

Subject : von der Schulenburg; UNDT litigation re removal as ERSG/UNIPSIL
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1. The Schulenburg case is curious because of the subject's position. Mr. Michael von der Schulenburg was the Executive Representative of the Secretary-General (ERSG), the head of the UNIPSIL mission in Sierra Leone. After a spell as Deputy-ERSG, he was appointed to the ERSG position in January 2009 and served there until recalled in February 2012.
2. The mandate of the UNIPSIL Mission¹ included, at Para 2.(i) focusing on:
Providing support to the Government of Sierra Leone and its electoral and democratic institutions in the preparation for the 2012 elections as requested, and providing technical assistance to all relevant stakeholders to play a meaningful role, in accordance with relevant national legislation, in achieving peaceful, credible and democratic elections.
3. There were presidential elections in Sierra Leone scheduled for November that year, and had he not been removed, Mr. Schulenburg had been expected to remain in post until after those elections.² He was, however, removed early by the Secretary-General.
4. It was reported extensively in both the local press as well as by such respected and credible sources as the Reuters news agency³ and The Economist⁴ that the reason for his removal from office was the result of political pressure from the President of Sierra Leone.

1 S/Res/2005(2011)

2 SG/SM/14092-AFR/2331. "Secretary-General Praises Excellent Service of Outgoing Head of Sierra Leone Peacebuilding Office." 2 February 2012. Available online at: <http://www.un.org/press/en/2012/sgsm14092.doc.htm>. (Accessed 19 February 2015)

3 "Sierra Leone president forced out U.N. envoy" Simon Akam. 13 Feb 2012. Available online at <http://www.reuters.com/article/2012/02/13/us-sierraleone-un-envoy-idUSTRE81C27420120213>. (Accessed 19 February 2015)

4 "Turning tables. A small west African country with a violent history browbeats the mighty UN" The Economist. 18 Feb 2012. Available online at: <http://www.economist.com/node/21547869> (Accessed 19 February 2015)

5. The Economist summarised Mr. Schulenburg's achievements in the post very favourably:

*Mr von der Schulenburg is deemed to have done a good job. He vastly reduced the UN presence in Sierra Leone—a rare achievement in an organisation often unwilling to put itself out of business. He also acted as a valued mediator between political parties in an environment where disputes can still easily turn violent. He met opposition leaders but did not favour them. Yet his even-handedness alone seems to have been enough to incur the wrath of the president.*⁵

6. The New African Magazine was similarly complementary, particularly of his hands-on approach to peace-building but also his achievements in scaling down the UN presence in the country.⁶ Scaling down the size of a UN Mission means a reduction in the number of senior posts available there, something that is an anathema to the short-sighted personal interests of many UN staff, and something that might reasonably be assumed to contribute to Mr. Schulenburg's unpopularity within the organisation.

7. The relationship between Mr. Schulenburg and the Sierra Leone President Ernest Bai Koroma clearly deteriorated. The reasons for this are not particularly relevant here other than that it appears that notwithstanding his mandate, to provide “*technical assistance...in achieving peaceful, credible and democratic elections*” some of that *assistance* was unpopular with the President as it was of assistance to the opposition party challenging him in the November elections. This ultimately resulted in Mr. Schulenburg being removed.

8. Regardless of whether or not he was well liked within the Organisation, while Mr. Schulenburg does appear to have been removed from office for political reasons, internal misconduct investigations by OIOS also appear to have been involved with that decision.

Misconduct Allegations

9. UNDT/2013/178 narrates how back in November 2010, a staff member in UNIPSIL had made a complaint of harassment against her Chief of Section and Deputy Head of Mission.⁷ It is not clear if this is one and the same person, or if the complaint was made against two

5 See Footnote 2, Para 5.

6 “The Shape of Things to Come.” New African Magazine. 1 April 2012. Available online at: <http://newafricanmagazine.com/sierra-leone-the-shape-of-things-to-come/> (Accessed 23 February 2015)T

7 UNDT/2013/178, para 5

subjects, but if it was a harassment complaint, it would be governed by ST/SGB/2008/5.

10. The harassment complaint in November 2010 was, according to the UNDT, also reported in the local press. The only reference to any such alleged incident involving Mr. Schulenburg that has been found in a search of the local media is dated May 2010⁸ - when he is alleged to have assaulted a staff member. Whether this is the misconduct complaint report referred to in the UNDT judgement is not known. If it is not, the disposal of that complaint is also not known.
11. On 1 December 2010, however, a second complaint was made against the Deputy Head of Mission, presumably also for harassment, but on this occasion the complaint also included what Mr. Schulenburg described as a “*few vague words of complaint*” against him.⁹
12. Also in December 2010, an OIOS investigation was initiated into leaks of confidential information. It appears that Mr. Schulenburg was the complainant in that matter.¹⁰ Whether there was any connection between the complaint alleging harassment and the complaint alleging leaks of confidential information is not known.

