

AT 5-6020

**International Labour Organization Administrative Tribunal**

**Dr. Francesco Zambon,**

*Petitioner,*

**V.**

**The World Health Organization,**

**Respondent**

***BRIEF OF AMICI CURIAE***

**WHISTLEBLOWING INTERNATIONAL NETWORK, GOVERNMENT  
ACCOUNTABILITY PROJECT, TRANSPARENCY INTERNATIONAL,  
TRANSPARENCY INTERNATIONAL ITALY, GLOBALEAKS AND  
WHISTLEBLOWER AID**

**22 September 2023**

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## **I. Introduction**

1. The Whistleblowing International Network, Government Accountability Project, Transparency International, Transparency International Italy, GlobaLeaks and Whistleblower Aid (the “Organizations”) are honored to submit this amicus curiae brief in the case of Dr. Francesco Zambon v. World Health Organization for the consideration of the International Labour Organization Administrative Tribunal (the “Tribunal”).
2. The six public interest organizations identified below all have missions and expertise in defending whistleblowers’ rights.
3. Government Accountability Project is an independent, nonprofit, nonpartisan, tax-exempt advocacy organization based in Washington, D.C., United States of America. Through litigating whistleblower cases, publicizing concerns, and developing legal reforms, Government Accountability Project’s mission is to protect the public interest by promoting government, corporate, and intergovernmental organization accountability. Since opening in 1977, Government Accountability Project has represented or informally assisted more than 8,000 whistleblowers in actions that have exposed injustice and corruption around the world. Government Accountability Project works with UN whistleblowers, supporting them with their retaliation cases and addressing wrongdoing. Through working with UN officials and relevant stakeholders, Government Accountability Project advocates for policy changes based on our casework and investigations. Government Accountability Project has a deep understanding of the factors that encourage and discourage whistleblowers and their supporting witnesses from coming forward with important information about misconduct.
4. The Whistleblowing International Network (WIN) is an international membership organization and leading center of global civil society expertise on whistleblowing law and practice. Established in 2018, WIN works to strengthen the legal, technical and strategic skills of civil society around the world to support whistleblowers in the public

interest. Membership includes non-profit organizations that provide access to free legal advice and support to whistleblowers. They share expertise and collaborate with those working to protect whistleblowers through law reform, investigative journalism, digital and human rights, climate justice and fighting corruption in 25+ countries. WIN was formed to respond to an urgent need to work together and share specialist skills as the importance of whistleblowing as a catalyst for holding power to account continues to increase around the world.

5. Transparency International is an independent, nonprofit, nonpartisan civil society organization registered in Germany. Transparency International's Mission is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society. Transparency International acts at both the international and, through its National Chapters, at the national level in over 110 countries. Recognising that whistleblowing is one of the most effective ways to detect and address corruption, Transparency International has been engaged for over 10 years in a wide range of advocacy, public awareness and research activities to improve the protection of whistleblowers. Transparency International has been advocating at the national, regional and international levels for the adoption of comprehensive and robust whistleblower protection standards and legislation that fulfills those objectives, their enforcement by the authorities and their implementation in the workplace by organizations across all sectors and jurisdictions, including International organizations. Transparency International Principles for Whistleblower Legislation is reflected in standards from the G20, the OECD, the UN and in the EU Directive on whistleblower protection. Through its Advocacy and Legal Advice Centres in over 60 countries, Transparency International helped more than 250,000 victims and witnesses of corruption, including whistleblowers, providing them with legal advice and support, both before they blow the whistle, to reduce personal risks and improve the chances of success, and afterwards, to address retaliation or inaction. Working directly with whistleblowers has informed Transparency International's evidence-based policy and advocacy towards effective whistleblower protection laws and frameworks.

6. Transparency International Italy is the Italian chapter representative of the Transparency International Coalition. An independent, nonprofit organization established in 1993 in Milan, its mission is to promote transparency and combat corruption practices in the country through projects to increase the awareness of society and by the implementation of practical activities that benefit both the public and private sector. Since 2009, Transparency International Italy has created a specific whistleblowing programme. Originally committed to dissemination activities and legislative advocacy, since 2014 it launched a program (ALAC - Allerta Anticorruzione) to assist potential whistleblowers in paralegal activities, explaining rights and risks related to blowing the whistle, and shepherding these individuals in reporting activities. In 2018 it launched WhistleblowingPA, a joint project with Globaleaks, to offer all public administrations a free, outsourced, secure, encrypted reporting platform and advising both public and private organizations in setting up compliant and efficient whistleblowing mechanisms.
7. GlobaLeaks is a project created in 2011 to enable anyone to easily set up and maintain a secure whistleblowing platform by offering a free and open source software. In GlobaLeaks's vision there is a world in which every person can access secure whistleblowing tools to report wrongdoings and human rights violations, and to promote the values of transparency and anti-corruption. To this end, the project promotes accountability in society and aims to increase the involvement of citizens in managing matters of public interest and to boost the active participation of employees in correcting the management of the corporations and companies for which they work. GlobaLeaks is part of a global community of human rights defenders whose work is based on the principles of international solidarity, the universality and indivisibility of human rights, impartiality, independence and diversity.
8. Whistleblower Aid is a 501(c)3 nonprofit organization dedicated to supporting and protecting whistleblowers — in the interest of the public, and in the pursuit of a robust, resilient and thriving democracy. Democracy functions best when institutions and leaders are subject to scrutiny, and when those who operate corruptly or illegally are held to account for their actions. Whistleblower Aid is a pioneering non-profit legal organization

that helps government employees and private-sector workers report and expose wrongdoing—safely, lawfully, and responsibly. Since its founding in 2017, Whistleblower Aid has supported and advocated for whistleblowers across government, Big Tech and other parts of the private sector, helping them find a safe way to disclose the important information they hold and bring that information to public attention. Whistleblower Aid empowers its clients to report and fix government and private-sector lawbreaking — without breaking the law.

