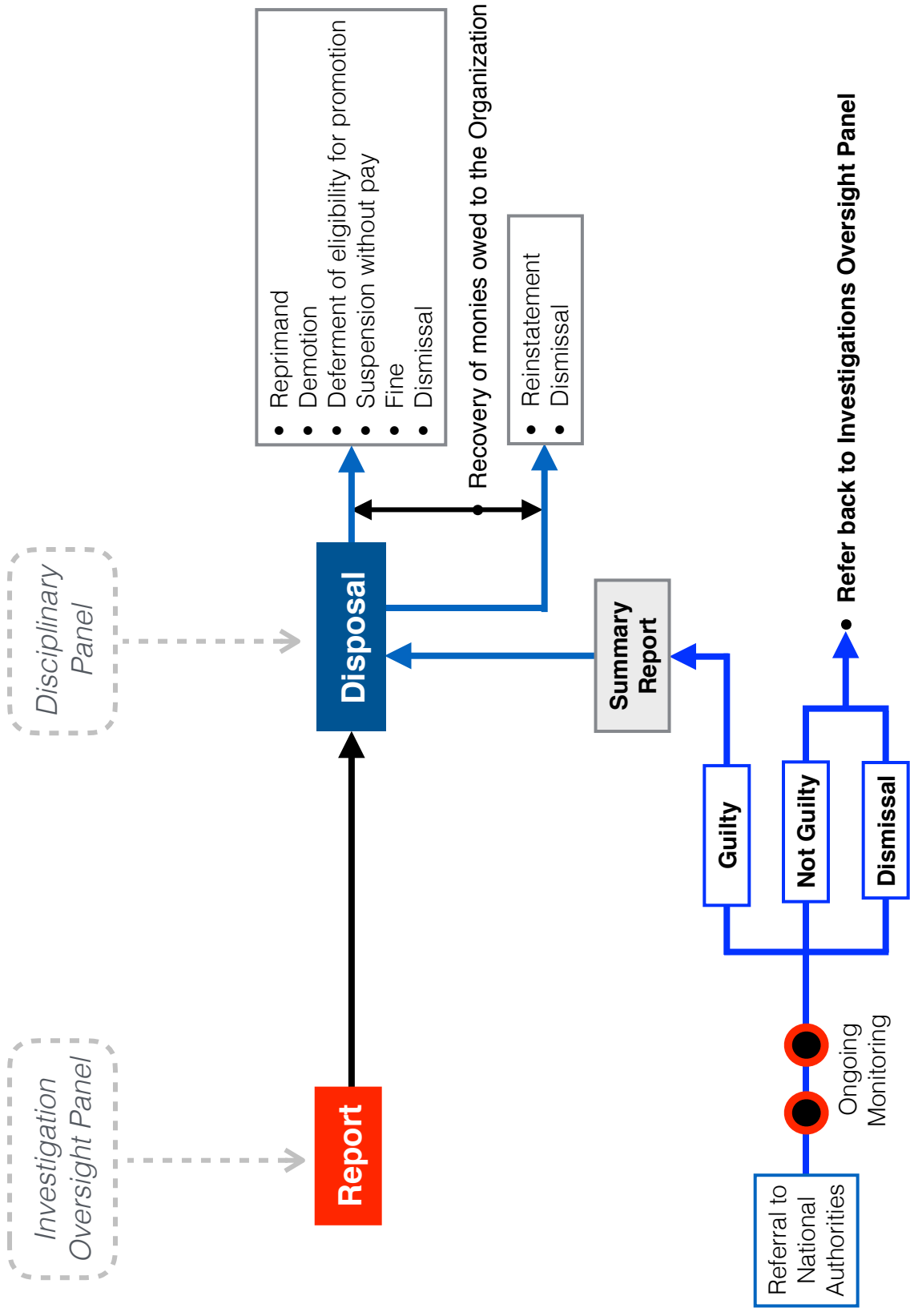


Annex D

Illustration of proposed oversight of disciplinary decisions

Proposal for Reform of UN Oversight Mechanisms

Disposal of Disciplinary Matters



Annex E

Illustration of proposed organisational structure

