

Designed to Fail

UN Whistleblower Protection Policy; an analysis of ST/SGB/2017/2

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The author is a former UN staff member who suffered retaliation over a two year period as a consequence of a having made a misconduct complaint, and was refused 'protection against retaliation' by the Ethics Office twice. ¹

Background

The ineffectiveness of the 'whistleblower protection' policy in the United Nations has been a matter of concern to staff members and member states for several years.

Examples of this include the cases of Mr. James Wasserstrom, who suffered the most overt and egregious retaliation after reporting a multi-million dollar corruption scheme involving UN officials and local companies in Kosovo in 2007.²

He sought protection against retaliation under ST/SGB/2005/21, until on appeal in 2014 (seven years after the retaliation) the UN Appeals Tribunal ruled that a UN staff member had no enforceable right to protection and the UN Dispute Tribunal therefore had no jurisdiction to hear a challenge to any decision made by the Ethics Office.³

An even longer running case has been that of former UN staff member Ms. Caroline Hunt-Matthes who suffered retaliation following her investigation of a rape in October 2003 and is still pursuing the case before the UN justice system almost 14 years later.⁴

1 http://peteragallo.com/?page_id=335

2 https://en.wikipedia.org/wiki/James_Wasserstrom

3 [Wasserstrom \(2014-UNAT-457\)](http://www.un.org/en/oaj/files/unat/judgments/2014-UNAT-457.pdf) Online at: <http://www.un.org/en/oaj/files/unat/judgments/2014-UNAT-457.pdf>

4 [Hunt-Matthes \(2013/UNDT/084\)](http://www.un.org/en/oaj/files/undt/judgments/undt-2013-084.pdf) Online at: <http://www.un.org/en/oaj/files/undt/judgments/undt-2013-084.pdf>

A study by the Government Accountability Project in 2012 found that the over 97% of all applications for whistleblower protection are unsuccessful.⁵

Cogniscent of the need for reform, and the importance of misconduct being reported in an organisation that is otherwise immune from accountability, in January 2014, the US Congress passed the 2014 Government Appropriations Act⁶ which contained, at §7048.(a)(1) a provision whereby 15% of the contribution to the United Nations budget was to be withheld pending a report by the Secretary of State on the implementation of 'best practices' for the protection of whistleblowers in the UN from retaliation.

Under §7048. (a)(1)(B) the United Nations should have been required to implement best practices for the protection of whistleblowers from retaliation, including best practices for:

- (i) protection against retaliation for internal and lawful public disclosures;
- (ii) legal burdens of proof;
- (iii) statutes of limitation for reporting retaliation;
- (iv) access to independent adjudicative bodies, including external arbitration; and
- (v) results that eliminate the effects of proven retaliation.

These conditions were never met. On the contrary, within six months of legislation being passed, the Wasserstrom decision⁷ actually removed even any pretence that 'whistleblower protection' in the UN was a legal right.

In the first Nguyen-Kropp & Postica⁸ case, which *did* not involve a challenge to any decision by the Ethics Office, the UNDT found there to have been retaliation by senior officials in OIOS. A second and parallel case by the same applicants was dismissed on jurisdictional grounds in November 2015⁹ following the precedent in Wasserstrom.¹⁰ The result has been that senior staff of OIOS/ID have been excused for actions that a UNDT judge found, after a public hearing, to be patently retaliatory.

Any cases of retaliation referred by the Ethics Office will therefore be investigated under the direction of OIOS staff who have not only been found to have engaged in retaliation themselves, but have been protected from criticism from senior management for doing so.¹¹

5 <https://www.whistleblower.org/blog/120003-gap-responds-critique-united-nations-ethics-office-statistic>

6 Online at: <https://www.gpo.gov/fdsys/pkg/PLAW-113publ76/html/PLAW-113publ76.htm>

7 Wasserstrom (2014-UNAT-457) Footnote 3 supra

8 Nguyen-Kropp & Postica (2013-UNDT-176) <http://www.un.org/en/oaj/files/undt/judgments/undt-2013-176.pdf>

9 Nguyen-Kropp & Postica (2015-UNDT-110) <http://www.un.org/en/oaj/files/undt/judgments/undt-2015-110.pdf>

10 Wasserstrom (2014-UNAT-457) Footnote 3 supra

11 The author has the rare distinction of being the only person to face any disciplinary action following all the disclosures in the Nguyen-Kropp & Postica case, when a comment on a whiteboard inside the OIOS office referring to the

The Wasserstrom decision was issued by the UNAT on 27 June 2014.¹² The legal lacuna could have been closed with a simple bulletin from the Secretary-General to amend ST/SGB/2005/21. Nothing was done for a period of two and a half years, in which time the case WIPO Director-General Francis Gurry further demonstrated the disregard for staff who report serious misconduct in any part of the UN system.

ST/SGB/2017/2 (attached as an annex) was only published after it became very clear that the cosy relationship the UN had enjoyed with the Obama administration was over and that President Trump was disinclined to tolerate the fraud, waste and abuse in the United Nations. It has been described as a positive measure, but the following analysis shows it is fundamentally flawed and offers no material improvement over ST/SGB/2005/21.

Defining Retaliation

The criteria for granting ‘whistleblower protection have been amended slightly, but the basic premise remains the same; for a staff member to qualify for protection against retaliation, they must have suffered retaliation after a “protected activity” which is either (a) reporting misconduct, or (b) having co-operated with a duly authorised investigation or audit.

The definition of ‘retaliation’ has been amended. ST/SGB/2005/21 para 1.4 stated:

Retaliation means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy.

This has been amended in ST/SGB/2017/2 para 1.4 to read:

*Retaliation means 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, as set out in section 2 below** (“protected activity”). [Emphasis added]*

This gives unscrupulous managers a patent loophole, and guarantees that retaliation will not be reduced but will only be dressed up in a more professional guise.

There is a Catch-22 situation here. Most retaliation in the UN meets the definition of ‘harassment’ or ‘abuse of authority’ - both of which constitute misconduct in their own right; they are prohibited under ST/SGB/2008/5, which addresses discrimination, harassment, sexual harassment, and abuse of

UNDT/2013/176 judgement was deemed to be ‘harassment.’ In this regard, the Organization confirmed that the UN Staff Rules take precedence over the freedom of expression contained in the Universal Declaration of Human Rights.