Diplomatic Pressure

13. On 21 September 2011, a member of President Koroma’s delegation to the General Assembly delivered a complaint to the Secretary-General accusing Mr. Schulenburg of mentoring and providing financial support to the opposition¹¹ then in December 2011, President Koroma is also reported to have called for his removal.
14. Although the Sierra Leone government denied officially having done so¹², this was the claim

8 “Schulenburg Gets Given Nicknames” Awareness Times, Freetown. 21 May 2010. Available online at <http://news.sl/drwebsite/exec/view.cgi?archive=6&num=15432&printer=1> (Accessed 19 February 2015)

9 UNDT/2013/178, para 6

10 UNDT/2013/178, para 7

11 Security Council Report. March 2012 Monthly Forecast, published 29 February 2012. [Note: “Security Council Report” is not an official UN publication. It is an independent not-for-profit organisation.] Available online at http://www.securitycouncilreport.org/monthly-forecast/2012-03/lookup_c_glKWLeMTIsG_b_7996429.php (Accessed 19 February 2015.)

12 “Head of UN Peace building Mission in Sierra Leone recalled” Sierra Leone Telegraph. 4 February 2012. Available online at <http://www.thesierraleonetelegraph.com/?p=1059> (Accessed 19 February 2015)

made by Reuters¹³ and this follows the pattern established by the criticism of Mr. Schulenburg at the General Assembly a few months earlier.¹⁴

15. Most significantly, Mr. Schulenburg himself acknowledged that it was happening when he wrote to Lynn Pascoe, the then USG/DPA on 22 December 2011. That letter was leaked to the media¹⁵, wherein he is quoted saying said:

"There can be little doubt, that the decision by the President to force my early departure will be seen - rightly or wrongly - by virtually every Sierra Leonean as an effort to remove a potential obstacle to his re-election and as opening the door to manipulating the election outcome in his favor. I also feel that we should engage the President directly over his sudden flair of hostility towards me before giving in to his request for my departure... Many Sierra Leoneans (as indeed many among the international community) may see the U.N. as readily caving in to unreasonable and unjustified pressures without making even the slightest attempt to protect the position as the Secretary-General's representative in this country."

16. Mr. Pascoe is reported to have confirmed the leaked letter was genuine, saying *"it speaks for itself."*¹⁶

UNDT Applications and Misconduct Investigations

17. Very shortly after sending that letter, on 10 January 2012 Mr. Schulenburg saw OIOS memos dated 28 & 29 November 2011 and learned he had been the subject of an investigation.¹⁷
18. Mr. Schulenburg was patently unhappy at the manner in which he had been removed from his position as the head of the UNIPSIL mission, particularly as it appeared the Secretary-General was caving in to political pressure from the host country. As a result, he appears to have filed four cases in the UNDT:

13 See Footnote 1

14 See Footnotes 7 & 12

15 See Footnote 1

16 Inner City Press. 14 February 2012. Online at <http://www.innercitypress.com/bancave1slsrg021412.html> (Accessed 22 February 2015)

17 UNDT/2013/178. para 11

Case number	Filing date	Cause of Action	Disposal	Result
UNDT/NBI/2013/014	15 Apr 13	Contesting the decision to close a complaint made against the Applicant after an investigation, and the decision to end his contract as ERSG/UNIPSIL. ¹⁸	UNDT/2013/178 [24 Dec 13]	Not receivable; No MEU request.
UNDT/NBI/2013/058	15 Aug 13	Not known	Respondent answered on 19 Sept 2013. As at April 2014, the case remained under consideration by the Tribunal ¹⁹	
UNDT/NBI/2013/087	29 Nov 13	Contesting decisions in 2012, not to select, not to extend, not to renew, not to reassign, not to re-appoint Applicant to <i>expected UN senior position</i> .	UNDT/2014/041 [15 April 2014]	Dismissed: a) Applicant challenged wrong decision b) Case not receivable
UNDT/NBI/2014/032	5 May 14	Challenging the selection exercise and decision for the position of SRSG/Libya	Order 048 (NBI/2015) [9 Feb 2015]	Withdrawn.