9. The above-mentioned organizations do not have a financial or other interest in the outcome of this case and jointly submit this brief because of their appreciation of the principles of due process, procedural fairness, and the best practices for whistleblower protection policies.
10. We submit this amicus curiae brief (hereinafter the “Brief”) e in Dr. Zambon’s case, because the outcome of this complaint has the potential to undermine the whistleblower protection policies, procedures and institutional culture across the UN common system and may have detrimental wider consequences that are in and of themselves serious matters of public interest. These include:
  - Dissuading top scientists from working at the UN and its agencies and programs as it may be perceived that they cannot act with scientific integrity without fear of reprisal,
  - Impeding the ability of future WHO and other UN whistleblowers to utilize internal channels to bring forward disclosures of public interest information on suspected wrongdoing risk or malpractice, and
  - Discouraging future whistleblowers from coming forward to report violations of integrity in scientific research, rendering the WHO unable to carry out its mission and undermining public trust and confidence in public health discourse, and in the scientific process itself.
11. We understand that while there are no rules concerning the submission of amicus curiae briefs, the Tribunal’s case law states that for a brief to be admitted it must contribute to

the clarification of the dispute.<sup>1</sup> In this regard, the Tribunal has frequently admitted the briefs of third parties, such as the staff associations of the Defendant Organization and the Federation of International Civil Servants Association (FICSA), to clarify important principles relevant to the dispute.

12. This brief includes an analysis of both the WHO's whistleblowing policies and the actual organizational response following an internal report of misconduct and retaliation. As to the former, we focus especially on the WHO Whistleblowing and Protection Against Retaliation Policy and Procedures 2015<sup>2</sup> (hereinafter the "WHO Whistleblowing Policy"), which was the WHO's operable policy at the time of the events.

## **II. The WHO did not follow their relevant internal rules and procedures**

### **A. The WHO Office of Compliance, Risk management and Ethics (CRE) misinterpreted the WHO Whistleblowing policy's requirement on what constitutes retaliation and the definition of whistleblower.**

#### **i. Suffering retaliation is not a condition for qualifying as a whistleblower**

13. Determining whether someone is a whistleblower - and thus entitled to protection - as well as determining whether a whistleblower has suffered retaliation are two different considerations, which must take place one after the other. The WHO Whistleblowing Policy "*applies to WHO staff members who report, in good faith, suspected wrongdoing of corporate significance at WHO and may be subjected to retaliation as a consequence*" (para 6). The policy defines 'whistleblowers' as individuals who report "*suspected wrongdoing that implies a significant risk to WHO, i.e. harmful to its interests, reputation, operations or governance.*" (para 9). It further specifies that "*Individuals who*

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<sup>1</sup> See ILOAT Judgment 3426, ILOAT Judgment 3395, ILOAT Judgment 2420 (cons 7) ("*The Association of Professional Staff has submitted an amicus curiae brief. Although the possibility of gathering the observations of an association or union representing staff interests is not envisaged under its Statute, the Tribunal considers that it can only be beneficial to extend that possibility, as do other international administrative tribunals, to associations and unions wishing to defend the rights of the staff members whom they represent in the context of disputes concerning decisions affecting the staff as a whole or a specific category of staff members. Indeed, the Organization has raised no objection to the Tribunal's examination of the submissions in question, which are not, however, to be equated with the brief of an intervener, and which are simply intended to clarify certain points raised by the complaints with the Tribunal.*").

<sup>2</sup>[https://cdn.who.int/media/docs/default-source/ethics/whowhistleblowerpolicy\\_en.pdf?sfvrsn=6949e726\\_11&download=true](https://cdn.who.int/media/docs/default-source/ethics/whowhistleblowerpolicy_en.pdf?sfvrsn=6949e726_11&download=true)

*report such cases in good faith are entitled to protection against retaliation in accordance with the provisions of this policy.” (para 17).*

14. Thus, according to the WHO Whistleblowing Policy, whether an individual has suffered retaliation is irrelevant to determining whether they qualify as a whistleblower. Determining that a reporting person does not qualify for whistleblower protection because they have not suffered retaliation would clearly be an incorrect application of the WHO policy (and blatantly against international standards and best practice).

15. The WHO Whistleblowing Policy does not require that reporting persons request the designation of whistleblower in order to be granted protection.

**ii. The WHO policy does not require that retaliation come from within a whistleblower’s chain of command**

16. The WHO Whistleblowing policy provides multiple definitions and examples of retaliation. Paragraph 12 defines retaliation as “...*a direct or indirect adverse administrative decision and/or action that is threatened, recommended or taken against [a whistleblower]...*”. Paragraph 13 refers to “...*a direct or indirect adverse action threatened, recommended or taken following the report of such suspected wrongdoing...*”, without any mention of the administrative character of the decision or action.<sup>3</sup> Paragraph 14 builds on these definitions, providing a non-exhaustive list of examples that can constitute retaliation, including both administrative actions and non-administrative actions such as harassment and discrimination as well as and threats to the whistleblower, their family and/or property including threats that may come from outside WHO.<sup>4</sup> While an express inclusion of “omission” as a form of retaliation is missing, the definition of retaliation is largely in line with international best practices.

17. Taken together, Paragraphs 12, 13, and 14 underscore that, regardless of form, adverse action does not have to originate from a whistleblower’s supervisor or someone in their

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<sup>3</sup>[https://cdn.who.int/media/docs/default-source/ethics/whowhistleblowerpolicy\\_en.pdf?sfvrsn=6949e726\\_11&download=true](https://cdn.who.int/media/docs/default-source/ethics/whowhistleblowerpolicy_en.pdf?sfvrsn=6949e726_11&download=true)

<sup>4</sup>[https://cdn.who.int/media/docs/default-source/ethics/whowhistleblowerpolicy\\_en.pdf?sfvrsn=6949e726\\_11&download=true](https://cdn.who.int/media/docs/default-source/ethics/whowhistleblowerpolicy_en.pdf?sfvrsn=6949e726_11&download=true)

chain of command to qualify as retaliation. This is evident from the repeated mention that adverse action can be direct or indirect, threatened or recommended, as well as the fact that retaliatory actions may come from outside the organization.

18. By not limiting the definition of retaliation to adverse action taken by a whistleblower's supervisor or someone in their chain of command, the WHO Whistleblowing Policy follows international best practice and precedent. For example, the UN Secretary-General's bulletin on 'Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations' defines retaliation as *"any direct or indirect detrimental action that adversely affects the employment or working conditions of an individual, where such action has been recommended, threatened or taken for the purpose of punishing, intimidating or injuring an individual because that individual engaged in an activity protected by the present policy"*. Principle 6 of the G20 High-Level Principles for the Effective Protection of Whistleblowers<sup>5</sup> highlights that *"Retaliation against whistleblowers may take many forms, not limited to workplace retaliation and actions that can result in reputational, professional, financial, social, psychological and physical harm"* and advises G20 countries *"to define the scope of retaliation as comprehensively as possible"*. The EU Whistleblowing Directive requires all EU Member States to *"take the necessary measures to prohibit any form of retaliation against [whistleblowers], including threats of retaliation and attempts of retaliation"*.<sup>6</sup> Relevant US law protecting federal government employees from whistleblowing retaliation has also been interpreted to permit adjudicators to consider the retaliatory motives of those outside of a whistleblower's chain of command.<sup>7</sup>

19. Therefore, interpreting the WHO definition of retaliation as excluding (threatened) adverse actions from outside a whistleblower's chain of command would be an erroneous application of the WHO policy, while also running contrary to international standards and best practice.