12 [Wasserstrom \(2014-UNAT-457\)](#) Footnote 3 supra

authority¹³. They could, therefore be investigated under the provisions of that bulletin regardless of any retaliation motive.

Complaints under ST/SGB/2008/5 however are investigated differently from other misconduct complaints. They are not investigated by OIOS but by a ‘fact finding panel’ comprised of at least two individuals from the same department, office or mission as the complainant, who have attended the 5-day training course run by OIOS¹⁴ on how to conduct an investigation. In practice this means two individuals who have been hand-picked by the Program Manager.

Given that the Program Manager has a vested interest in ensuring that no complaints against his managers are upheld, this practice this allows for these complaints to be investigated by two hand-picked individuals whose selective blindness and willingness to produce a result that will be “satisfactory” to the Program Manager is assured.

Where the aggrieved staff member is suffering retaliation by senior officials who have the support of the Program Manager, they are fortunate even to have a fact finding panel appointed. This lack of impartiality is instrumental in ensuring that retaliation is carried out within the parameters of the UN Staff Regulations and Rules.

Burden of Proof

As in the old policy, the burden of proof in retaliation cases is reversed. The onus remains on the Organization to demonstrate, by “*clear and convincing evidence*” that they would have taken the same allegedly retaliatory action even without the *protected activity*.

However, there is an enormous disparity between the manner in which the Ethics Office will accept as ‘clear and convincing’. Any justification offered by management can be accepted at face value, whereas the significance of evidence of retaliation offered by the staff member applying for protection can be dismissed as failing to meet that standard, and such subjective or arbitrary decisions to the detriment of the staff member cannot be challenged.

Burden of Proof on the Applicant

There is a presumption against retaliation. One of the important means by which this is exercised is through the assessment of the requirement in Section 2.1 that the misconduct complaint cited to be the ‘protected act’ must contain “*information or evidence to support a reasonable belief that misconduct has occurred.*”

¹³ Online at: <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=ST/SGB/2008/5&Lang=E>

¹⁴ Ironically enough, the ‘ST/SGB/2008/5 Panel’ training was conducted by the same OIOS staff as were themselves responsible for the retaliatory investigation in [Nguyen-Kropp & Postica \(2013/UNDT/176\)](#) Footnote 8

Regardless of whether the determination of what constitutes ‘a reasonable belief’ in these circumstances should be objective or subjective, the reality is that the determination is made by the unfettered discretion of the Ethics Office alone and that is not subject to independent review.

Burden of Proof on the Administration

The burden of proof on the Administration to demonstrate that the same allegedly retaliatory decision would have taken even without the “*protected activity*” is greatly reinforced under ST/SGB/2017/2 with the introduction of a new provision in section 2.2 allowing management to argue that:

*....the alleged retaliatory action was **not taken for the purpose of punishing, intimidating or injuring the individual** who engaged in the protected activity.* [Emphasis added]

If therefore, an explanation is offered that (the ostensibly retaliatory) decision was taken for another reason – such as for a legitimate management reason – the punitive motive is removed and this will allow the Ethics Office to find in their preliminary review that the staff member’s treatment is not “retaliation” for the purposes of ST/SGB/2017/2.

By simply accepting the justification offered by the administration that the decision “*was not taken for the purpose of punishing, intimidating or injuring the individual*” under section 2.2, the Ethics Office can find that the staff member’s application falls outside the scope of ST/SGB/2017/2 and dismiss the application.

As the staff member still has no legal right to challenge the decision *not* to find a prima facie case of retaliation¹⁵ they will have no opportunity to lead evidence to rebut that assertion.

Preliminary Reviews

An analysis by the Government Accountability Project of the applications for protection against retaliation submitted to the UN Ethics Office between 2006 and 2014 showed that only 3% were granted.¹⁶ In 2014, the UNAT decision in Wasserstrom¹⁷ confirmed it was pointless even applying for protection, and in 2015, the Ethics Office redefined the categories of what was included in their Annual Report, reducing the comparability of the subsequently available statistics year-over-year.¹⁸

Key to the Ethics Office strategy in dismissing applications for protection is the ‘preliminary review’ requirement (then under ST/SGB/2005/21) which allowed a spectacular 97% of those applications for protection to be rejected without a comprehensive investigation.

¹⁵ ST/SGB/2017/2, section 10.3

¹⁶ <https://www.whistleblower.org/multimedia/value-walk-questions-whistleblowing-un-wake-systemic-abuses>

¹⁷ Wasserstrom (2014-UNAT-457) Footnote 3 supra

¹⁸ Ethics Office Annual Report 2015. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/307 para 15

This loophole is protected by the UNAT in Wasserstrom and is now reinforced in section 10.3.

Preliminary Reviews are now addressed in Section 7.

Section 7.1

“Upon receipt of a complaint of retaliation or threat of retaliation, the Ethics Office will conduct a preliminary review of the complaint to determine whether (a) the complainant engaged in a protected activity; and (b) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.”

This represents no change to the wording in ST/SGB/2005/21 section 5.2(c).

However, the key phrase most often ignored here is that the retaliation need only be “*a contributing factor*” and not the primary motive for the retaliation. In practice, the Ethics Office has a history of using any contrary excuse to refuse applications for protection, disregarding even the possibility that the ‘protected act’ might have been a factor in what followed.

Section 7.2

“The Ethics Office shall maintain the confidentiality of all communications received from complainants who request protection against retaliation, and from all relevant third parties. Complainants may authorise the Ethics Office to contact any office or staff member to obtain additional information and/or records related to the request for protection. However, the Ethics Office may be required to cooperate with requests for information from United Nations oversight bodies or from the United Nations Dispute Tribunal or the United Nations Appeals Tribunal in the course of their official functions.”

The wording here is that the Ethics Office may be required to co-operate with *requests for information from the United Nations Dispute Tribunal* or other bodies. It addresses nothing other than requests for information.

In the UNDT case of Nartey¹⁹, the Tribunal ordered that the applicant be protected by the Ethics Office and the Ethics Office refused to do so, arguing successfully on appeal²⁰ that it was not within the scope of the Ethics Office mandate to do so.

