GOVERNMENT ACCOUNTABILITY PROJECT

1612 K Street NW, Suite 1100
Washington, DC 20006
(202) 457-0034
whistleblower.org

May 13, 2020

The Honorable Yvonne Mokgoro
Chairperson
United Nations Internal Justice Council
New York, NY 10017

RE: Government Accountability Project's Recommendations to the General Assembly

Dear Judge Mokgoro,

This submission supplements our letter dated April 30, 2020 containing recommendations to help inform the Internal Justice Council's (IJC) recommendations to the General Assembly (GA). We are grateful for your letter on April 17, 2020 inviting Government Accountability Project to submit our recommendations on how to improve the internal justice system at the United Nations (UN). As lawyers who represent UN whistleblowers, we have first-hand experience with how the internal justice system works in practice when there are work-related disputes between the Organization and its staff members. Over the years, Government Accountability Project's attorneys have represented various whistleblowers across UN agencies, programs, and funds.

We have also worked on drafting nearly every whistleblower law in the United States over the last 40 years; provided consultations on legislative proposals for over 34 countries as well as the European Union; and consulted for IGOs including the UN, the Asian Development Bank, the African Development Bank, the World Bank, the Inter-American Development Bank, the European Bank for Reconstruction and Development[1], the International Monetary Fund, the International Labor Organization, and the Organization for Economic Cooperation and Development.

Last year, the IJC's recommendations sought to address the need to protect staff from retaliation for reporting problems or participating as a witness. The IJC also offered recommendations to improve procedural and structural problems. Government Accountability Project believes that the IJC's recommendations are sound, and we support them as well as the IJC's continuing efforts. We believe that, if combined with our recommendations for policy and procedure changes, the ICJ recommendations could create genuine reforms of the internal justice system, protection for staff who report misconduct, and consequences for abuses of power.

This supplemental letter adds recommendation numbers 14, 17, and 45. We also amended recommendation numbers 4, 7, 11, 12, 13, 16, 23, 26, 34, 39, 41, 42, 43, 47, and 48. Finally, we withdrew or removed the recommendations formerly numbered 45, 48, 50, 52, and 53 in our original submission.

Should you have any questions about our recommendations or how to implement them, Government Accountability Project remains at your disposal. Please do not hesitate to contact us if we can be of any further assistance in your efforts to improve the internal justice system at the UN.

Sincerely,

Samantha Feinstein
Staff Attorney and Deputy Director, International Program

Email: samanthaf@whistleblower.org

Tom Devine
Legal Director
Email: tomd@whistleblower.org

And
Thad Guyer
Of Counsel
Email: thad@guyerayers.com

On behalf of:
Government Accountability Project
1612 K Street NW, Suite 1100
Washington, DC 20006

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RECOMMENDATIONS

II. Amend the Whistleblower Protection Policy to Rise of the Level of International Best Practices and Close Loopholes

1. CONSISTENCY

It is important that the internal justice system ensures that all staff rules apply equitably for all staff members and signatories of the oath of office, including Heads of Organizations. This will eliminate both double standards across the system and the possibility of individual governing bodies being unduly influenced at any stage by individual AFP heads who (a) may have a vested interest in not wishing to deal with a particular issue, (b) have previously suppressed or are currently suppressing incidences within their Organization, or (c) have been or are presently accused of harassment or retaliation themselves. It will also eliminate blatant cases of conflict of interest and abuse of authority. To illustrate, as one whistleblower reported, in order to avoid accountability for their actions, a USG-level Head of Organization who is paid a UN salary and a member of the UNJSPF persuaded their governing body that the staff rules and associate accountabilities do not apply to them as they are not a staff member.

Recommendation 1

In the event of an omission or conflict between an agency whistleblower policy and the Secretary's whistleblower policy for the UN Secretariat, the latter shall be controlling.

2. SCOPE OF PROTECTED CLASS

Applicants and former employees are covered in US whistleblower law as well as the EU Whistleblower Protection Directive. Although employees, interns, volunteers, and contractors are protected in sections 2.1 and 8 of the Secretary-General's Bulletin; this is inconsistent across the UN. The ICAO whistleblower policy, for instance, in section 55 only specifies that employees or contractors working for ICAO are protected from retaliation. Furthermore, blacklisting is a tactic used by retaliators for which they can easily cause damage and escape accountability. Government Accountability Project has evidence of defamatory and scurrilous accusations and characterizations of former employees who are whistleblowers. Unfortunately, there was no investigation, protection, or remedy for those whistleblowers, nor any consequences for the people who caused the reputational damage.