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<sup>5</sup>[https://www.mofa.go.jp/policy/economy/g20\\_summit/osaka19/pdf/documents/en/annex\\_07.pdf](https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/pdf/documents/en/annex_07.pdf)

<sup>6</sup> Article 19 of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>

<sup>7</sup> <https://www.law.cornell.edu/uscode/text/5/2302>; *Whitmore v. Department of Labor*, 680 F.3d 1353, 1371 (Fed. Cir. 2012).



**iii. Internal reporting channels at WHO failed to uphold their requirement to conduct a full and timely investigation into disclosures and retaliation complaints**

20. The 2015 WHO whistleblower policy defines retaliation as misconduct and prescribes several internal, competent departments for handling misconduct and other disclosures who should grant whistleblowers adequate protection once a disclosure is made to them. In this regard, paragraphs 35 and 36 of the WHO Whistleblowing Policy state that individuals can report wrongdoing that implies a significant risk to WHO to their supervisors, CRE or IOS, but that supervisors may address the disclosures by engaging the Office of the Ombudsman, HR, Staff Association or Boards of Appeal. The policy does not explain how these various departments, which lack an investigative mandate, can also contribute to protecting whistleblowers.
21. When a whistleblower reports retaliation, the organization is obligated to conduct an investigation. This means, among other things, conducting interviews with the aggrieved individual, the alleged offender, and any other individual who may have relevant information about the alleged conduct.
22. “...[T]he Tribunal has consistently stated that international organisations are required to investigate accusations in this area and to provide protection for persons who claim they are the victims of harassment (see Judgments 2706, consideration 5, and 2552, consideration 3) and also to ensure that their investigative and internal appeal bodies for this purpose are functioning properly (see Judgments 3314, consideration 14, and 3069, consideration 12), these obligations being part of a more general duty owed by those organizations to provide a safe and adequate environment for their staff, free from physical and psychological risk (see Judgments 4299, consideration 4, and 4171, consideration 11).” (ILOAT Judgement No. 4601, at 11).
23. Therefore, unless reports of retaliation are subject to a full and timely investigation in which the aggrieved individual and reporter of wrongdoing is interviewed, the internal investigative channels at the WHO cannot be construed to constitute a neutral first

instance process utilizing fair procedures and fulfilling its duty to provide a safe and adequate environment for staff.

### **III. WHO's whistleblower framework and policies are not in line with international law principles and international best practices on whistleblower protection and fair procedures**

#### **A. The WHO must apply international law principles to their framework for handling whistleblowers' employment disputes**

24. The Constitution of the WHO (Constitution) was adopted in conformity with the Charter of the United Nations which sets out that '*the United Nations shall promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all*'.<sup>8</sup> Hence, the WHO has the obligation to promote universal respect for, and observance of, human rights and fundamental freedoms, including freedom of expression and freedom of information.<sup>9</sup>

25. Freedom of expression and freedom of information include the 'freedom to seek, receive and impart information'.<sup>10</sup> Any unwarranted inhibition of imparting information is censorship. WHO's research reports are subject to stringent scientific and ethical rules.<sup>11</sup> The WHO has the obligation to protect the freedom of research concerning the agency's research work. '*This freedom includes, at the least, the following dimensions: protection of researchers from undue influence on their independent judgment; [...] sharing of scientific data and analysis with policymakers, and with the public wherever possible.*'<sup>12</sup> Based on this the WHO is the duty-bearer and both the researchers of the WHO and the general public (whom the WHO serves) are the rights-holders. The researchers, among others, have the right to impart information and the public has the right to receive it.

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<sup>8</sup> Article 55, paragraph c) of the United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>9</sup> UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no34-article-19-freedoms-opinion-and> [accessed 19 May 2023].

<sup>10</sup> Article 19 of the UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>11</sup> See the Code of Conduct for responsible Research, November 2017, at <https://www.who.int/about/ethics/code-of-conduct-for-responsible-research> [accessed 19 May 2023].

<sup>12</sup> Paragraph 13 of the UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*, 30 April 2020.

26. The importance of whistleblower frameworks is underscored by the WHO's obligation to safeguard human rights, freedom of expression, freedom of information, and to ensure the protection of researchers' independence and the public's right to access information. The Council of Europe Committee of Ministers' defines the ideal whistleblower protection framework as "*normative, institutional and judicial elements which, together, provide a comprehensive and coherent whole in which reporting and disclosure channels, investigatory and remedial mechanisms, and legal remedies for the protection of whistleblowers all interact with each other effectively.*" (Recommendation, para. 29).<sup>13</sup>
27. Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) mandates that everyone is entitled to a fair and public hearing by a competent, independent, and impartial tribunal.<sup>14</sup> The rights afforded to those utilizing a system of justice include the right to be represented, due process, and natural justice. As an intergovernmental organization, the UN is not, nor can it be, a signatory of the ICCPR or other international conventions. Accordingly, the rights under such do not immediately apply to those employed by the UN and its agencies, such as the WHO. However, international administrative law precepts and norms apply to how the UN takes actions against their staff. Importantly, the UN should be in a position where best practice is applied and is seen to be applied in order to bolster the credibility of the organization and encourage internal disclosure. Therefore, the body of internal laws of the UN (including all its agencies, funds, and programs) regarding its internal whistleblower policies and procedures should meet the minimum standards of procedural and general fairness, justice, due process, independence of consideration of decisions, and rules of natural justice.
28. A significant body of case law recognizes that UN staff have due process rights that must be upheld for the good of the individual staff member and for the good of the UN system itself. Due process in the UN justice system includes holding hearings (in person, via

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<sup>13</sup> <https://rm.coe.int/16807096c7>

<sup>14</sup> International Covenant on Civil and Political Rights, Article 14, General Assembly resolution 2200A (XXI) adopted on 16 December 1966.

telephone, or video-conference) at which each party can present and challenge the evidence presented by the other party. *“It is firm Tribunal case law that a staff member is entitled to an efficient internal means of redress and to expect a decision on an internal appeal to be taken within a reasonable time.”* (ILOAT Judgement No. 3168).