19. When the UN Appeals Tribunal published the docket for their session in New York from 16 to 27 February 2015, one of the cases to be heard was listed as '2014/589; Schulenburg'. There was however no information as to the UNDT case number to which that appeal relates.
20. Logically, the UNAT appeal must be against either UNDT/NBI/2013/014, or UNDT/NBI/2013/087; both of which were dismissed on receivability grounds. There has been no judgement issued in UNDT/NBI/2013/058, so we have to assume that was still pending, and UNDT/NBI/2014/032 has been withdrawn.
21. On 9 February 2015, *after* the UNAT docket was published, the UNDT issued Order No. 048 (NBI/2015), being an Order on the Applicant's motion to withdraw UNDT/NBI/2014/032.
22. At the UNAT sitting, it was discovered that in fact Mr. Schulenburg had two appeals pending; 2014/589 and 2014/621. We do not know what either of them were actually about, of course, because both were withdrawn.²⁰

¹⁸ Reported in UNDT/2014/041 para 3

¹⁹ Reported in UNDT/2014/041 para 4

²⁰ 2015 UNAT Spring Session – Outcome of Judgements.pdf

23. A settlement was reached. Although this is what happened in Lubbad²¹, Sirohi²² and possibly other cases of potential embarrassment to OIOS, an Applicant has a right to withdraw any application at any time, and for any reason; there is nothing sinister in a withdrawal *per se*.

Causes of Action

24. After being withdrawn from UNIPSIL, Mr. Schulenburg applied for the post of SRSG for the new mission in Libya, but was not selected. He attributed this, in part, to both the recruitment exercise and the decision making process being adversely influenced by an OIOS/ID report dated 5 June 2012, *of which he had not been aware*.²³
25. Clearly, the report must have made adverse findings against him, and if so, he had a legal right to be aware of them. Moreover, if there was an OIOS/ID report dated June 2012, this begs the question of what was contained in the OIOS/ID memos on 28 & 29 November 2011.²⁴ One could assume these would be transmittal memos, sent at the same time as the draft investigation reports were sent, seeking comments from the implicated party, and which he would therefore be aware of. That is likely, though it could also mean there was a third investigation.
26. The harassment complaints in November²⁵ and December 2010²⁶ (referred to in paras 9 & 11 above) being governed by ST/SGB/2008/5, should normally have been investigated and the report completed within three months.²⁷
27. According to what Mr. Schulenburg told the Tribunal, it was more than a year later when on 10 January 2012, the USG/DFS advised him that he was the subject of an investigation under ST/SGB/2008/5²⁸. If that harassment complaint related to the same incident or incidents as had been reported over a year earlier - in November and December 2010²⁹ - and no action

21 UNDT Order NBI/2014/159.

22 Judgement not yet published.

23 UNDT/2014/041. para 11

24 UNDT/2013/178. para 11

25 UNDT/2013/178, para 6

26 UNDT/2013/178, para 6

27 ST/SGB/2008/5, para 5.17

28 UNDT/2013/178. para 12

29 UNDT/2013/178, paras 5&6

was taken until after Mr. Schulenburg wrote complaining that the Secretary-General was being improperly pressured by the host nation government; the timing is suspicious.

28. If Mr. Schulenburg was being informed he was being investigated in January 2012 for a complaint raised over a year earlier, the organisation appears to have been at fault in failing to take action *promptly*. If, on the other hand, he was being informed in January 2012 that he was being investigated for another complaint, this leaves unanswered the question of what happened to those old 2010 complaints, and why they were even mentioned in the UNDT/2013/178 judgement.
29. That UNDT judgement refers to two OIOS memos and refers to OIOS investigations in the plural.³⁰ The implication is that there was one OIOS investigation into the leaks, and a second OIOS investigation into unspecified complaints against Mr. Schulenburg and the Deputy Head of Mission³¹ but the existence of only one OIOS investigation can be verified. The OIOS Annual Report for the year ending 30 June 2012 lists the various OIOS/ID cases completed during the year. It refers to a single investigation; 0553/10 which was dated 28 November 2011 and concerned “*Disclosure of confidential information by a staff member at UNIPSIL*”. There is no reference to any report dated 29 November.³²
30. Reading UNDT/2013/178 paras 7, 11 & 12 together, it appears to suggest that the OIOS investigations were separate from, and in addition to, the complaint (or *complaints*) under ST/SGB/2008/5, which would (or *should*) have been investigated separately, by a panel. This would appear to mean that Mr. Schulenburg learned he was suddenly the subject in a total of three investigations that we now know of.
31. In any event, it appears the Organisation moved very slowly on whatever ST/SGB/2008/5 complaint that was brought to Mr. Schulenburg's attention in January 2012. Notwithstanding the duty in para 5.3 of that Bulletin to take action *promptly*, or the provision in para 5.17 to the effect that that fact finding investigations should normally be completed and the report submitted no later than three months from the date of the complaint; it was nine months after being advised of the complaint against him that Mr. Schulenburg was advised that there were