In its present form, the UN's whistleblower policy omits individuals who are not staff members: "Any retaliatory measures against a contractor or its employees, agents or representatives or any other individual engaged in any dealings with the UN because such person has reported misconduct by UN staff members will be considered misconduct that, if established, will lead to disciplinary or other appropriate action. "It should be expanded to protect any person who assists whistleblowers irrespective of their dealings with the UN.

Recommendation 2

All UN AFP anti-retaliation protection policies should be extended to applicants, contractors, subcontractors, grantees, and subgrantees.

Recommendation 3

Amend the whistleblower policy to include enforceable protection from retaliation across UN agencies, funds, and programs (AFP), not only from within the respective agency or fund.

Recommendation 4

The policy should be amended to include protection for those perceived as whistleblowers, those about to make a disclosure, those who assist whistleblowers, witnesses, and parties.

3. *REFUSAL TO OBEY ILLEGAL ORDERS:*

The whistleblower policy does not specify that a covered person could receive protection for refusing to obey illegal orders. This is necessary to meet international best practices.

Recommendation 5

The whistleblower policy should be updated to protect covered persons from retaliation for refusing to cooperate with orders they reasonably believe violate any rule, law, regulation, or code.

4. *ANTI-GAG PROTECTION:*

The World Bank's whistleblower policy, as an example, implements this best practice, protecting the superseding right to blow the whistle.

Recommendation 6

The whistleblower policy should be amended to ban any non-disclosure policy, form, or agreement or other "gag orders," whether written or spoken, that override their right to make disclosures that are protected under the policy.

5. *PRIVACY:*

Section 3 of the UN whistleblower policy requires that the Administration protect the whistleblower's identity to the "maximum extent possible." There is no provision of anonymous channels for whistleblowers. Furthermore, the standards across AFPs are inconsistent in identity and confidentiality protections. The UN ICAO policy does not mention any protections for the identity of the whistleblower. A whistleblower can complain anonymously, but the only mention of protecting confidentiality in the ICAO policy is in section 72. This section protects a whistleblower who claims to have been retaliated against from being identified in the Secretary-General's written decision that follows the completion of the Ethics Officer's retaliation investigation and recommendations. This written decision comes months after an internal or external investigation, leaving the whistleblower fully exposed to retaliation during the investigation.

Recommendation 7

Establish the right to confidentiality and privacy and the right to anonymity in all UN AFP whistleblower policies. Consistent with global best practices, the policy should cover the

whistleblower's identity and identifying information, require written consent for discretionary releases of such information, and provide timely advance warning for nondiscretionary releases.

6. *MOTIVES:*

Global best practices consistently reject the "good faith" standard as a valid standard for whistleblower policies because motives in whistleblowing are irrelevant. To illustrate, the EU Whistleblower Protection Directive stipulates that motives of the reporting person in making the report should be irrelevant as to whether they should receive protection. The controlling standard is a "reasonable belief," which is codified in United States law to mean "whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger." See 5 USC 2302(b)(14). Essentially, the test is whether people with similar experience, qualifications, and knowledge could agree with the disclosure.

In instances where the faith test is used, courts shrank the meaning of "bad faith" to "knowingly false disclosures." In Black's Law Dictionary, there must be a showing of actual or constructive fraud or a design to mislead or deceive another. A bad faith disclosure can't be an honest mistake, but must instead have a sinister motive.

Recommendation 8

Remove the "good faith" standard from all UN whistleblower policies and replace it with a reasonable belief standard.

Recommendation 9

Define the test for reasonable belief to be by "determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the employer evidence such violations, mismanagement, waste, abuse, or danger. To meet this standard[,] the presiding Judge must determine whether someone with similar experience, qualifications, and knowledge could agree with the disclosure."

Recommendation 10

"Bad faith" should be removed from all whistleblower policies or be defined narrowly as "knowingly false disclosures." To prove bad faith there must be a showing of actual or constructive fraud or a design to mislead or deceive another. A bad faith disclosure can't be an honest mistake, but rather there must be a sinister motive.

7. *SCOPE OF PROHIBITED CONDUCT:*

Recommendation 11

Retaliation should be defined as *"Any act or omission, which causes detriment because of whistleblowing."* The scope of prohibited conduct should be broad enough to cover any active or passive retaliation, whether direct or indirect, taken, attempted, threatened,

recommended, or tolerated; and retaliation outside of just the employment context such as cyberbullying, blacklisting, or stalking causing results in prejudice that could chill the exercise of the rights in this policy.

8. *BURDEN OF PROOF:*

The burden of proof for whistleblowers to prove retaliation needs to be modernized. The policy has no standard for the whistleblower's burden of proof, permitting arbitrary dismissals. Under the EU Directive, this test is satisfied if the whistleblower engaged in protected activity, and a prejudicial action occurred. That standard should be codified in the UN policy.