29. The UN internal justice system’s mandate to steadily improve the administration of justice, is noted in 2010-UNAT-084 (Sanwidi) at para. 38:

30. *“Administrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.”*<sup>15</sup>

31. In other words, justice must prevail over efforts to evade accountability for misconduct or abuse of discretion on the part of the Administration. Internal, pre-tribunal stage appeal mechanisms are the preliminary stage of the formal process of employment-related dispute resolution. These internal mechanisms are required to be exhausted before complainants can challenge administrative decisions before an “external” administrative tribunal. In most cases, national courts lack jurisdiction to hear challenges, given the UN’s immunity as an international organization. As such, the UN itself is expected and required to provide adequate resources, mechanisms, and remedies for their staff to challenge actions the UN takes against their staff. These resources, mechanisms, and remedies must comply with international law, which include the principles of the rule of law and due process.<sup>16</sup>

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<sup>15</sup> Sanwidi v. Secretary-General of the United Nations, Case No. 2010-082, 27 October 2010.

<sup>16</sup> See General Assembly Resolution 61/261, in relevant part *“Decides to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike”* para. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/510/03/PDF/N0651003.pdf?OpenElement>.

32. Accordingly, these principles indicate that it is of no defense for an organization to claim that it lacks the resources to promptly investigate a claim of retaliation made by a staff member.
33. While international law principles are already enshrined in the UN Charter and an individual organization's applicable rules, regulations, and administrative issuances, they fall short of being adequately implemented.<sup>17</sup>

**B. The WHO's whistleblowing policy does not follow best practices for whistleblower protection as set by international organizations and civil society organizations**

34. Existing international standards for whistleblower reporting and protection include the G20 High-Level Principles for the Effective Protection of Whistleblowers<sup>18</sup>; the 2021 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions<sup>19</sup>(Section XXII and Annex II); Directive (EU) 2019/1937 on the protection of persons reporting on breaches of Union law<sup>20</sup>; UNODC's Resource Guide on Good Practices in the Protection of Reporting Persons<sup>21</sup>; and the Council of Europe Recommendation CM/Rec(2014)7 on the Protection of Whistleblowers<sup>22</sup>. Best practice standards have also been collated in several civil society led frameworks including the Government Accountability Project's International Best Practices for Whistleblower Policies<sup>23</sup>, Transparency International's International Principles for Whistleblower Legislation<sup>24</sup> and Best Practice Principles for Internal Whistleblowing Systems<sup>25</sup>, the report of the UN Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression<sup>26</sup>, ISO 37002 Guidance

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<sup>17</sup> See the Resolution adopted by the General Assembly on 24 December 2008 "Reaffirming the decision in paragraph 4 of its resolution 61/261 to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike" available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/485/97/PDF/N0848597.pdf?OpenElement>

<sup>18</sup> [https://www.mofa.go.jp/policy/economy/g20\\_summit/osaka19/pdf/documents/en/annex\\_07.pdf](https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/pdf/documents/en/annex_07.pdf)

<sup>19</sup> <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378>

<sup>20</sup> <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>

<sup>21</sup> [https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf)

<sup>22</sup> <https://rm.coe.int/16807096c7>

<sup>23</sup> <https://whistleblower.org/international-best-practices-for-whistleblower-policies/>

<sup>24</sup> [https://images.transparencycdn.org/images/2013\\_WhistleblowerPrinciples\\_EN.pdf](https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf)

<sup>25</sup> [https://images.transparencycdn.org/images/2022\\_Internal-Whistleblowing-Systems\\_English.pdf](https://images.transparencycdn.org/images/2022_Internal-Whistleblowing-Systems_English.pdf)

<sup>26</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/273/11/PDF/N1527311.pdf?OpenElement>

on Whistleblowing Management Systems<sup>27</sup> and the International Chamber of Commerce 2022 Guidelines on Whistleblowing.<sup>28</sup>

**i. The WHO whistleblower Policy does not protect individuals who refuse to obey illegal orders**

35. International best practices protect individuals who reasonably believe that they are being asked to violate the law. This includes protecting individuals for refusing to obey illegal or unethical orders, or those that violate an organization's procedures (such as wrongdoing in research or misconduct), which can itself prevent the future need to blow the whistle.<sup>29</sup> In such cases, protection against retaliation should begin from the point of the refusal to obey the order.
36. The WHO policy does not protect individuals from retaliation for refusing to violate UN rules, policies, or regulations. When individuals are safeguarded against reprisals for refusing to comply with illegal directives, it encourages a culture of accountability and responsible decision-making. By offering this protection, whistleblower policies promote a healthy work environment where employees are empowered to act ethically and report wrongdoing without fear of retaliation. Ultimately, including protection for refusing to follow illegal orders ensures that organizations operate within legal boundaries and promotes the greater public interest.
37. In cases where there is a refusal to obey an unethical or illegal order, an appropriate application of international best practices on whistleblowing should entitle the reporter of wrongdoing to protection from retaliation from the point of the initial refusal to obey an unethical or illegal order.

**ii. The WHO whistleblower policy imposes overly onerous requirements to qualify as having suffered retaliation**

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<sup>27</sup> <https://www.iso.org/standard/65035.html>

<sup>28</sup> <https://iccwbo.org/wp-content/uploads/sites/3/2022/02/icc-guidelines-on-whistleblowing-2022.pdf>

<sup>29</sup> See International Bar Association and Government Accountability Project report "Are Whistleblower Laws Working? A global study of whistleblower protection litigation" available at: <https://www.ibanet.org/article/EE76121D-1282-4A2E-946C-E2E059DD63DA>

38. The WHO policy limits protection against retaliation of reporting persons to adverse action taken *after* they made their report of suspected wrongdoing. Protection should be extended to individuals who are considering making a disclosure as they may face workplace harassment, abuse, or misconduct aimed at discouraging them from blowing the whistle.<sup>30</sup> This includes protection from individuals seeking information and advice about whistleblowing (for example from WHO's CRE as per para 37 of the WHO policy).<sup>31</sup> Although the WHO Whistleblowing Policy is silent on this issue, the CRE has made statements on its website and in materials made available on its website that communicate or otherwise infer that communication with the CRE is protected from retaliation.<sup>32</sup> International best practices also recommend protecting whistleblowers from mistaken belief retaliation, meaning individuals who are perceived as whistleblowing should be guarded against retaliation. The U.S. and Australia are among several countries with federal whistleblower laws protecting employees from retaliation as a result of suspected whistleblowing.