As a result, the UN justice system exonerated the actions of UN management, in a manner that demonstrated the impotency of both the Ethics Office and the UNDT in the face of certain staff members *failing to observe and perform their functions consistent with the highest standards of integrity required* of them by the UN Charter and staff rules.

19 Nartey (UNDT/2014/051) Online at: <http://www.un.org/en/oaj/files/undt/judgments/undt-2014-051.pdf>

20 Nartey (2015/UNAT/544) Online at: <http://www.un.org/en/oaj/files/unat/judgments/2015-UNAT-544.pdf>

Nothing in ST/SGB/2017/2 reflects any desire on the part of the Ethics Office to strengthen their mandate in order to better protect the interests of the staff member should a similar situation arise in the future.

On the contrary, it was significant to observe that the retaliation was attributed to an individual who has a history of acting with impunity.²¹

Section 7.3

“All offices and staff members shall cooperate with the Ethics Office and provide access to all records and documents requested by the Ethics Office, except for medical records that are not available without the express consent of the staff member concerned and OIOS records that are subject to confidentiality requirements.”

This reference to OIOS is a convenient mechanism for wrongdoing by managers to be covered up.

A history of misconduct complaints to OIOS would be indicative of a toxic working environment and would support an application for protection against retaliation, but unless the victim of the retaliation who is applying for protection has evidence of all of those (confidential) complaints, he cannot prove that there has been such a history and OIOS cannot even be compelled to confirm that any reports were ever received.

The major evidential problem in the UN “justice” system is that the staff member does not have access to management communications, and cannot obtain same without an Order from the Tribunal that will not be granted in the absence of prima facie evidence that they exist.

Even when such an order is granted, there is a history of the Administration failing to disclose documents to applicants in the course of litigation.

Section 7.4

“The Ethics Office shall seek to complete its preliminary review within 30 days of receiving all information requested concerning a complaint of retaliation submitted.”

This is a change from the previous time limit which was within 45 days *from receiving the complaint of retaliation*.²² It has now been changed to within 30 days *of receiving all information requested*.

This is a retrograde step. It actually allows the Ethics Office to delay the process and take as much time as they wish, further aggravating the retaliation being suffered by the staff member, by

²¹ <http://www.foxnews.com/story/2009/04/21/un-official-investigated-for-wrongdoing-still-at-post.html>

²² ST/SGB/2005/21 para 5.3

requesting more and more documents and resetting the 30-day clock every time they do so.

The impotency of this provision is reflected in the wording that requires only that the Ethics Office “seek to” meet the 30-day time limit. There is no penalty or sanction for over-running this time period, and the staff member has no right to challenge the Ethics Office failure to act in the specified time period.

Section 7.5

“If the Ethics Office determines that there is no prima facie case of retaliation or threat of retaliation, it shall so notify the complainant in writing. Should the Ethics Office determine in such cases that there is an interpersonal problem within a particular office, it may additionally advise the complainant of the mandate of the Office of the Ombudsman or of the existence of other informal mechanisms of conflict resolution in the Organization.”

This reflects of ST/SGB/2005/21 section 5.8 provides that if the Ethics Office considers the matter to be one of “*an interpersonal problem within a particular office*” they may advise the victim of the alleged retaliation that they can consult the Office of the Ombudsman.

This belies the obvious observation that every case of retaliation can be dismissed as an interpersonal problem. Indeed, if there was no ‘interpersonal problem’ before, the misconduct complaint is likely to ensure that there will be one afterwards! Moreover, the UN does not appreciate that mediation is not a solution to allegations of misconduct or a lack of integrity.

This also has to be considered in view of OIOS taking a strict interpretation of their mandate (ST/AI/273) and routinely dismissing as “management problems” any complaint of possible misconduct to which this label can be applied. The combined result is that there is an institutional bias against any staff member trying to draw attention to mismanagement of UN contracts or other malfeasance such as bribery and corruption which involves the UN’s interaction with contractors.

Section 7.6

“If the Ethics Office determines that there is no prima facie case of retaliation or threat of retaliation but considers there to be a managerial problem relating to a particular department or office, it will advise the head of department or office concerned and, if it considers it appropriate, the Secretary-General.”

This clause is reassuring, but pointless. In most cases, the managerial problems relating to a particular department or office are well known and continue to be tolerated anyway.

OIOS/ID, the office supposedly charged with actually investigating misconduct, has been documented as a toxic working environment since 2009, also continues to be riddled with unresolved

allegations of mismanagement, corruption and retaliatory practices.²³

It is also a requirement that any application to the UNDT must be preceded by a request for management evaluation. This is another practice whereby the Administration will go to great lengths to justify any management decision, but the Management Evaluation Unit reports directly to the Under-Secretary-General of Management, so the Department of Management is actively engaged in rationalising every contested management decision in the UN – and no remedial action is taken from any of those cases. Doing so would, of course, prejudice the Respondents ability to legally resist the Application.

Section 7.7

“If the Director of the Ethics Office is of the opinion that there is an actual or potential conflict of interest in his or her reviewing a request for protection against retaliation, he or she shall decide on the possibility of referring the request to an alternative reviewing body, including the alternate Chair of the Ethics Panel of the United Nations.”

The Director of the Ethics Office has always had the option of *deciding on the possibility of recusing herself*. This has been done in the past.²⁴

While this section addresses the situation where Ethics Office staff members themselves have a conflicts of interests. ST/SGB/2005/21 contained a provision, at para 5.10, for cases where the Ethics Office considered there may be a conflict of interest with OIOS conducting the actual investigation, to be referred to an ‘Alternative Investigating Panel.’ This is repeated in section 8.2 of the new policy.

This was done in the case of Nguyen-Kropp & Postica²⁵ after the Ethics Office found there was a prima facie case of retaliation, and the retaliator was the Acting Director, OIOS/ID.