30 UNDT/2013/178. para 11

31 UNDT/2013/178, para 7

32 A/67/297 (part I)/Add 1.

insufficient grounds even to initiate a fact-finding investigation into it.³³

32. Quite apart from not following the procedure in ST/SGB/2008/5 para 5.14, this begs the question of why, if there insufficient grounds to initiate a fact-finding investigation, it that fact was not recognised back in December 2011 when the decision was apparently made to proceed with the complaint?
33. Still, that Mr. Schulenburg should learn of there being a complaint against him under ST/SGB/2008/5 as well as two complaints being investigated by OIOS, and learn of all three on the same day cannot be a coincidence. It implies some co-ordination. Coming after pressure from the Government of Sierra Leone to have him removed, and his letter to the USG/DPA of 22 December 2011, the timing of the decision to investigate him for a harassment complaint - made on 24 December 2011 - is particularly suspicious.
34. In, Mr. Schulenburg describes the report of 5 June 2012 as "*Department of Field Support (DFS)/Office of Internal Oversight Services (OIOS) fact-finding report*".³⁴ This is confusing. The involvement of DFS is not explained, but an ERSG would be aware that it not part of the OIOS mandate to conduct joint misconduct investigations. This could be a basic comprehension error on the Applicant's part, though it could also be a reference to the investigation undertaken by a fact-finding panel formed under ST/SGB/2008/5, if not some other investigative activity undertaken by the DFS, whose resources include the Conduct & Discipline Team in UNIPSIL.³⁵ It is not clear.
35. Nothing is known about the report dated 5 June 2012. According to the OIOS Annual Report, the only Investigation report issued on that day was 0118/11, which was an investigation into the misuse of IT resources in Vienna.³⁶ Given Mr. Schulenburg's seniority, if there was an OIOS report dated 5 June 2012 - as he has averssed in his pleadings before the

33 UNDT/ 2014/178 para 17.

34 UNDT/2014/041, para 11

35 The involvement of the Conduct & Discipline Unit in any activity perceived to be in concert with an OIOS investigation must be viewed as particularly suspicious, given that the Acting Director at the time of this investigation, Michael Dudley, is married to Ms. Mercedes Gervilla, the Head of the Conduct & Discipline Unit - creating a very obvious perceived conflict of interests situation that the Organisation has failed to recognise.

36 A/67/297 (part I)/Add 1. The Addendum to the activities of OIOS for the period from 1 July 2011 to 30 June 2012, at page 38

Tribunal³⁷ - this omission from the OIOS Annual Report must be considered suspicious. It could be interpreted as an attempt to conceal the investigation from the General Assembly.

36. Whatever else was happening, Mr. Schulenburg must have known that there was an OIOS investigation into *something*, because he was interviewed about it. That was eight months before he found that he was the subject of the report, and we also know that on 9 May 2011, he had written to the USG/OIOS - Ms. Lapointe – to complain about the conduct of OIOS investigators who interviewed him.³⁸
37. If this is correct; it is apparent from the UNDT document that Mr. Schulenburg, an ERSG, was interviewed by OIOS but that **they failed in the very basic responsibility of advising him that he was the subject of the investigation.** This is important because the OIOS report lies at the core of Mr. Schulenburg's cause of action.
38. Mr. Schulenburg must have been seriously irritated by the OIOS interview because he complained to Ms. Lapointe afterwards.³⁹ Of course, if he believed at the time he was being co-operative and was being interviewed as a witness, but the investigators had failed to inform him he was in fact the subject of their investigation and were treating him as such, it is clear to see how he might feel offended.