39. In the case of the WHO and particularly with respect to misconduct in research, there is a lack of clarity and completeness as well as contradictions in the information provided to staff about which channels an individual should or can use to report wrongdoing in research. For example, the pamphlet about the WHO Code of conduct for responsible research<sup>33</sup> and the pamphlet about Misconduct in research<sup>34</sup> directs individuals to the Integrity Hotline or the Ethics Office (i.e. the CRE) to report wrongdoing in research, without mentioning the possibility to also report it to supervisors. In contrast the WHO Whistleblowing policy, which applies to misconduct in research, instructs individuals who suspect wrongdoing to report to their supervisors or to the IOS (para 35 and 38). The

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<sup>30</sup> Government Accountability Project (GAP), International Best Practice for Whistleblower Policies, 2016, Principle 4; Transparency International, Best practice guide for whistleblowing legislation, 2018, p13

<sup>31</sup> Transparency International, International Principles for Whistleblower Legislation, 2013, principle 18; Transparency International, Internal Whistleblowing Systems - Best practice principles for public and private organizations, 2022, p. 26

<sup>32</sup> See: WHO Ethics Flyer "Whistleblowing and protection against retaliation" (accessed 12 July 2023) available at: [https://cdn.who.int/media/docs/default-source/documents/ethics/whistleblowing-and-protection-against-retaliation-pamphlet-en.pdf?sfvrsn=7e6cc69\\_2](https://cdn.who.int/media/docs/default-source/documents/ethics/whistleblowing-and-protection-against-retaliation-pamphlet-en.pdf?sfvrsn=7e6cc69_2) see also: <https://www.who.int/about/ethics>

<sup>33</sup> [https://cdn.who.int/media/docs/default-source/documents/ethics/code-of-conduct-for-responsible-research-pamphlet-en.pdf?sfvrsn=93f07bc9\\_7](https://cdn.who.int/media/docs/default-source/documents/ethics/code-of-conduct-for-responsible-research-pamphlet-en.pdf?sfvrsn=93f07bc9_7)

<sup>34</sup> [https://cdn.who.int/media/docs/default-source/documents/ethics/code-of-conduct-for-misconduct-in-research-pamphlet-en.pdf?sfvrsn=ac5d50fc\\_2#:~:text=Reporting%20wrongdoing%20in%20research%20is,and%20Protection%20against%20Retaliation%20applies.&text=WHAT%20IS%20WRONGDOING%20IN%20RESEARCH,is%20considered%20wrongdoing%20in%20WHO.](https://cdn.who.int/media/docs/default-source/documents/ethics/code-of-conduct-for-misconduct-in-research-pamphlet-en.pdf?sfvrsn=ac5d50fc_2#:~:text=Reporting%20wrongdoing%20in%20research%20is,and%20Protection%20against%20Retaliation%20applies.&text=WHAT%20IS%20WRONGDOING%20IN%20RESEARCH,is%20considered%20wrongdoing%20in%20WHO.)

CRE seems to be available only for guidance, not for reporting wrongdoing outside of retaliation (para 37) and can be contacted either directly or through the External Hotline (i.e. the Integrity Hotline), which reports to the CRE.<sup>35</sup> However, the only reporting channels mentioned in the pamphlet used to raise awareness about the WHO policy on Whistleblowing is the Integrity Hotline, without mention of supervisors or the IOS.<sup>36</sup> Given these confusing and contradictory instructions, it is not a good practice that the WHO (and the CRE) consider the use of a specific channel a necessary condition in determining whether someone is a whistleblower or whether retaliation occurred. This accords with ILO Judgment No. 2017, cons 6, which states “*an organization must interpret the statements of a staff member in good faith and that, as part of its duty to spare the staff member unnecessary injury, it may also be called upon to provide procedural guidance and help to put right a mistake*”.<sup>37</sup>

40. Furthermore, it is a best practice that organizations allow whistleblowers to choose their own reporting channel in order to avoid discouraging people from raising their concerns. Organizations should protect whistleblowers whether they used the designated internal channels or reported to another “natural” internal authority (such as a Director, senior management, an ethics office, an Ombudsperson or the Director-General of an organization).<sup>38</sup>

41. Accordingly, a whistleblower who reports wrongdoing to their supervisor, leadership, or the organization’s ethics officials should not have his or her claims disregarded because they were not immediately reported to an organization’s internal investigations.

### **iii. The WHO whistleblower policy imposes an overly high standard to establish a prima facie case of retaliation to trigger an internal investigation**

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<sup>35</sup> We assume this is the Integrity Hotline mentioned in the Pamphlet, as the Policy indicates that “Contact details [of the External Hotline] will be added to the policy once the external hotline is operational”

<sup>36</sup> Page. 4,  
[https://cdn.who.int/media/docs/default-source/documents/ethics/whistleblowing-and-protection-against-retaliati-on-pamphlet-en.pdf?sfvrsn=7e6cc69\\_2](https://cdn.who.int/media/docs/default-source/documents/ethics/whistleblowing-and-protection-against-retaliati-on-pamphlet-en.pdf?sfvrsn=7e6cc69_2)

<sup>37</sup>[https://www.ilo.org/dyn/triblex/triblexmain.fullText?p\\_lang%3Den%26p\\_judgment\\_no%3D2017%26p\\_language\\_code%3DEN&sa=D&source=docs&ust=1693382565640335&usg=AOvVaw1libRI6cfn\\_rV1znLDASF](https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang%3Den%26p_judgment_no%3D2017%26p_language_code%3DEN&sa=D&source=docs&ust=1693382565640335&usg=AOvVaw1libRI6cfn_rV1znLDASF)

<sup>38</sup> See for example Transparency International’s International Principles for Whistleblower Legislation# and Best Practice Principles for Internal Whistleblowing Systems