A finding that the Acting Director OIOS/ID was a retaliator would, of course, be seriously damaging to the reputation of OIOS and would reflect badly on the Organization as a whole. The case was referred to an Alternative Investigation Panel - but the applicants were denied the right to challenge the appointment of members of the panel or their terms of reference, despite concerns that the panel members were not independent.²⁶

Unsurprisingly, despite the retaliator having admitted that there was so much evidence against him he

²³ <http://foreignpolicy.com/2015/08/26/the-u-n-s-investigation-wars/>

²⁴ <http://peteragallo.com/wp-content/uploads/2015/12/Ethics-Office-recusal-12-Mar-14.pdf>

²⁵ Nguyen-Kropp & Postica (UNDT/2015/110). Footnote 9 supra

²⁶ Nguyen-Kropp & Postica (UNDT/2015/110). Footnote 9 supra. paras 10-26.

could not defend himself from it,²⁷ this Alternative Investigation Panel found there was no retaliation. This claim was then contradicted by the Tribunal following a hearing in Nguyen-Kropp & Postica (2013/UNDT/176).

The UN concept of “independent” is limited to other parties who are part of the UN system or otherwise beholden to the Secretary-General.²⁸

The Alternative Investigation Panel in that case was appointed by the same parties as were so keen to have this Acting Director OIOS/ID - who was referred to in the then USG/Oversight’s End of Assignment Report²⁹ as the “internal candidate” - confirmed in the post permanently.

Similarly, the Deschamps Panel was appointed, and its terms of reference drafted, ostensibly by the Secretary-General, when the conduct of the Secretary-General’s own Chef de Cabinet was in question for orchestrating the unwarranted investigation into Mr. Anders Kompass.

The provision in ST/SGB/2017/2 allowing for a reference to the UN Ethics Panel is cosmetic. This Panel cannot reasonably be described as “independent” and can be relied upon to return the same decision as the the Ethics Director would do alone and which is most likely to be favourable to management. That Panel is comprised of the Director of the Ethics Office of the UN Secretariat and other members who are UN staff members and whose performance evaluations are influenced by UN management.

Preventative Action

Much is being made about the new provision which allows the Ethics Office to take ‘prevention action’.

The Ethics Office mandate ST/SGB/2005/22³⁰ includes, at section 1.2:

“ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability.”

In practice, however, the Ethics Office has been wilfully blind to retaliation taking the form of actions that would, even in the absence of a retaliatory motive, constitute harassment and/or a breach of authority under ST/SGB/2008/5. Nothing has ever prevented the Ethics Office from counselling a staff member on how to frame a report of misconduct. Nothing has ever prevented them from writing to the appropriate Program Manager to express concerns about misconduct that appears to be

27 UNDT Order 308. (NY/2010) para 49c. Online at: <http://www.un.org/en/oaj/files/undt/orders/ny-2010-308.pdf>

28 See the example of the Deschamps Panel: <http://whistleblower.org/blog/103830-un%E2%80%99s-independent-external-panel-sexual-abuse-peacekeepers-africa-not-independent-not#sthash.Zt4AYdgl.dpuf>

29 Online at: <http://www.humanrightsvoices.org/assets/attachments/documents/8802reportbrit.pdf>

30 Online at: <https://daccess-ods.un.org/TMP/8108344.67411041.html>

practiced.

Instead, focussing exclusively on dismissing applications under ST/SGB/2005/21, the Ethics Office has traditionally left the victims of such misconduct/retaliation to their own resources, and aside from recommending that they consult the Ombudsman's Office, have avoided advising them on how to redress misconduct.³¹

On the contrary - the Kompass case showed that the Ethics Office actually facilitated the (unwarranted) misconduct complaint that High Commissioner Zeid made against Mr. Anders Kompass. Joan Dubinsky, the then Ethics Director had been included in the preparations for that complaint three weeks earlier, specifically because it was foreseen that Mr. Kompass might – at a future date – apply for ‘whistleblower protection.’³² Zeid’s memo requesting an investigation is dated 9 April 2015, Dubinsky’s signature appears on the second page of Zeid’s memo, dated 8 April 2015.³³

It is also significant that by Chief of Staff Susanna Malcorra was co-ordinating that investigation, and both Dubinsky the Ethics Director and Lapointe, the Under-Secretary-General of OIOS, were complicit in orchestrating an investigation that was so patently unjustified that the Director of Investigations recused himself from taking any part in it.

He was, unsurprisingly, over-ruled by Lapointe who was later found by the Deschamps Panel to have acted improperly and abused her authority in the matter,³⁴ and the UN reached an out of court settlement with him rather than expose the retaliation and interference he had faced.³⁵

In addition, Dubinsky should have retired at the end of March 2015, but her contract was extended – by Malcorra – so she would have fully five years service in the UN and therefore gain the additional \$12,000 per year benefit from a vested pension.³⁶

Senior management’s “need” to ensure the Ethics Director’s post was kept filled by someone of their choosing has to be compared with the fact that the post of Investigations Director was kept vacant for two and a half years while senior management lobbied for Michael Dudley – the internal candidate favoured by senior management for that post,³⁷ who was later publicly exposed for his retaliation against the applicants in Nguyen-Kropp and Postica (2013/UNDT/176).³⁸

Despite being established to be “independent” the Ethics Office has been shown to have consistently

31 ST/SGB/2005/21, section 5.8

32 Report of the Deschamps Panel. Online at: <http://www.un.org/News/dh/infocus/centafricrepub/Independent-Review-Report.pdf> Page 67.

33 <http://www.codebluecampaign.com/s/04-Memo-to-request-investigation-OHCHR-to-OIOS-April-9-2015.pdf>

34 Report of the Deschamps Panel. Supra. Section 1.5 Page 69.

35 UNDT Order 276 (NY/2015). Online at: <http://www.un.org/en/oaj/files/undt/orders/ny-2015-276.pdf>

36 <http://www.foxnews.com/world/2015/07/30/un-benefit-boost-to-outgoing-ethics-watchdog-questioned-in-light-sex-abuse.html>

37 Online at: <http://www.humanrightsvoices.org/assets/attachments/documents/8802reportbrit.pdf>

38 See footnote 8, also UNDT Order 308(NY/2010) <http://www.un.org/en/oaj/files/undt/orders/ny-2010-308.pdf>

acted in the best interests of the administration. For over ten years, the effect of the only preventative measures that have been able to demonstrate relate to preventing senior management and tother protected by them from facing any accountability for retaliating against staff who tried to report misconduct.

Nothing in ST/SGB/2017/2 will have any bearing on the dismissive culture in the Ethics Office or their presumption against retaliation.