Irregularities within OIOS/ID

39. One of the curious facts established in the hearing in the Nguyen-Kropp and Postica case in October 2013 was that during the course of the investigation into the allegations raised by the complainant in 0052/09, Michael Dudley, then acting Director, OIOS/ID, had had meetings Ms. Catherine Pollard, then ASG/OHRM about the case.⁴⁰ The Respondent failed to refute the evidence; leaving the allegation unchallenged. The question that remains unanswered, however, is what interest the ASG/OHRM would have otherwise appeared to have been a routine and relatively insignificant ongoing investigation.⁴¹ It suggests, however, that OIOS

37 UNDT/2013/041, para 11

38 UNDT/2013/178. para 8

39 UNDT/2013/178 para 8

40 Peter A Gallo; contemporaneous notes taken during the Nguyen-Kropp & Postica hearing, October 2013

41 The complainant in 0052/09 had alleged that the Medical Services Division had been dispensing drugs to senior UN staff members improperly, one of which was Viagra, so it might not be unreasonable to assume that somebody senior had an embarrassing medical condition they were anxious to keep secret.

failed to maintain strict confidentiality in their investigations at the time if a senior official might be embarrassed by it.

40. Mr. Schulenburg was a very *very* senior UN official. Investigations into anyone at that level would, by definition, be politically sensitive. If ever there was an investigation that might be subject to external political influence, this would probably be it.

41. It was also revealed in the course of the Nguyen-Kropp & Postica hearing in October 2013 that the complainant in 0052/09 was also the subject of *another* investigation by OHRM.⁴²

42. The nature and extent of Mr. Dudley's communications with the ASG/OHRM being unknown, this raises the possibility that information about the OIOS investigation was being shared inappropriately, and one plausible reason for that would be to assist that other investigation. Considered alongside Dudley's withholding of the evidence supplied by the complainant in 0052/09, the fact that OIOS had then initiated a bad faith investigation (0234/09) against her,⁴³ and the fact that there was also another investigation being conducted by another department, all appears to indicate that the Organisation was actively co-ordinating the efforts to have that Staff Member dismissed.

43. Mr. Schulenburg appears to have been making similar complaints about a similar concerted effort to get rid of him. Could this be suggestive of a pattern of prejudicial behaviour.

Schulenburg's Complaint to Lapointe

44. The more pertinent question, however, is *why* Mr. Schulenburg complained about the investigators. We do not know the precise nature of his complaint. We only know that on 9 May 2011 he wrote to complain to Ms. Lapointe.⁴⁴ If his letter indicated there was the slightest dubiety in his mind as to who the subject of the investigation was, this would indicate a fundamental procedural error on the part of the OIOS investigators who interviewed him.

42 Peter A Gallo; contemporaneous notes taken during the Nguyen-Kropp & Postica hearing, October 2013

43 UNDT/2013/176. para 33

44 UNDT/2013/178. para 8

45. What is clear from his submissions to the UNDT is that Mr. Schulenburg did not know he was the subject of an investigation until the following January; so at the time he was interviewed, it follows that he must have assumed he was only a witness.⁴⁵
46. If a complaint was received by someone as senior as an Executive Representative of the Secretary-General, it would be reasonable to assume that the USG/OIOS would take special care to ensure it was investigated thoroughly and properly. The very least she should have done is reviewed the record of the interview. That should have made it very clear that (first) Mr. Schulenburg had been interviewed as a subject, and (second) that he had been asked specifically about the allegations against him.
47. If the interview record was found to be unassailable and showed nothing wrong in the interview of Mr. Schulenburg, it would follow that there was no probable cause to investigate his complaint against the OIOS investigators. The problem, of course, is that it appears Mr. Schulenburg did *not* know he had been interviewed as a subject, which must logically mean there was something wrong.
48. If, on the other hand, it *was* not clear from the record of interview that Mr. Schulenburg knew he was the subject of the investigation, his complaint against the OIOS investigators would be at least appear to be well-founded, even if later deemed to be unsubstantiated.
49. Whether or not any action was taken against the investigators, the problem was patently one caused by PPS having produced just one template, for use in the interviews of both subjects and witnesses.
50. Faced with a complaint from no less a figure than an ERSG, regardless of whether or not that particular complaint was upheld, the prudent management action would have been to direct that the OIOS/ID interview templates be amended to avoid the risk of confusion in the future. This was never done.
51. We do not know the content of Ms. Lapointe's reply to Mr. Schulenburg on 17 May 2011, but it would be extraordinary if a reply could be sent to such a senior official that failed to give due consideration to the substance of his complaint.