The UN policy does have a best practice burden of proof for the employer -- demonstrating by clear and convincing evidence that the same action would have occurred absent whistleblowing. Recently the European Union Directive's Recital provided further guidance for national laws on how to interpret the employer's reverse burden of proof. It states at Section 32 (para.71), that after the whistleblower has proven a prima facie case, the "burden of proof should shift to the person who took the detrimental action, who should then demonstrate that the action was not linked in any way to the reporting or the public disclosure." That clarification should be codified in the UN policy.

Recommendation 12

Establish that if the whistleblower demonstrates protected activity under the policy and there is a subsequent prejudicial personnel action, the burden of proof shall shift to the employer to show by clear and convincing evidence that it would have taken the same action in the absence of whistleblowing by demonstrating that the action was not linked in any way to protected activity.

9. *ACCESS TO DUE PROCESS:*

As a prerequisite for due process, whistleblowers have to survive a gauntlet of multiple approvals by the Ethics Office and OIOS. Government Accountability Project's client Jim Wasserman's Kafkaesque road to nowhere illustrates how administrative relief is an obstacle to due process, rather than a remedy to exhaust. Even at the Tribunal Level whistleblowers are up against dysfunctional forums that are not independent, are biased against employees, and are hopelessly backlogged. What's more, some UN AFPs and specialized agencies don't have any independent, external due process mechanism available to them.

Recommendation 13

If the employee has not obtained relief from the Ethics Office and OIOS within 180 days of filing a complaint, the employee shall have jurisdiction to file a *de novo* appeal for due process adjudication in the UN administrative law system. An alternative to this recommendation is to make the administrative channels an alternate to Tribunal due process rather than a prerequisite that must be exhausted. While there may be an exhaustion of administrative remedies requirement, an employee's access to due process should not require administrative approval.

Recommendation 14

Allow whistleblowers to appeal decisions of the UN Appeals Tribunal to the International Labor Organization Administrative Tribunal (ILOAT), an option which should also be applied to any UN AFPs and Specialized Agencies under the Tribunal's jurisdiction.

10. ACCOUNTABILITY:

Recommendation 15

A finding by the Ethics Office, OIOS, an Administrative Law Judge, or UN tribunal that this policy has been violated shall result in a proposed two-day suspension for a first offense, and proposed termination for a second offense. (This mirrors the US Kirkpatrick Act.)

11. RELIEF:

We agree with the Internal Justice Council's recommendation number 5. However, the Office of Staff Legal Assistance lacks the funds and capacity to handle the caseload, especially if more staff feel empowered to enforce their rights under a more functional system.

We also agree with the UNAT's recommendation in Annex II of the IJC's 2019 submission to the GA which seeks to address the issue of management opting to pay compensation in lieu of reinstatement by amending article 9 (1) of the statute of the Appeals Tribunal. The UNAT's recommendation states "article 9 (a) of the statute of the Appeals Tribunal, as well as the relevant article of the statute of the Dispute Tribunal, should be amended to read as follows (amended text in bold): (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph. **The selection of the in-lieu compensation by the respondent shall be reasoned and allowed only in exceptional circumstances subject to an appeal and review by the Appeals Tribunal.**"

The IJC recommended that article 10 (5) (a) of the statute of the Tribunal be modified to read as follows: "Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered. The election available to the respondent to pay compensation shall be subject to prior review and approval by the Tribunal, which shall undertake to ensure that exercise of the election is both reasoned and reasonable under the totality of the circumstances existing at the time of judgment."

The lack of reinstatement affects settlements. The UN has a respected mediation program which the UN legal office and agencies almost never want to use, since they view two years of pay as the worst-case scenario remedy for ruining someone's career. As with any wrongful termination case, the employer will be far more reasonable in settlement talks if they fear reinstatement. In fact, we have only participated in one mediation program because every other time the legal office or agency said it would not be helpful. It is because they do not fear reinstatement.

Recommendation 16

A whistleblower who prevails shall be entitled to reimbursement for costs and attorney fees, reinstatement, lost wages and seniority, consequential and comprehensive damages, and any other relief necessary to make the whistleblower whole by eliminating all the direct and indirect consequences of the retaliation, including but not limited to reinstatement with back pay and seniority.

Recommendation 17

In addition to the IJC's recommendation cited above, we recommend the following sentence be added: "Before the Dispute Tribunal gives such approval, the Applicant must have been given the opportunity to attend compulsory mediation over the issue of reinstatement or the Respondent's election to pay compensation in lieu thereof."

12. ESSENTIAL SUPPORT SERVICES FOR RIGHTS:

Recommendation 18

The whistleblower policy should be amended to reflect the requirement that the rights under the policy should be posted prominently in workplaces, and that trainings should be provided for employees, employers, and judges.