The preventative measures under section 5.2 are also likely to be rendered moot by the definition of retaliation in para 1.4 to include the proviso that an action that appears to be retaliatory can be excluded from the regulation if it was not “*recommended, threatened or taken for the purpose of punishing, intimidating or injuring*” the subject.

Referrals from OIOS

Under section 5.1 however, OIOS is authorised to inform the Ethics Office of reports received of wrongdoing that OIOS identifies as posing a retaliation risk to a staff member.

This is no innovation. Nothing ever prevented OIOS from advising complainants that the matter could be referred to their Program Manager or to the Ethics Office. OIOS procedures include templates for referring complaints considered more appropriately investigated under ST/SGB/2008/5 and ST/SGB/2005/21 to Program Managers and the Ethics Office respectively.

Staff members making complaints to the OIOS hotline are already advised that the matter should instead be referred to their Program Manager – which is of course, a thoroughly futile recommendation when the staff member is suffering mistreatment by senior staff loyal to that very Program Manager, but many complaints sent to OIOS are nevertheless rejected on that basis.

OIOS also investigators routinely advise witnesses in investigations that in the event of suffering any retaliation, they should report this as misconduct.

The greater futility concealed in section 5.1 however, is that it gives OIOS authority to identify whether or not particular staff members are at risk of retaliation. OIOS however, is similarly tainted with a history of retaliation, corruption, bias and covering up misconduct that could be embarrassing to themselves and to senior management. Staff members cannot be blamed for having a lack of confidence in the impartiality of any investigations they carry out.

Aside from the observation that almost *all* complainants are at risk of retaliation in the UN; section 5.1 will require a referral decision to be made by the same OIOS officials as were responsible for the retaliation identified in Nguyen-Kropp & Postica (2013/UNDT/176) and who have consistently enjoyed the protection of senior management to avoid accountability for their own misconduct.

In seeking to make a referral under section 5, OIOS requires the consent of the individual making the allegation. In most cases that is the aggrieved party, but this requirement does not address the insidious practice of *third party complaints*. This is a device not uncommon in OIOS, where it has been used to effect ‘retaliation by proxy.’

This could also protect anyone making a Third Party complaint in bad faith from having to give the Ethics Office enough information to reach a finding that a prima facie case of retaliation exists.

External Parties

While ST/SGB/2017/2 establishes that it is misconduct to retaliate against an outside party, neither the UN nor the Ethics Office can compel an external contractor not to terminate or otherwise mistreat one of their own employees, and that employee is likely to be at risk of serious retaliation for jeopardising a lucrative UN contract.

At the present time, such retaliation could reasonably be prosecuted under the catch-all Staff Rule 1.2(b) which requires staff members to uphold the highest standards of efficiency, competence and integrity expected of an international civil servant, but this is never done.

On the contrary, in what appeared to be reprisals against an independent accredited journalist for taking too close an interest in a story that had implications of serious inside the UN Secretariat³⁹, the UN Press Office physically evicted the InnerCityPress reporter Matthew Lee, downgraded his press access and threw him and his laptop out in the street.

Under ST/SGB/2005/21, as an external party, Matthew Lee had no recourse to the UN justice system and immunity under the UN Convention on Privileges and Immunities prevented him seeking justice for an ex facie breach of the First Amendment in the US civil courts.

Under ST/SGB/2017/2, while purporting to extend the coverage of the whistleblower protection policy to non-staff members, the Administration need only demonstrate that the reason for Lee’s eviction was not “*for the purpose of punishing, intimidating or injuring an individual because that individual engaged in an activity protected*” but for allegedly breaching the rules of the UN Correspondents Association. Disregarding the fact that Lee’s dispute with the UN Correspondents Association can be attributed to his reporting, the UN Press Office could still argue that the same action would have been taken even if he had *not* reported wrongdoing within the UN.

³⁹ <https://www.wsj.com/articles/former-u-n-general-assembly-president-charged-in-bribery-scheme-1444141619>

1. Wrongdoing by External Parties

The criteria for granting ‘whistleblower protection have been amended slightly, and ST/SGB/2017/2 differs from its predecessor slightly in Section 2.1(a) where the reference to the “misconduct” that is reported has been extended from:

Reports the failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service, including any request or instruction from any staff member to violate the above-mentioned regulations, rules or standards....

By the addition of the final clause:

*... or reports wrongdoing by **any** person that, if established, would be manifestly harmful to the interests, operations or governance of the Organization. [Emphasis added]*

In practice, the effect of this additional phraseology is to include a situation where, for example, a staff member reports commercial malpractice which has an impact on the UN, such as fraud by a vendor.

In most cases, however, this is unlikely to be of any value because such reports have routinely been dismissed by OIOS/ID as being “management issues” in order to exclude them from the remit of the OIOS mandate as defined in ST/AI/273.

Where such cases are not investigated, the Ethics Office need only doubt that the matter could be “*established*” or if it was, that it would be “*manifestly harmful*.” This will allow them to find that the conditions precedent in Section 2.1(a) are not met and deny protection on that basis.

It does extend the coverage of the protection to include wider reports. It should⁴⁰ also cover a situation akin to that of Mr. Anders Kompass who reported sexual abuse by peacekeepers not under UN command, and then suffered what was patently retaliation – by UN management - for that action.

2. Wrongdoing by UN Personnel against External Parties

ST/SGB/2017/2 section 11 contains a new provision entitled ‘Prohibition of retaliation against outside parties.’

This, however, is of limited utility. It confirms that it is misconduct for a UN staff member to retaliate against a contractor, its employees or other third parties dealing with the Organization should they report wrongdoing, but it cannot protect the victim of that retaliation.

⁴⁰ Subject to the interpretation of Section 4

In the absence of an additional contractual obligation, the UN is powerless to prevent someone who is employed by a UN contractor being retaliated against, as would be very likely if such an individual were to report misconduct that reflected badly on the contracting company engaging them. This happened in the case of the former US Police Officer who reported her own supervisor for sexual exploitation and abuse when serving as an UNPOL officer in MINUSTAH.⁴¹

Judicial Review

The Wasserstrom decision⁴² emasculated an already ineffective whistleblower protection regime. It did that by reference⁴³ to Article 2(1) of the UNDT statute, which limits the jurisdiction of the Tribunal to hear a challenge to only an “*administrative decision*” that is alleged to breach the terms of the staff member's employment.