42. According to the WHO policy, “...CRE’s preliminary review determines whether a causal relationship between the suspected retaliatory action and the previous reporting of wrongdoing can be established (referred to as a “prima facie” review). [...] Should CRE find that there is a credible case of retaliation, it will refer the case in writing to IOS for investigation and will notify the whistleblower. Should CRE find that there is a managerial problem or identify a trend or pattern of complaints in a particular office, it will advise the head of the office concerned and, where necessary, the Ombudsman, and in the regions the DPM, DAF and / or the Regional Director, and at Headquarters ADGs, the ADG/GMG and the Executive Director of the Director General’s Office.”
43. The evidence threshold that whistleblowers must meet to have their retaliation complaint investigated internally stays behind the most recent standards. The existing threshold is difficult for whistleblowers to meet, particularly without access to discovery of evidence. Under best practice and international standards, as illustrated by the EU Whistleblowing Directive, such a prima facie test - in proceedings before a court or other authority - is satisfied if the whistleblower engaged in a protected activity, and suffered a detriment.<sup>39</sup> In the United States, the Merit Systems Protection Board, which is a quasi-judicial agency that implements the Whistleblower Protection Act (the federal law protecting federal government workers), utilizes a low standard for determining whether a complainant has made a prima facie case for judgements on the pleadings. This standard is whether the complainant has made a non-frivolous allegation - the lowest possible standard. The standard utilized by U.S. federal courts is higher; the complainant has to support a plausible allegation in their pleadings. It is worth noting that the U.S. Office of Special Counsel (OSC) can receive, screen, and refer whistleblower disclosures for investigation, however even if their screening does not result in a substantial likelihood finding, they consult with the whistleblower who has the option to allow the disclosure to be sent to the agency anyway for their action. Thus, OSC strikes a balance by responsibly serving as a pre-investigation screening service without having the undesirable effect of being a blockade for the flow of information. By comparison, the higher requirements set

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<sup>39</sup> See also Transparency International's International Principles for Whistleblower Legislation, principle 8.

by the WHO policy, only to trigger internal investigation at IOS, seem unreasonable and at odds with international best practice.

44. Additionally, the WHO Policy does not specify what happens when the CRE finds that there is neither a credible case of retaliation, nor a managerial problem, or identifies a trend or pattern of complaints in a particular office. Neither does it foresee the notification of the whistleblower in such a case.

**iv. The WHO Policy does not protect whistleblowers from criminal or civil liability lawsuits or from retaliatory immunity waivers**

45. Although WHO staff members and experts are protected by privileges and immunities that prevent national courts from having jurisdiction over most matters concerning their official work duties, it can be expressly waived by the organization.<sup>40</sup> Decisions to waive immunity are political in nature and not considered administrative decisions.<sup>41</sup>
46. Given that retaliation tactics can go beyond workplace harassment, international best practices for whistleblower policies include protection against civil suits and criminal prosecutions. The WHO Whistleblowing Policy is silent in that regard. The EU Whistleblower Protection Directive Articles 21.3 and 21.7 provide an affirmative defense against any liability of any kind, and many national whistleblower laws also provide such protection.<sup>42</sup> Additionally, the governments of Australia, Bangladesh, Bosnia, Botswana, Cayman Islands, Ghana, Guyana, Ireland, Jamaica, Kosovo, Latvia, Lithuania, Malaysia, Namibia, New Zealand, North Macedonia, Pakistan, Republic of Korea, Rwanda, Serbia, Tunisia, Uganda, and Zambia all have criminal and civil liability shields in their whistleblower protection laws.<sup>43</sup> In the context of international organizations, to determine whether an organization provides whistleblower protection and discharges its

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<sup>40</sup> See the UN Convention on the Privileges and Immunities of Specialized Agencies, Annex VII Section 2 available at [https://treaties.un.org/doc/Treaties/1949/08/19490816%2010-43%20AM/Ch\\_III\\_2p-full%20text.pdf](https://treaties.un.org/doc/Treaties/1949/08/19490816%2010-43%20AM/Ch_III_2p-full%20text.pdf)

<sup>41</sup> See WHO Convention on Privileges and Immunities <https://apps.who.int/gb/bd/PDF/bd47/EN/convention-on-the-privi-en.pdf>; see also *Kozul-Wright v. Secretary-General of the United Nations* Judgement No. 2018-UNAT-843 at p. 17 available at: <https://www.un.org/en/internaljustice/files/unat/judgments/2018-UNAT-843.pdf>

<sup>42</sup> See International Bar Association and Government Accountability Project report "Are Whistleblower Laws Working? A global study of whistleblower protection litigation" available at: <https://www.ibanet.org/article/EE76121D-1282-4A2E-946C-E2E059DD63DA>

<sup>43</sup> *Id.*

duty of care, it is also necessary to examine whether it affirmatively acts to protect a whistleblower from potentially retaliatory civil and criminal prosecutions by asserting privileges and immunities on behalf of the staff member.

47. If the WHO does not support whistleblowers in asserting their right to immunity towards national authorities and, regardless, still instructs them not to cooperate with national authorities, that exposes the whistleblowers to an untenable situation. Such practice also jeopardizes the privileges and immunities of the UN because staff will not keep secrets if the UN allows them to face criminal prosecution for acts related to their employment. Due process requires that immunity waivers and failures to assert immunity be subject to review or appeal. Whistleblowers should be able to challenge decisions to waive their immunity.

48. Finally, best practice is that an accused personnel filing criminal and/or civil liability lawsuits against whistleblowers for matters related to their official duties is a factor in determining the accused's misconduct.

### **C. The WHO whistleblower framework does not follow best practices on fair procedures**

#### **i. The WHO lacks an effective forum for determining whether there is a prima facie case of retaliation**

49. According to the WHO's organigramme as of 15 June 2023, the CRE (as well as IOS and the Global Board of Appeal) is situated within the Director General's office, which affects its ability to make impartial decisions free of conflicts and makes the CRE inherently vulnerable to obstruction of justice and abuse of process, regardless of claims that such offices function with operational independence.<sup>44</sup> The UN Evaluation Group's Principles of Ethics in Evaluation require "*independence, impartiality and incorruptibility*" and reports of misconduct "*must be referred to appropriate channels*."<sup>45</sup> When the CRE, which lies squarely within the office of the respondent, conducts their

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<sup>44</sup> See: [https://cdn.who.int/media/docs/default-source/documents/about-us/who-hq-organigramme.pdf?sfvrsn=6039f0e7\\_34](https://cdn.who.int/media/docs/default-source/documents/about-us/who-hq-organigramme.pdf?sfvrsn=6039f0e7_34)