13. FORMALIZED REVIEW PROCESS:

Recommendation 19

The whistleblower policy should be amended to include a permanent and formalized process to track whistleblower cases, their outcomes, the effectiveness of the policy, and an annual process for regularly making changes to policies and procedures based on lessons learned. These reports should be made publicly available on the UN's website.

III. Implement Procedural and Structural Reforms to Improve Case Processing Time and Address Obstructions to Justice

(a) TRANSPARENCY:

14. PUBLISH ALL JUDGEMENTS AND ORDERS:

The Internal Justice Council is the oversight body of the UNDT and UNAT. There have been issues with failing to publish judgements or orders that are unfavorable or embarrassing to management - for instance the situation in which the applicant settles or Management's conduct is highly questionable - despite the claim to the contrary by the AOJ. These acts are evidence of bias.

Recommendation 20

The IJC should ensure that all judgements and orders are routinely published to ensure that neutrality and independence are honored.

15. *REQUIRE THE SECRETARY GERNAL TO RESPOND TO IJC RECOMMENDATIONS:*

Previous recommendations have not led to the kind of substantial reform that is required to improve access to justice for UN staff. Many of the internal justice system issues have been repeatedly raised by the IJC, Applicants, Counsel, and Tribunal judges without results, which wastes time and resources.

Recommendation 21

The GA should include in its resolution a requirement that the Secretary-General respond in writing to all IJC recommendations, both in the current report and from all previous reports.

(b). PROCEDURES FOR CHALLENGING NEW RETALIATIORY ACTIONS:

16. *RETALIATION AFTER CONCLUDED CASES:*

Even after winning a whistleblower case and having been successfully placed in a new job, whistleblowers can still end up getting fired because of their protected speech. After placement in a permanent post, the whistleblower's case is closed and there are no longer protections for the whistleblower. The UN practice is that if retaliation continues, even from the same retaliators against whom the case was won, a new case must be filed and the continuing retaliation is to be viewed as "new." That "new" behavior then has to be linked to the original protected activity all over again, and with the new six-month cutoff rule, the new behavior cannot be linked to activities more than six months old, even if there are ten years of prior ongoing retaliation from that individual.

Recommendation 22

The rules should be amended to allow whistleblowers to challenge new instances of retaliation that they believe occurred because of their protected speech up to 15 years after the date of their protected speech without requiring the factfinder to make a new finding concerning the merits of the proven protected activity.

17. *RETALIATION DURING OPEN CASES:*

The UN has interfered with whistleblowers with during their open cases with actions like the arbitrary withholding of part of their salary prior to a hearing. Currently, whistleblowers must challenge this interference as a new/separate administrative decision. This requirement is inefficient and wastes the time of the complainants, therefore incentivizing Respondents to use such intimidation tactics while cases are pending.

Recommendation 23

The Tribunals should allow applicants to challenge retaliatory actions taken during open cases as part of the same case and controversy and seek the immediate protective intervention of the ethic Office, OIOS, or a due process proceeding to stop the Respondent's interference with the Applicant without it being treated as a separate administrative decision to be separately challenged.

18. *EQUAL ACCESS TO OSLA's LEGAL ASSISTANCE:*

OSLA's mandate only covers the staff members of the UN Funds and Programs, not the specialized agencies. This makes the staff in those agencies even more vulnerable – they are expected to use their own financial resources to go through the appeals processes against the whole weight of their Organization. Such an unfair power dynamic effectively cultivates a culture of impunity among certain Executive Heads of the UN Organizations, as it is reasonably expected that staff members are ill-equipped financially, socially, and structurally to mount successful appeals against mistreatment.

Recommendation 24

In addition to increasing resources of the OSLA, the GA should expand their mandate to all specialized UN agencies. Additional resources for such an expanded mandate should be contributed by the agencies to the OSLA under an agreeable funding formula, similar to the funding formula used to fund the UN Staff College. Such a formula could also be used to fund the expansion of the mandate for OIOS.

19. *STAFF ASSOCIATION STANDING:*

Currently, cases filed by representatives of staff associations are treated as filings by those named representatives rather than the entities those representatives serve. As staff representatives are subject to elections and re-elections, new representatives may be disqualified to represent the case if they have not been named throughout the entire process. As some cases have taken years to resolve, it is possible that the entire case may be invalidated if all the representatives have been changed.