By a majority decision, the Appeals Tribunal held that because ST/SGB/2005/21 section 5.7 only authorised the Ethics Office to make a *recommendation* to the Secretary-General based on the outcome of the investigation into the retaliation, those recommendations are not ‘*administrative decisions*’ and even if the form of the retaliation has a serious detrimental effect on the staff member’s employment, decisions made by the Ethics Office are not deemed to be subject to judicial review. The UN does not consider they have “direct legal consequences.”

The Ethics Office may *recommend* that the staff member be protected from retaliation but the Secretary-General is under no obligation to accept that recommendation.

Whistleblower protection in the UN is therefore not an enforceable legal right, because the staff member has no legal means by which to compel the Organization to protect them, no matter what the findings of the retaliation report might be.

Decisions made by the Ethics Office cannot be reviewed by the UNDT.

Section 9 provides for the “review” of the Ethics Office decision by the Alternate Chair of the UN Ethics Panel, but the argument that that is somehow “independent” is fallacious. The Alternate Chair of the UN Ethics Panel will always be a professional colleague of the Ethics Director and any professional relationship they have should create a conflict of interests that prevents them reviewing the decision of someone they know and work with.

Furthermore, from making such a therefore decisions of the Ethics Panel cannot be reviewed by the

41 See the author’s written statement to US congressional committee in April 2016:

<http://docs.house.gov/meetings/FA/FA16/20160413/104766/HHRG-114-FA16-Wstate-GalloP-20160413.pdf> Page 7

42 Wasserstrom (UNAT/2014/457) Footnote 3 supra

43 Wasserstrom (UNAT/2014/457) Footnote 3 supra, at para 41

UNDT. There is no independence in this mechanism.

ST/SGB/2017/2 section 10 only partially closes the loophole that allowed for the dismissal of the application in Wasserstrom.⁴⁴ Section 10.1 now establishes that any action by the Administration (or any failure to take such action) following a recommendation from the Ethics Office once a *prima facie* case of retaliation has been established will constitute a contestable administrative decision – but only if it has “*direct legal consequences*” affecting the staff member’s terms and conditions of appointment.

This, by definition, only affects the 3% of applications where the Ethics Office actually concedes there is a prima facie case of retaliation!

In Wasserstrom, the Ethics Office relied on a flawed OIOS closure report that concluded there was no retaliation. Mr. Wasserstrom sought to challenge the decision on the basis that the finding in the OIOS report was contradicted by the evidence disclosed to him by the Ethics Office.⁴⁵

Section 8.4 allows the Ethics Office to disregard the findings of a perfectly sound OIOS investigation report that *does* find there to be retaliation. This can be done by Ethics Office making an arbitrary decision that the information provided by the Administration is “clear and convincing” so, in view of the reversal of the burden of proof, they can determine that the standard of proof is not met and no retaliation therefore occurred.

Such a finding would not be subject to review.

Where the policy fails to protect the remaining 97% of staff members who apply for ‘protection against retaliation’ of course is that section 10.3 specifically excludes recommendations of the Ethics Office from the definition of ‘administrative decision.’

As a result, the Ethics Office decide there is no prima facie case of retaliation, even if that conclusion is contradicted by all the evidence, the staff member has no legal right to challenge that decision in the formal justice system.

Even if the Ethics Office does find a prima facie case of retaliation, and the matter is formally investigated by OIOS and the results of that investigation indicate retaliation – the Ethics Office “independent review” under section 8.4 allows them to reject the findings of the OIOS investigation; and the consequent decision by the Ethics Office not to find retaliation cannot be challenged by the staff member.

⁴⁴ Wasserstrom (UNAT/2014/457) Footnote 3 supra

⁴⁵ Order 19 (NY/2010). Online at: <http://www.un.org/en/oaj/undt/orders/ny-2010-019.pdf> para 12.

US Budget Withholding Provisions

The requirements of the 2016 Appropriations Act⁴⁶ §7048 can be summarised as follows:

1) Protection against retaliation for internal and lawful public disclosures

The protection provided by ST/SGB/2017/2 is no better than ST/SGB/2005/21 and in many respects it is worse.

While there is a mechanism for reporting retaliation, and provisions for how the staff member might be protected, the means of determining whether or not the conditions for ‘Protection against Retaliation’ are met is seriously inadequate and fails to recognise most retaliation in the UN.

2) Legal burdens of proof

Whatever the burden of proof, this is determined by the Ethics Office who have a proven history of misrepresenting the legal requirements, and demonstrating bias in recognising what constitutes “*information or evidence to support a reasonable belief that misconduct has occurred*” which is the reporting pre-requisite in section 2.1.

The Ethics Office can make arbitrary determinations as to the adequacy of the evidence and because the UNDT has no jurisdiction to review these decisions, unless the complaint has cleared the first hurdle in the Ethics Office and met the standard of a prima facie retaliation case, the aggrieved staff member has no recourse to challenge that decision.

3) Statutes of limitation for reporting retaliation

Applications to the Ethics Office for protection against retaliation must be received no later than six months after the date on which the individual knew, or, in the opinion of the Ethics Office, should have known, that they had been retaliated against.

A time limit of this order is clearly necessary, but there are examples of the Ethics Office dismissing complaints for protection against retaliation on grounds for being time-barred, which penalised staff members who try to resolve problems informally.

4) Access to independent adjudicative bodies, including external arbitration

This new policy provides no mechanism for access to any body which is either independent or adjudicative.

Staff members applying for protection against retaliation are entirely beholden to the discretion of the Ethics Office which is “independent” in name only, and has an overwhelming history of finding

⁴⁶ Online at: <https://www.gpo.gov/fdsys/pkg/PLAW-113publ76/html/PLAW-113publ76.htm>

against the applicant.

In the event that the Ethics Office Director and/or staff recuse themselves from acting, the alternative suggested in Section 7.7 offers no guarantee of impartiality either, as any person on the UN Ethics Panel is, by definition, a UN staff member subject – directly or indirectly – to the same political pressures as the Ethics Office Director.

5) Results that eliminate the effects of proven retaliation.