<sup>45</sup> See: <http://www.unevaluation.org/document/detail/2866>

initial investigation to determine whether there is a prima facie case of retaliation, the evidence and record before the CRE is an opportunity for the respondent to learn the evidence against it and such evidence is then prone to potential destruction, tampering, or suppression. Furthermore, the CRE is unlikely to have adequate training, time, or resources to conduct investigations into prima facie retaliation cases given their burden of proof requirements. Such efforts seem inefficient and redundant given the existence of a separate office, the IOS, which is designated to conduct investigations- although IOS is part of the office of the Director General. Unfortunately, neither the IOS nor the CRE's decisions are audited by an independent or external evaluator to identify issues of bias to ensure the fair and correct implementation of the rules protecting workers from retaliation. It is common that the UN Ethics Offices default finding is that no prima facie case exists. Under the WHO's newly launched Whistleblower Policy, whistleblowers submit retaliation complaints directly to IOS who conducts the preliminary review directly and examines whether there are "*...reasonable grounds to support the perception or likelihood of retaliation*" before proceeding with an investigation.<sup>46</sup>

50. The WHO Independent Expert Oversight Advisory Committee's annual report in 28 September 2020, noted that the UN Joint Inspection Unit's "Review of the state of investigation function: Progress made in the United Nations system organizations in strengthening the investigation function" highlighted the fragmentation of the responsibility for investigations and related activities, and the level of independence of the investigation function, its organizational setup and the degree of professionalization as particular shortcomings and weaknesses. The Committee, over the past few years, has raised concerns about the level of staffing of the IOS and CRE and the timeliness of investigations.

**ii. The Global Board of Appeal (GBA) lacks the requisite independence, neutrality, and professionalization**

**a. The GBA is not a professionalized internal appeals body**

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<sup>46</sup> WHO Policy on Preventing and Addressing Retaliation, updated July 2023, at § 3.23

51. The UN General Assembly Resolution 61/261 stated:

*...Reiterating that a transparent, impartial, independent and effective system of administration of justice is a necessary condition for ensuring fair and just treatment of United Nations staff and is important for the success of human resources reform in the Organization,*

*Affirming the importance of the United Nations as an exemplary employer, Stressing the importance of measures to eliminate any conflicts of interest in the system of administration of justice,*

*Recognizing that the current system of administration of justice at the United Nations is slow, cumbersome, ineffective and lacking in professionalism, and that the current system of administrative review is flawed,*

*Noting with concern that an overwhelming majority of individuals serving in the system of administration of justice lack legal training or qualifications,*

*Noting that legal assistance to the management of the Organization is provided by a cadre of professional lawyers,*

*Emphasizing the importance for the United Nations to have an efficient and effective system of administration of justice so as to ensure that individuals and the Organization are held accountable for their actions in accordance with relevant resolutions and regulations...*

52. The internal justice system at UN agencies utilizes one model for the UN Secretariat and varying models for other UN common system organizations, including the WHO. All should be equally efficient, effective, and impartial internal procedures. However, the justice system in these specialized and independent organizations are inferior to those of the UN Secretariat in that partially professionalized administrative review processes imitating judicial processes are established while, per se, structurally maintaining conflicts of interest. These agencies utilize volunteer staff who are neither independent - as they are employed by the organization and ultimately are accountable to the executive head of the organization - nor possess any specialized legal or dispute settlement training. In exchange for non-participation in the professional management evaluation process, specialized organizations are meant to have equally efficient, effective, and impartial internal procedures.

53. In the case of the WHO Global Board of Appeal, internal appeals are reviewed and recommendations of the Board are then passed on to the executive head of the agency to make a decision. This is the administrative equivalent of a judicial first instance process

of appeal otherwise performed by a professional justice system. However, it is not equivalent in that it is not independent, neutral, or fully professional. The role of judges are instead performed, at least in part, by individuals who lack specialized legal expertise and qualifications, and otherwise have insufficient training, and have full-time jobs at the organization.

54. These weaknesses threaten impartiality and accountability at the UN. The UN Appeals Tribunal (UNAT) rejected such a process in *Hefberger v. The Secretary General of the International Civil Aviation Organization* (ICAO), and remanded the case back to ICAO. ICAO subsequently changed their procedures, moving from the rejected peer-review internal board that merely made recommendations to the respondent for a decision, to a quasi-judicial system in which two staff members are appointed by the respondent and one by the staff union but only the Judge makes the final determinations that are binding on the executive head of the organization. The UNAT's jurisprudence also required the International Maritime Organization and the Universal Postal Union to reform their internal appeal procedures along similar lines.

#### **b. The GBA has inherent conflicts of interest in its structure**

55. The Chair, Deputy Chair, 14 members, and 14 alternate members of the GBA are appointed by the Director-General. While the staff also elect 14 members to the GBA, by virtue of the Staff Regulations, all staff members are subject to the authority of the Director-General.<sup>47</sup> The GBA merely produces a report with their findings for the Director General to consider, at their discretion, before making their decision on the appeal. This procedure, on its face, does not qualify as an “independent and professional avenue of appeal” or a “neutral second instance and final right of appeal process” and thus WHO staff have inferior dispute resolution rights to those afforded to United Nations’ personnel (who may appeal to the UN Dispute Tribunal where they may enjoy stronger independence and due process rights).

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<sup>47</sup> See WHO Global Board of Appeal rules in section III.12.4 of the WHO eManual, Version 5.0, and Staff Rule 1230.2.