Recommendation 25

Per the IJC's Recommendation No. 72, which says *"Reaffirming previous recommendations of the Council, staff associations should be granted standing to intervene in cases of systemic importance to staff. In appropriate cases, these associations should be permitted to apply in their own right to seek redress for interference with the right of association of their members"* (emphasis added) **Government Accountability Project recommends that "in their own right" be redefined to mean that appeals filed by staff representatives are recognized as cases filed by the associations, irrespective of who represents those associations over time.**

20. *TRAINING TO IMPROVE COMMUNICATION QUALITY:*

UN whistleblowers are frustrated with the Ethics Office, OIOS and communication breakdowns; and lack of enforcement of the existing policies is at the crux of the systemic problem. If mandatory training was conducted with a qualified trainer, the services provided by these offices may improve.

Recommendation 26

The UN should require mandatory training of Ethics Office and OIOS staffs on whistleblower rights and how to improve communication and working relationships with whistleblowers.

(c) REFORM THE OFFICE OF INTERNAL OVERSIGHT SERVICES (OIOS):

21. *EQUAL ACCESS TO PRCEDURES ACROSS UN AFPs:*

For all the UN Funds and Programs, such investigations can be handled by the UN Office of Internal Oversight Services (OIOS) as it already has that mandate. However, OIOS currently does not have any jurisdiction over the UN specialized agencies.

Recommendation 27

The GA should grant a mandate that allows OIOS to cover all the organizations within the UN system.

22. *INDEPENDENCE:*

Currently, OIOS lacks independence. OIOS receives funding at the discretion of the Executive Office of the Secretary General and the Chef de Cabinet, which includes posts. In addition, OIOS receives funding from UN departments, and that funding is sometimes at the discretion of the subjects of OIOS's investigations. To illustrate the problem, OIOS was investigating the head of a UN department for retaliation and the subject, while under investigation, more than doubled their funding to OIOS. OIOS's funding should be guaranteed and sufficient to maintain their operations so that their financial and operational interests are not beholden to any individual or party they are responsible for investigating.

Recommendation 28

OIOS should be restructured to ensure that their funding levels, postings, and promotions cannot be influenced by anyone they have the authority to investigate.

23. *TIMEBOUND INVESTIGATIONS:*

In addition to lengthy delays in UNAT and UNDT cases, significant delays can often occur within the organization before an appeal can be filed. Since an appeal cannot be filed before a management decision has been made, such internal delays are sometimes used as intentional tactics to deny the victims justice. For example, an investigation of a retaliation complaint may take more than a year to complete and the organization may take another year or more to decide on the conclusion of the

investigation and its recommendation. Meanwhile, the victim may continue to suffer ongoing retaliation without the possibility of filing an appeal.

Recommendation 29

Investigations of retaliation complaints should be timebound to 90 days for investigation and 30 days for management decision after the investigation. Although extensions may be necessary to complete an investigation, after 180 days the complainant should have the right to kick out their case to the tribunal for *de novo* review (see Recommendation #13).

24. CONFLICTS OF INTEREST:

OIOS's integrity as an investigatory body is compromised - it has its own problems of corruption and retaliation that have not been resolved. OIOS staff not only actively collude with ALS (respondent's representatives) staff when applications involve OIOS matters, but they also collude on cases investigated by OIOS that could reveal investigation errors or cover-ups. The current Deputy Director of OIOS has been proven to retaliate against whistleblowers who made disclosures about his misconduct, but he has escaped accountability and the retaliation has not ended. OIOS should be investigated and culpable staff should be held to account.

Recommendation 30

The rules should be amended to establish that the OIOS cannot investigate itself. An independent committee free of conflicts of interest should be established to oversee investigations into whistleblower disclosures as well as retaliation claims.

25. INTEGRITY OF INVESTIGATION PROCEDURES:

Witness statements supporting the retaliator far outnumber the witness statements supporting the victim as a result of an investigative bias by OIOS in favor of the UN Administration. Investigations where vastly more witnesses are interviewed on one party's side should be viewed with suspicion and investigated for bias.

Recommendation 31

OIOS should be directed to create a system to ensure that all witnesses for victims are requested to testify.

26. PROTECTION OF RECORDS:

After testimony is given, every person who testifies receives either a recorded copy of the interview or a written transcript. Government Accountability Project has received a confidential disclosure that, in at least one instance, OIOS changed and deleted significant parts of the recording. Furthermore, the transcripts are written and can be edited by OIOS. This process should be amended to deny OIOS any direct contact with any transcripts or recordings in an editable state.

Recommendation 32

The procedures for handling OIOS's witness transcripts and records should be amended to ensure that they are not tampered with. Certified reporters and recorders who are

independent of OIOS should record and transcribe interviews and handle the transcription and audio files directly as well as subsequent distribution to the parties to ensure that they are unaltered.

27. INDEPENDENT REVIEW:

OIOS could push for accountability and has the means to go before the GA and report that management and the SG failed to take action in cases investigated by OIOS or in similar mission breakdowns. It no longer does this in practice. Given its important role, staff no longer trust OIOS. OIOS currently lacks independence and routinely sides with Management.