45 UNDT/2013/178. para 11

52. Whatever Mr. Schulenburg was told, it does not appear to have appeased him. If it had, he would have had no reason to make a reference to his having been interviewed by OIOS six months later when he mentioned it in his comments on the Audit report on 3 January 2012,⁴⁶ which was six months later, but still *before* he was made aware of the completed OIOS investigations on 12 January.⁴⁷

Significance of the timing of Mr. Schulenburg's complaint

53. Ms. Nguyen-Kropp filed an application (Case No. UNDT/NY/2010/107) with the UNDT on 28 December 2010. The administrative decision that she was contesting was the decision to “conduct a secret and retaliatory investigation” in which she was the subject.⁴⁸ Mr. Postica had had evidence of such an investigation since August 2010.⁴⁹

54. On 2 May 2011 was a significant date as far the management of OIOS/ID was concerned. On that day, (First) Ms. Lapointe met with Mr. Postica and Ms. Nguyen-Kropp and told them that there was no substance to the allegations that had been made against them in Ms. Beverley Mulley's “quality assurance review”. She told them that any shortcomings that may have been identified did not amount to misconduct, so the matter was closed and they were each to be given a clearance letter. Ms. Lapointe also told them that the investigation that had been conducted by the ICTY investigator Mr. Carry Spork should never have taken place and had been a waste of public funds.⁵⁰

55. In making these statements, Ms. Lapointe appears to have conceded there was some merit in Ms. Nguyen-Kropp and Mr. Postica challenging the decision to investigate them. It appears to be an admission that in her opinion, Ms. Suzette Schultz and Ms. Beverley Mulley, who were responsible for the “quality assurance review” that cleared Michael Dudley - *their superior* - of any wrongdoing while recommending investigation of Ms. Nguyen-Kropp and

46 UNDT/2013/178, para 10. This refers to Ms. Lapointe replying to Mr. von der Schulenburg's comments on the audit report on 6 January 2010. This appears to be a typo; the year should read 2012. We know from the Addendum to the OIOS Annual Report for the year ending 30 June 2012 (A/67/297 (Part I)/Add.1) that the UNIPSIL audit (AP2011/560/02) was signed on 23 January 2012.

47 UNDT/2013/178 para 11

48 UNDT/2013/176. Para 2

49 UNDT/2013/176. Para 92

50 UNDT/2013/176. Para 99

Mr. Postica – must have either been ignorant of what constitutes misconduct or that they had acted in bad faith.

56. Also on that same day, 2 May 2011, the Ethics Office reported that the panel that had been formed after their initial determination on 6 October 2010 (when they had found a *prima facie* case of retaliation against Ms. Nguyen-Kropp and Mr. Postica⁵¹) had completed their work and now found that they were *not* the victims of retaliation.⁵²
57. It is difficult to reconcile the two events of 2 May 2011. If there were never any reasonable grounds to merit the investigation, Ms. Schultz and Ms. Mulley ought to have known that, which would lean towards suggesting there was retaliation, as Meeran J. would subsequently do. Even if it was not 'retaliation' as defined by ST/SGB/2005/21, it certainly calls the motives, the professionalism and the judgement of the parties responsible into doubt. It is difficult to see how any reasonable person could consider that these people were acting in good faith. If, on the other hand, there was no retaliation; why had the Ethics Office made a preliminary finding that there was, and what grounds did Ms. Nguyen-Kropp and Mr. Postica have to complain about a “*secret and retaliatory*” investigation?
58. At the very least, in the early part of May 2011, it is logical that Ms. Lapointe must have cause for concern that OIOS procedures had not been followed. Her predecessor had given written instructions to Ms. Schultz and Ms. Mulley on 8 December 2009 that their “*quality assurance review*” should include speaking with both Mr. Dudley and Mr. Postica and this had not been done.⁵³ An external investigation had been instructed, at considerable expense to the organisation, and Ms. Lapointe was now acknowledging that it was a waste of money and should never have been initiated. There was clearly something wrong.
59. With that background, a complaint was then received from no less an individual than an ERSG, complaining about the conduct of OIOS investigators. Regardless of how Ms. Nguyen-Kropp and Mr. Postica's UNDT case(s) would be resolved, the possibility of *another*

51 UNDT/2013/176. Para 95

52 UNDT/2013/176. Para 100, though Meeran J found, following his explanations from para 119 to para 142 that there had indeed been a fundamentally retaliatory motive. No hearing has yet been held in UNDT/NY/2011/054 and UNDT/NY/2011/055, being applications filed by Ms. Nguyen-Kropp and Mr. Postica respectively, wherein the conduct of the Ethics Office will be explored.

53 UNDT/2013/176. Para 56

complaint against OIOS investigators must, at that time, have posed a serious threat to the reputation of OIOS.