56. The conflict of interest in the role of the Director General in making a decision on appeal from his or her own decisions, taken or sanctioned, violates the natural justice principle of *nemo in propria causa judex*, meaning no one should be made a judge in their own case. It is a minimum standard rule against bias that the authority giving the decision must be composed of impartial persons acting fairly, without prejudice and bias.
57. In *Heftberger*, the UNAT ruled that UN ICAO's internal appeal board was insufficient as a second neutral and final right of appeal and was inferior to what UN personnel have, which violates the special appellate arrangements as outlined in the Tribunal's statute.<sup>48</sup> This ruling operationalized the following principle from Article 2(10) of the UNAT's statute:
58. *"The Appeals Tribunal shall be competent to hear and pass judgment on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal ... Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law. In such cases remands, if any, shall be to the first instance process of the agency, organization or entity."*
59. Like ICAO, the World Health Organization is a specialized agency within the terms of Article 57 of the Charter of the United Nations. However, unlike ICAO, WHO staff have recourse at the ILOAT rather than the UNAT if disputes are not resolved internally. However, all UN specialized agencies should nevertheless meet the minimum standards in respect to due process, natural justice, procedural fairness, independent decision making, justice, and the proper assertion of an internal justice system in respect of

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<sup>48</sup> See Judgment No. 2020-UNAT-1012, *Heftberger v. The Secretary General of the International Civil Aviation Organization*, <https://www.un.org/en/internaljustice/files/unat/judgments/2020-UNAT-1012.pdf>.

handling whistleblower retaliation complaints and appeals. As written, the whistleblower framework needs amendments to remove ambiguity, correct the conflicts of interest and other issues identified regarding the whistleblowing framework, and provide better compliance with acceptable procedures as generally understood both internally by the UN General Assembly and internationally.

**c. The WHO's lack of urgency in responding to whistleblowers does not comply with their rules or best practices**

60. Respecting the timeframes and deadlines prescribed by whistleblowing policies and related procedures - or even in shorter delays depending on the circumstances of the case shows that an organization deals with cases fairly, justly, and independently of the Administration. As stated by the Tribunal:

*...[T]he Tribunal considers that a request to be granted whistleblower status is inherently urgent and must be examined with particular speed, regardless of its merits, so that the official concerned can receive the protection afforded thereby as quickly as possible should the request prove warranted, or, at the very least, be informed of the decision taken on the matter. (ILOAT Judgement No. 4476)*

**d. The GBA does not provide adequate due process hearings**

61. It appears that the GBA fails to provide for oral hearings during which further evidence of the nature and scope of harms done to a whistleblower could be fully assessed and witnesses, as well as the complainant, could be interviewed, despite the existence of a rule allowing the GBA the discretion to permit such hearings.

62. As a best practice for due process, requests for oral hearings should only be denied in favor of rulings on the papers if there is a good reason to support such a denial or if both parties otherwise agree. This is especially important if, as we understand it, the Tribunal views the role of an internal appeal board as serving as the primary finder of fact.<sup>49</sup> As a

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<sup>49</sup> See ex. ILO Judgement 2295 at para. 10 available at [https://www.ilo.org/dyn/triblex/triblexmain.fullText?p\\_lang=en&p\\_judgment\\_no=2295&p\\_language\\_code=EN](https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2295&p_language_code=EN) (stating "... it is not the role of the Tribunal to reweigh the evidence before the Joint Appeals Board which, as the primary trier of fact has had the benefit of actually seeing and hearing many of the persons involved, and of assessing the reliability of what they have said. For that reason the Board is entitled to considerable deference.) See also ILO Judgement No. 3424 at para. 11 available at [https://www.ilo.org/dyn/triblex/triblexmain.fullText?p\\_lang=en&p\\_judgment\\_no=3424&p\\_language\\_code=EN](https://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3424&p_language_code=EN) (stating "When it transpires that the internal appeal procedure in force in an international organisation has not



consequence, the Tribunal itself does not hold oral hearings and instead expects to be able to rely on the diligence of an internal appeal board which holds hearings when they are appropriate. Due process principles require that whistleblowers have their right to their day in court or its equivalent for the matter to be properly considered by the judges on the first instance or on appeal where a dynamic interchange with counsel or with a party is needed. Generally speaking, written submissions alone can be inadequate because there are questions raised that need to be dealt with in interaction between the court and a counsel or party. Otherwise issues may not be properly considered. Although decisions on the papers is a convenient way to dispose of a case, justice has to be seen to be done. Quasi-judicial proceedings like those of the GBA are administrative functions that have an obligation to assume a judicial approach and comply with the basic requirements of natural justice. Their fundamental purpose is to provide due process which includes, inter alia, an opportunity to be heard, to confront parties, and witnesses, and to compel production of evidence.

63. A significant body of UN case law recognizes that UN staff have due process rights that must be upheld both for the good of the individual staffer and for the good of the UN system itself. Specifically, due process in the UN justice system includes the holding of a hearing (in person, telephonically, or via video-conference technology) at which each party can present, and question, evidence presented by the other. As Judgement No. 2018-UNAT-873 (Blekhabbaz) explained, in pertinent part, “*The purpose of a fair hearing is to give affected persons an opportunity to participate in the decisions that may adversely affect them and a chance of influencing the ultimate outcome. The aim is to guarantee the dignity of the affected persons and to improve the quality and rationality of decision-making in order to enhance its legitimacy.*”<sup>50</sup>

64. It is especially because discretion at the GBA (and other similar quasi-judicial bodies at the UN) is abused in favor of the efficient disposal of cases over justice that such

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been followed properly, the Tribunal often decides – in some instances on its own initiative – to remit the case to the organisation, in order that the competent appeal bodies can hear it, rather than to examine its merits (see, for example, Judgments 1007, 2341, 2530, 2781 or 3067).

<sup>50</sup> See Judgement No. 2018-UNAT-873, *Belkhabbaz v. Secretary-General of the United Nations*, 26 October 2018, at para. 68 available at <https://www.un.org/en/internaljustice/files/unat/judgments/2018-UNAT-873.pdf>

discretion needs further guardrails to prevent abuses of discretion and support fair procedures.

#### **IV. Conclusions**

65. Efficient and effective whistleblowing systems are key to ensuring that an international organization's research is of high-quality and is ethical, transparent and rigorous. However, the check and balance that UN agencies such as the WHO rely on is ethical workers utilizing internal reporting systems where many whistleblowers are then ignored, isolated, and retaliated against.

66. While perfect systems may not exist, whistleblowing can prosper and benefit the organization only when there is a comprehensive whistleblowing framework in place in accordance with international law and best practices. To safeguard the public interest, the WHO should strive to have: (1) employees who are confident in the integrity of the process, the reliability of their rights, and their access to expedient protection from retaliation; (2) whistleblowing channels that are independent, adequately resourced, and have the power to conduct thorough and timely investigations, while ensuring confidentiality is protected; (3) outcomes with consequences for individuals responsible for wrongdoing or retaliation against people who report it or refuse to obey illegal or unethical orders; and (4) a professionalized first instance internal appeals body with decision making authority that is neutral, transparent, independent, provides an opportunity to be heard, confront parties and witnesses, and compel the production of evidence.

Respectfully Submitted,  
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