Recommendation 33

OIOS's decisions should be audited by an independent and external evaluator who will identify issues and recommend reforms to address any issues of bias that interfere with the fair and correct implementation of the rules meant to protect staff from retaliation.

(d) REFORM THE ETHICS OFFICE

28. INDEPENDENCE:

The Ethics Office lacks independence. Their financial resources, including the appointment of posts and promotions, are under the control of the Office of the Secretary-General pending GA approval. Although the Ethics Office reports to the GA, their financial budget, job promotion decisions, employee contract renewals, and the written performance evaluations of the Ethics Office Director all sit with the Executive Office of the SG (EOSG) and/or the Chef de Cabinet – not the GA. Government Accountability Project has reason to believe that the EOSG suddenly decided not to continue funding the Officer of the Ethics Office's post after pushing to make a prima facie finding when the Director said there was no prima facie case despite not reviewing the case. Pulling funding for a position is a commonly used tactic that managers use to fire UN staff.

Recommendation 34

The Ethics Office should be restructured to be independent and free from the Secretary General or Executive Agency Heads. This should include freeing their financial resources, posts, promotions, performance evaluations, and contract renewals. The Ethics Offices should only report directly to the GA who shall control their budget and have the authority to decide on any disciplinary actions proposed against Ethics Officers, including removal.

29. CONFLICT-FREE INTERIM PROTECTION PROCEDURES:

Presently, the procedure for interim protective measures is inherently conflicted. As a result, managers named in complaints have also been responsible for coordinating the temporary placement of the person who had a pending case against them. This discretion has been abused as a tool for further retaliation. Once the Ethics Office establishes a prima facie case, they recommend interim protective measures to the SG, which includes the option for the staff member to move to another department to work while remaining in his or her post until the investigation and formal

finding is established. The focal-point for protection against whistleblower retaliation sits with the USG DM. The Ethics Office only has the role of establishing whether or not retaliation has occurred and making recommendations to the SG accordingly. When the prima-facie case is established, the placement and protection of the whistleblower rests with the UN Administration – not the Ethics Office. This procedure has caused issues whereby the whistleblowers were placed in temporary jobs that the retaliator had influence over and where abuse and harassment of the whistleblower continued.

Recommendation 35

The procedures for recommending interim protective measures should be amended to remove the Secretary General and the managers from accused offices from the decision-making process due to the likelihood of their conflict of interests. The procedure should be amended so that the Ethics Office determines the solution in direct consultation with the complainants themselves and human resources.

30. *CONFLICT-FREE REFERRALS FOR INVESTIGATION:*

OIOS has investigated cases where they have actively collaborated with retaliators. Although OIOS cannot investigate cases where there is a conflict of interest according to the Secretary General's Bulletin on retaliation, that provision is not being followed, and applicants cannot enforce it.

Recommendation 36

The Ethics Office should be directed not to refer cases to OIOS when there is a conflict of interest with the OIOS. The Secretary General's Bulletin should also be amended to allow complainants to have an enforceable right to challenge investigations they believe to be conducted by an investigator or agency that has a conflict of interest.

31. *TRANSPARENCY:*

The Ethics Office (i.e. the Director of the Ethics Office) makes recommendations to the SG about whether or not retaliation took place. Before making recommendations, the Ethics Office refers cases to OIOS for investigation, or to another body if a conflict of interest is present. After the investigation is complete, the investigation report is sent to the Ethics Office. The whistleblower does not get a copy of the report, and they are not allowed to read it. Therefore, the Ethics Office makes a determination on whether or not to overrule the investigative body and their report without showing it or discussing it with the whistleblower. This current procedure enables OIOS to produce reports that are unsupported by evidence or lack merit without being challenged by the party with the greatest interest in ensuring that procedures are conducted with integrity.

Recommendation 37

The Ethics Office should be directed to send preliminary determination letters to whistleblowers that reveal, if not full investigative reports, the evidence and supporting arguments that make up the basis of their finding so that the whistleblower can challenge any issues in the investigation and/or findings before a final recommendation is submitted to the Secretary General.

32. INDEPENDENT REVIEW:

The Ethics Office is similarly biased and does not function well in practice. (1) The Ethics Office attempts to thwart applicants from submitting applications by stating and/or insinuating to the applicant that the applicant's own behavior is causing the (retaliatory) response of the retaliator. During preliminary consultations, applicants are pressured to visit the Ombudsman instead of filing and pressured to withdraw their applications after filing. (2) The Ethics Office has the default starting point that no prima facie case exists. Reinforced by the absence of an objective standard in the policy for a prima facie case, the Ethics Office routinely rejects claimants arbitrarily. Whistleblowers perceive that OIOS will only make a prima facie determination if the evidence is so bad that OIOS wants to do an investigation themselves to help shield the misconduct from the media or the member states.