60. While Ms. Lapointe may not have been able to foresee that Mr. Schulenburg would later claim to be the victim of “*a secret misconduct investigation*” by OIOS, his seniority alone should have given weight to his complaint. It is only logical that she should take an interest in ensuring that there were no procedural errors in the interview, as ought to have been uppermost in her mind, being conscious of the financial cost to the organisation incurred as a result of the investigation into Mr. Postica & Ms. Nguyen-Kropp, to say nothing of the embarrassment of the retaliation aspect that had been investigated by the Ethics Office.

Denials of a Secret Investigation

61. The UNDT/2013/178 judgement is a judgement on receivability, not on the merits of the case, which was case No. UNDT/NBI/2013/014. That application involved Mr. Schulenburg contesting the decision to close a complaint made against him after an investigation⁵⁴: so the OIOS investigation was material to his cause of action.

62. In UNDT/2013/178, in para 9 it states:

The Respondent denies that there were any investigations into the conduct of the Applicant or that the investigations, findings and reports relating to the Applicant were concealed.

63. This is curious because just two paragraphs earlier, in para 7, the Tribunal had acknowledged:

In December 2010, the Office of Internal Oversight Services (OIOS) initiated an investigation into leaks of confidential information allegedly made by the Complainant. On the basis of information that had come his way on 12 February 2011, the Applicant says that in the course of this investigation, OIOS also conducted a secret misconduct investigation into the complaints against him and the Deputy Head of Mission.

64. If para 7 is not a direct contradiction of para 9, it must simply be unclear, but mean that Mr. Schulenburg was the person who made the complaint about the leaks. That would explain why, when he was interviewed by OIOS investigators, he would naturally assume that he was being interviewed as a witness in respect of a matter that he himself had reported.

⁵⁴ Reported in UNDT/2014/041 para 3

65. This makes logical sense, because in UNDT/2013/178 paras 11 & 12, the Tribunal records that Mr. Schulenburg learned that he was the subject of an investigation on 10 January 2012, when he saw the OIOS memos of 28 & 29 November 2011.⁵⁵ That was over a year *after* the ST/SGB/2008/5 complaint had been made, and more than 6 months after he had complained about the OIOS investigators who had interviewed him.
66. It is significant that there were two memos and UNDT/2013/178 para 11 refers to OIOS investigations in the plural. Para 7 had mentioned one investigation into the leaks, and a second investigation into complaints against Mr. Schulenburg and the Deputy Head of Mission.
67. That does not explain, of course, why in UNDT/2013/178, para 9, the Respondent is on record as having **denied that Mr. Schulenburg was the subject of an investigation**. That said, there is a precedent here in that the Organisation also tried to deny that Mr. Postica was the subject of a secret OIOS investigation.⁵⁶
68. There is clearly something suspicious here. Whether or not pressure from the Government of Sierra Leone was the real reason Mr. Schulenburg was withdrawn from the Mission, and whether he was the best or the worst ESRG in the history of the United Nations, are of academic interest; he was a very senior figure in the UN and *even after being interviewed*, **he did not know that he was the subject of an OIOS investigation**. That being so, he does appear to have a grievance related to the manner in which that investigation was conducted.

UNAT Appeal

69. Little is known about what was appealed to UNAT. We know that two decisions were appealed; as 2014/589 and 2014/621. We know that the UNDT found against Mr. Schulenburg in two cases; UNDT/NBI/2013/014 and UNDT/NBI/2013/087. What we do not know, however, is that if both the UNDT decisions were appealed, which is probably the more likely conclusion, or if both appeals arose out of different decisions on the one case.

⁵⁵ By November 2011, Mr. Stefanovic was the Director, OIOS/ID, having been appointed in August 2011. The investigation challenged by Mr. Schulenburg was therefore carried out when Michael Dudley was in charge.

⁵⁶ Peter A Gallo; contemporaneous notes taken during the Nguyen-Kropp & Postica hearing, October 2013