The Ethics Office has been unsuccessful in eliminating retaliation since the introduction of ST/SGB/2005/21 over ten years ago and ST/SGB/2017/2 offers little prospect of any improvement in that record.

The attitude of senior management of the UN to the plight of staff members suffering retaliation is amply demonstrated in the cases of Wasserstrom,⁴⁷ Nguyen-Kropp & Postica⁴⁸, Nartey,⁴⁹ as well as in the Ethics Office's record of dismissing 97% of all applications for protection against retaliation.⁵⁰

Senior management of the organisation failed to take any action to protect the credibility of OIOS following the Nguyen-Kropp & Postica (2013/UNDT/176)⁵¹ decision. The UN considers it appropriate that allegations of misconduct by other staff members be investigated under the auspices of senior OIOS managers whose investigative record of is tainted with retaliation, bias, poor judgement and serious wrongdoing themselves for which they have never faced any accountability.

At the same time, their management record is testimony to their inability and/or unwillingness to address a known toxic working environment that has been documented as going back to 2009 and before.⁵²

The UNAT decision in Wasserstrom was issued in 27 June 2014⁵³ six months after the warning contained in the US 2014 Appropriations Act and yet nothing was done to address a serious vulnerability in the whistleblower protection regime for another two and a half years.

It is difficult to interpret this as anything other than contempt for the concerns of legislators for the UN's biggest financial donor.

47 Footnote 2 supra

48 Footnotes 8 & 9 supra

49 Footnote 21 supra

50 <https://www.whistleblower.org/multimedia/value-walk-questions-whistleblowing-un-wake-systemic-abuses>

51 Footnote 8 supra

52 <http://foreignpolicy.com/2015/08/26/the-u-n-s-investigation-wars/>

53 Wasserstrom (2014-UNAT-457) Footnote 2 supra

Conclusion

When announcing the publication of ST/SGB/2017/2, the Secretary-General also announced the establishment of an ‘Internal Working Group’ to monitor progress under this new policy.⁵⁴

Given that the foregoing analysis is based mostly on public records of the UN’s conduct in protecting whistleblowers from retaliation since the Ethics Office was established, there is no reason to believe that ST/SGB/2017/2 will have any effect whatsoever on their established culture.

Experience has shown that ST/SGB/2005/21 was manipulated to protect unethical and retaliatory managers more than staff members. ST/SGB/2017/2 was intentionally drafted to maintain those aspects, and indeed to provide the Administration with additional means of evading accountability for patently retaliatory actions.

- **This policy will have no material effect and will not protect UN staff members who report misconduct and then suffer retaliation.**

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5 February 2017

www.peteragallo.com

54 <http://www.un.org/apps/news/story.asp?NewsID=56026#.WJCEJLwn5I>



20 January 2017

Secretary-General's bulletin

Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations

The Secretary-General, for the purpose of ensuring that the Organization functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals who report misconduct or cooperate with duly authorized audits or investigations, and in accordance with paragraph 161 (d) of General Assembly resolution 60/1, paragraph 6 of Assembly resolution 70/255 and paragraph 44 of Assembly resolution 71/263, promulgates the following:

Section 1 General

1.1 It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation.

i.e. It is **misconduct** for a staff member **not** to report it.

1.2 It is also the duty of staff members to cooperate with duly authorized audits and investigations. An individual who cooperates in good faith with an audit or investigation has the right to be protected against retaliation.

How this is a "right" if there no mechanism for it to be enforced?

1.3 Retaliation against individuals who have reported misconduct or who have cooperated with audits or investigations violates the fundamental obligation of all staff members to uphold the highest standards of efficiency, competence and integrity and to discharge their functions and regulate their conduct with the best interests of the Organization in view.

1.4 Retaliation means 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, as set out in section 2 below ("protected activity").

Retaliatory actions can therefore be excluded from the definition of 'retaliation' if an alternative motive can be offered.



Section 2
Scope of application

2.1 Protection against retaliation applies to any staff member (regardless of the type of appointment or its duration), intern or United Nations volunteer who:

(a) Reports the failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances, the Financial Regulations and Rules, or the Standards of Conduct of the International Civil Service, including any request or instruction from any staff member to violate the above-mentioned regulations, rules or standards, or reports wrongdoing by any person that, if established, would be manifestly harmful to the interests, operations or governance of the Organization. In order to receive protection, the report should be made as soon as possible and not later than six years after the individual becomes aware of the misconduct. The individual must make the report in good faith and must submit information or evidence to support a reasonable belief that misconduct has occurred; or

(b) Cooperates in good faith with a duly authorized investigation or audit.

2.2 The present bulletin is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance, non-extension or termination of appointment. However, the burden of proof shall rest with the Administration to demonstrate by clear and convincing evidence that it would have taken the same action absent the protected activity referred to in section 2.1 above or that the alleged retaliatory action was not taken for the purpose of punishing, intimidating or injuring the individual who engaged in the protected activity.

2.3 The transmission or dissemination of unsubstantiated rumours is not a protected activity. Making a report or providing information that is intentionally false or misleading constitutes misconduct and may result in disciplinary or other appropriate action.

Section 3
Reporting misconduct through established internal mechanisms

Except as provided in section 4 below, reports of misconduct should be made through the established internal mechanisms: to the Office of Internal Oversight Services (OIOS), the Assistant Secretary-General for Human Resources Management, the head of department or office concerned or the focal point appointed to receive reports of sexual exploitation and abuse. It is the duty of the Administration to protect the confidentiality of the individual's identity and all communications through those channels to the maximum extent possible.

Section 4
Reporting misconduct through external mechanisms

Notwithstanding Staff regulation 1.2 (i), protection against retaliation will be extended to an individual who reports misconduct to an entity or individual outside of the established internal mechanisms, where the criteria set out in subparagraphs (a), (b) and (c) below are satisfied:

→ Determined by the unfettered discretion of the Ethics Office - which decision is not subject to judicial review.

→ Determined by the unfettered discretion of the Ethics Office

...which has a record of rejecting 97% of applications from staff members,

and which decision is not subject to judicial review.