Recommendation 38

The Ethics Office's decisions should be audited by an independent and external evaluator who will identify issues and recommend reforms to address any issues of bias to aid the fair and correct implementation of the rules meant to protect staff from retaliation.

(e). ELIMINATE THE MANAGEMENT EVALUATION UNIT (MEU)

33. SIMPLIFIED PROCESS FOR COMPLAINTS:

The MEU, which is still a prerequisite procedural step before filing a case with the UNDT and which is supposed to independently review a contested administrative decision, does the exact opposite. It is not an objective body and almost invariably sides with management. There are too many administrative hurdles for whistleblowers who suffer from retaliation. The requirement for administrative approval of due process rights is extremely rare in global whistleblower laws, but the requirement for three is unprecedented. The MEU process to review an administrative decision is duplicative of the Ethics Office and OIOS's role. The system should be streamlined to allow whistleblowers to go straight from one unit for complaints directly to the UNDT if there is not timely relief.

Recommendation 39

The MEU should be removed entirely from the process of reviewing cases of whistleblower retaliation and adverse personnel decisions.

(f). JUDICIAL REFORMS

34. TRIBUNAL INDEPDENDENCE:

Whistleblower Emma Reilly was working as a human rights officer at the Human Rights Council in 2013 when she discovered a senior staff member, Eric Tistounet, gave the Chinese government the names of Chinese human rights defenders planning to attend a session of the Council in Geneva, thus placing the human rights defenders in great danger. She was retaliated against and harassed after making disclosures, and seven years later, she is still waiting for justice. Ms. Reilly's case amply demonstrates the inherent conflict of interest in the current structures. Ms. Reilly complained

that the Principal Registrar and Executive Director of the Office of Administration of Justice (OAJ) had engineered the removal of the judge who heard her case, inter alia by misleading the GA. Ms. Reilly's lawyer, from OSLA, could not assist in her request for recusal of the judge because of a conflict of interest. One of the alleged wrongdoers is the Second Reporting Officer of every OSLA lawyer. The Registrar (whose First Reporting Officer and Second Reporting Officer are the subjects of Ms. Reilly's complaint) then unilaterally decided that Ms. Reilly was prohibited from filing a motion for correction of the judge's order or from appealing said order. Ms. Reilly has no means of appealing this unilateral decision of the Registrar or reporting his clear conflict of interest.

Recommendation 40

Staff supporting the Tribunals should report directly to the judges and not to the Administration itself because the Administration is a party to every case. OSLA should be an entirely separate office.

35. CONSEQUENCES FOR FAILURE TO SANCTION VIOLATIONS:

When parties violate their obligations under the code of conduct, there are instances where no action was taken by the judge against the offending party or parties. In whistleblower cases, the Respondent invariably refuses to provide any and all information required, so the applicants stand little to no chance of prevailing due to, in part, difficulty obtaining evidence needed to prove their case. In national tribunals, withholding evidence and perjury or deliberately misleading the Tribunal are serious offences which result in automatic consequences. At the UN, there are no consequences for either officials or lawyers who are acting for the Administration, and so these practices are almost systematically used. This constitutes an abuse of power and the resulting imbalance deprives staff of obtaining any hope of genuine due process and justice.

Recommendation 41

Tribunal Judges should be required to justify any decisions not to enforce sanctions against parties who withhold evidence during discovery and thus cause undue delays in proceedings, commit perjury, or commit other serious acts of contempt of court.

36. PREVENT ABUSES OF JUDICIAL DISCRETION:

Judges have discretion to deny Applicants' requests for an in-person hearing. Tribunal Judges have been routinely denying these requests and thus have abused their discretion. Decisions on paper can be less favorable for Applicants. Tribunals should make every effort to ensure that Applicants get appropriate due process procedures.

Recommendation 42

Absent exceptional circumstances, direct Tribunal Judges to permit Applicants to have an in-person hearing when their counsel requests rather than have denying requests for in-person hearings be the norm.

37. AD LITEM JUDGE REMOVALS:

There is great concern over the independence of tribunal judges. Government Accountability Project is concerned that the Secretary General, who is a party to an active whistleblower case, participated in the removal of the judge hearing the case against him.

Recommendation 43

There should be an external, independent inquiry into the circumstances surrounding the removal of ad litem judges without any handover period and without them receiving information as to the end date of their functions. No current or former UN staff members should participate in the inquiry.