70. UNDT/NBI/2013/014 was an application contesting the decision to close a complaint made against the Applicant after an investigation, and the decision to end his contract as ERSG in UNIPSIL.⁵⁷
71. The former is a strange decision to challenge. It must mean that there was indeed an investigation, that it was completed, that it was referred to Ms. Catherine Pollard, the ASG/OHRM and implies that she then took the decision to close the matter.⁵⁸
72. We do not know for sure, however, if this refers to an investigation in which Mr. Schulenburg was the *complainant* or one in which he was the *subject*, but in either event, if Mr. Schulenburg's submission to the UNDT was that the OIOS report caused harm to his professional career and had a negative effect on the decision not to extend, renew, reassign, or re-appoint him to an expected senior position,⁵⁹ the report must have contained adverse findings against him.
73. Disproving those adverse findings in the OIOS report would, by necessity, involve challenging and discrediting the investigation conducted by OIOS.
74. Given his seniority, it is reasonable to assume that the USG/Oversight would have been particularly careful in studying the report, and should have ensured it was credible and the misconduct proven by clear and convincing evidence. All OIOS reports, even at that time, were thoroughly reviewed by the Professional Practices Section after completion.⁶⁰
75. It may be speculative but there appears to be reasonable grounds here to suspect that for whatever reason, Mr. Schulenburg was indeed the victim of a conspiracy to use an OIOS investigation report as a smokescreen to cover the real reason for this removal as ERSG in UNIPSIL, and that was that the Secretary-General succumbed to pressure from the Government of Sierra Leone, applied for a political purpose that even went contrary to the mandate of the UNIPSIL mission.

57 Reported in UNDT/2014/041 para 3

58 ST/AI/371. Para 3

59 UNDT/NBI/2014/087

60 UNDT/2013/176 illustrated how the Professional Practices Section, rather than carrying out any function relating to "legal adequacy" was the means by which Michael Dudley orchestrated a thoroughly retaliatory investigation being initiated, despite the absence of reasonable grounds to believe that any misconduct had even occurred.

76. The further implication appears to be that the ASG/OHRM ultimately declined to rely on the OIOS report alleging wrongdoing on Mr. Schulenburg's part, and instead sought to cover the matter up by closing the file.
77. In this regard, Mr. Schulenburg's case can be considered along with that of the unidentified Ms.X in 0052/09, Nguyen-Kropp & Postica (UNDT/2013/176), Lubbad (UNDT/2013/132) and Sirohi (*whose judgement still remains unpublished*) and possibly many others that are unknown, but where corruption within OIOS played a sinister role in the persecution of a staff member whose career was destroyed without proven cause, and it was done for a petty political end. At least in Mr. Schulenburg's case, that political end was an external one.
78. If this is the case; it raises serious questions about whether the OIOS investigation was predicated on a misconduct complaint made in good faith in the first place, or whether even the initial decision to investigate Mr. Schulenburg was made for an ulterior motive.
79. The full facts will never be known. Order 048 (NBI/ 2015) confirms that some settlement was reached with Mr. Schulenburg on 9 February 2014 – shortly before the Appeals Tribunal was due to sit. That appears to be similar to the Lubbad case in Order No.159 (NBI/2014), a case that was potentially embarrassing to OIOS and was settled at the last minute. If another very senior post has not been procured for Mr. Schulenburg, the only remaining conclusion is that the matter must have been settled for a large if undisclosed sum.
80. Not only will there be no public hearing but the parties agreed that all proceedings between the Parties would be withdrawn and stricken from the records. The matter is to be buried and forgotten. In para 10 of Order 048 (NBI/ 2015) it states '*The Applicant informs the Tribunal that following successful mediation, all claims have now been settled so that the parties agreed that "all proceedings between the Parties would be withdrawn and struck from the UNDT/UNAT Court records."*' [Emphasis added]. It is significant that this mentions all proceedings, and not just the application in UNDT/NBI/2014/032, and that it specifically uses the term UNDT/UNAT which foretold what would be confirmed by the UNAT; that the appeals had also been withdrawn.
81. No Order has been published in respect of either UNDT/NBI/2013/058 or the UNAT Appeal,

it is not yet confirmed if the exact same language appears in the UNAT motions granting the Appellant's motions to withdraw, but it raises the question of whether even the publication of Order 048 (NBI/ 2015) on the UNDT website was an error on the part of the Registry.

82. Motions to Strike are recorded in the records of the UNDT in only 18 documents; being 7 Orders and 11 Judgements. An analysis of these records⁶¹ suggest that the agreement recorded in Order 048 (NBI/ 2015), that all proceedings between the parties be *stricken from the records* of the Tribunals is **unprecedented**. The embarrassing case appears to be being made to disappear.

83. In any event, with the information publicly available on these cases, it is possible to draw the reasonable conclusion that the Respondent reached a settlement with Mr. Schulenburg rather than risk a public hearing that would expose further incompetence or corruption within OIOS, for either:

- (a) knowingly initiating an investigation in bad faith,**
- (b) failing to advise Mr. Schulenburg that he was being interviewed as the subject of an investigation, or**
- (c) some other as yet unknown irregularity, the disclosure of which would be an embarrassment.**

⁶¹ Summary attached as Annex hereto: "Motions to Strike filed with the United Nations Disciplinary Tribunal"