(g). APPEALS REFORMS

38. EQUAL ACCESS TO PROCEDURES:

Appeals procedures are different across the UN. This reform would ensure that all cases of harassment and retaliation are dealt with equitably across all sister elements of the UN. As ethical standards apply equally to all members of staff of UN who sign the oath of office irrespective of which UN body they work for, it should also be the case that all appeal procedures should be mandated from above and not be left to respective governing bodies of particular AFPs to cherry pick which aspects of the internal justice system (the process itself or the acceptance of outcomes) that they wish to apply to their AFP and which they do not. It is also important the internal justice system ensure that all staff rules apply equitably for all staff members and signatories of the oath of office, including Heads of Organizations.

Recommendation 44

Appeals procedures should be unified across all UN Agencies Funds and Programs (AFP).

1. APPEALS JURISDICTION BEYOND ADMINISTRATIVE DECISIONS

The UNAT extended its denial of jurisdiction over whistleblower protection in *Wasserstrom* (Aug. 2014) to once again overrule the UNDT in *Postica-Kropp*. In *Wasserstrom*, the UNAT ruled that the Ethics Office that is supposed to protect whistleblowers is limited to making recommendations to the administration, and that Ethics Office actions are not "administrative decisions" subject to judicial review since those acts do not have any "direct legal consequences" on the staff member. *Wasserstrom* was then used to extend non-jurisdiction over an investigation suffered by OIOS investigators in *Postica-Kropp* that had harassment, intimidation, and retaliatory investigations. By limiting appeals to administrative decisions, the Secretariat prevents staff members from appealing when no formal administrative decision has been issued, but terms and conditions of employment have been violated or altered de facto. Employees must be able to appeal all forms of non-compliance and disciplinary measures, whether formally or informally imposed.

Recommendation 45

Amend the whistleblower policy to overrule the narrow judicial precedence denying receivability over retaliation that does not meet the narrow definition of "administrative decision," and extend protection more broadly to cover "intangible" adverse actions and

retaliatory investigations. Consistent with global best practices, the standard must be any active or passive prejudicial action that chills the exercise of rights included in the policy.

39. INDEPENDENT ETHICS OFFICE APPEALS:

If retaliation is not established by the Ethics Office (I.e. The Director of the Ethics Office), whistleblowers can go to the outside panel for a second opinion. The panel Chair is the Director of the Ethics Office, which is an inherent procedural conflict of interest because she would likely be reviewing her own decisions. Should she recuse herself, she is still the Chair who selects and extends the panel's members. Also, the Chair can overrule all of the panel member's votes as the Chair. Government Accountability Project is not aware of any cases where the Panel overruled the finding of the UN Ethics Office.

Recommendation 46

The procedure for Ethics Office appeals should be amended to exclude the Director of the Ethics Office entirely from the panel, both as chair and as a member. The panel members should be selected by a disinterested person or committee. The Ethics Office Director should not have any say whatsoever on who serves on the panel and should have no decision-making authority over the term on the panel or the funding of it.

(h). ENFORCEMENT OF RETALIATION FINDINGS

40. NEUTRAL DECISION-MAKING AUTHORITY FOR ACCOUNTABILITY RECOMMENDATIONS:

Retaliation is defined as misconduct, but if the retaliator is a superior at a senior level, disciplinary measures are rarely taken and even more rarely enforced. Enforcement of strict disciplinary measures against retaliators are the key to enabling UN staff members to speak up. Staff surveys show that staff members are aware of the fate suffered by whistleblowers and the impunity of retaliators. Some retaliation perpetrators have escaped any consequences at all, some have been promoted, and others have retired with full benefits. It is problematic that some UN organizations lack any independent appeals mechanism.

Recommendation 47

The whistleblower policy should be amended to remove the Secretary General's and UN Executive Heads' roles in making recommendations for accountability. For organizations under the UN Tribunal's jurisdiction, Ethics Offices should make recommendations for accountability to Tribunal Judges who, after a due process hearing, should have the sole responsibility for deciding on and enforcing proposed sanctions for accountability for violations of anti-retaliation rules. For organizations under the ILO Administrative Tribunal's jurisdiction, Ethics Officers should make recommendations for accountability to ILO Judges who should have the sole responsibility, after a due process hearing, for deciding on and enforcing mandatory proposed sanctions for accountability for violations of anti-retaliation rules.

41. STANDARDIZE PERSONAL ACCOUNTABILITY:

The UN has allowed retaliators to escape accountability for their actions which undermines the whole accountability mechanism. The UN should establish a policy to require certain disciplinary consequences for particular rule violations to make consequences consistent and fair.

Recommendation 48

The UN should establish a committee of external and independent Human Resources professionals to create a set of recommendations, later to be adopted into the UN's code, for personal accountability for rule violations, including for violating confidentiality by disclosing the identity or identifying information of a confidential whistleblower without their consent.