- (a) Such reporting is necessary to avoid:
 - (i) A significant threat to public health and safety; or
 - (ii) Substantive damage to the Organization's operations; or
 - (iii) Violations of national or international law; and
- (b) The use of internal mechanisms is not possible because:
 - (i) At the time the report is made, the individual has grounds to believe that he/she will be subjected to retaliation by the person(s) he/she should report to pursuant to the established internal mechanism; or
 - (ii) It is likely that evidence relating to the misconduct will be concealed or destroyed if the individual reports to the person(s) he/she should report to pursuant to the established internal mechanisms; or
 - (iii) The individual has previously reported the same information through the established internal mechanisms, and the Organization has failed to inform the individual in writing of the status of the matter within six months of such a report; and
- (c) The individual does not accept payment or any other benefit from any party for such report.

Section 5

Prevention action

5.1 OIOS will inform the Ethics Office of reports received of wrongdoing that OIOS identifies as posing a retaliation risk to a staff member. OIOS will provide this information to the Ethics Office only upon the consent of the individual making the allegation.

5.2 When informed by OIOS of an individual who is at risk of retaliation, the Ethics Office will consult with that individual on appropriate retaliation prevention action. With the individual's consent, such action may include engagement by the Ethics Office with the individual's senior manager or managers to ensure monitoring of the individual's workplace situation, with a view to preventing any retaliatory action against the individual as a consequence of engaging in a protected activity.

Section 6

Reporting retaliation to the Ethics Office

6.1 Individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation may submit a request for protection against retaliation to the Ethics Office in person, by regular mail, by e-mail or through the Ethics Office helpline. They should forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible.

6.2 Requests for protection against retaliation must be submitted to the Ethics Office no later than six months after the date on which the individual knew, or, in

the opinion of the Ethics Office, should have known, that the alleged retaliatory action was taken.

Section 7

Preliminary review by the Ethics Office

7.1 Upon receipt of a complaint of retaliation or threat of retaliation, the Ethics Office will conduct a preliminary review of the complaint to determine whether (a) the complainant engaged in a protected activity; and (b) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.

7.2 The Ethics Office shall maintain the confidentiality of all communications received from complainants who request protection against retaliation, and from all relevant third parties. Complainants may authorize the Ethics Office to contact any office or staff member to obtain additional information and/or records related to the request for protection. However, the Ethics Office may be required to cooperate with requests for information from United Nations oversight bodies or from the United Nations Dispute Tribunal or the United Nations Appeals Tribunal in the course of their official functions.

7.3 All offices and staff members shall cooperate with the Ethics Office and provide access to all records and documents requested by the Ethics Office, except for medical records that are not available without the express consent of the staff member concerned and OIOS records that are subject to confidentiality requirements.

7.4 The Ethics Office shall seek to complete its preliminary review within 30 days of receiving all information requested concerning a complaint of retaliation submitted.

7.5 If the Ethics Office determines that there is no prima facie case of retaliation or threat of retaliation, it shall so notify the complainant in writing. Should the Ethics Office determine in such cases that there is an interpersonal problem within a particular office, it may additionally advise the complainant of the mandate of the Office of the Ombudsman or of the existence of other informal mechanisms of conflict resolution in the Organization.

7.6 If the Ethics Office determines that there is no prima facie case of retaliation or threat of retaliation but considers there to be a managerial problem relating to a particular department or office, it will advise the head of department or office concerned and, if it considers it appropriate, the Secretary-General.

7.7 If the Director of the Ethics Office is of the opinion that there is an actual or potential conflict of interest in his or her reviewing a request for protection against retaliation, he or she shall decide on the possibility of referring the request to an alternative reviewing body, including the alternate Chair of the Ethics Panel of the United Nations.¹

¹ Pursuant to [ST/SGB/2007/11/Amend.1](#), the Ethics Panel of the United Nations consists of the heads of the Ethics Offices of the separately administered organs and programmes of the United Nations and the Ethics Office of the United Nations Secretariat.

97% of applications for 'Protection against Retaliation' are rejected at this 'preliminary review' stage.

The staff member still has no legal right to challenge the rejection of their application.

Section 8

Ethics Office action where there is a prima facie case i.e. the fortunate 3%

8.1 If the Ethics Office considers that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days.

8.2 Where, in the opinion of the Ethics Office there may be a conflict of interest if OIOS conducts an investigation as referred to in section 8.1 above, the Ethics Office may recommend to the Secretary-General that the complaint be referred to an alternative investigating mechanism.

optional

8.3 Pending completion of the investigation, the Ethics Office may recommend that the Secretary-General take appropriate measures to safeguard the interests of the complainant, including, but not limited to, temporary suspension of the implementation of the action reported as retaliatory and, with the consent of the complainant, temporary reassignment of the complainant within or outside his or her office or placement of the complainant on special leave with full pay.

optional

8.4 Upon receipt of the investigation report, the Ethics Office will conduct an independent review of the findings and supporting documents to determine whether the report and the supporting documents show, by clear and convincing evidence, that the Administration would have taken the alleged retaliatory action absent the complainant's protected activity or that the alleged retaliatory action was not made for the purpose of punishing, intimidating or injuring the complainant. If, in the view of the Ethics Office, this standard of proof is not met, the Ethics Office will consider that retaliation has occurred. If the standard of proof is met, the Ethics Office will consider that retaliation has not occurred. In all cases, the Ethics Office will inform the complainant in writing of its determination and make its recommendations to the head of department or office concerned and to the Under-Secretary-General for Management. Those recommendations may include that the matter be referred to the Assistant Secretary-General for Human Resources Management for possible disciplinary procedures or other action that may be warranted as a result of the determination.

8.5 If the Ethics Office considers that there has been retaliation against an individual, it may, after taking into account any recommendations made by OIOS or other concerned office(s) and after consultation with the complainant, recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action and protecting the complainant from any further retaliation. Such measures may include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, or, if requested by the individual, transfer to another office or function for which the individual is qualified, independently of the person who engaged in retaliation. The head of department or office concerned shall provide a written decision to the complainant and the Ethics Office on the recommendations of the Ethics Office within 30 days.

i.e. the Ethics Office may still reject the findings of the OIOS report

8.6 Should the Ethics Office not be satisfied with the response from the head of department or office concerned, it can make a recommendation to the Secretary-

determined by the unfettered discretion of the Ethics Office - which decision is not subject to judicial review.

Reversal of the burden of proof

General. The Secretary-General will provide a written decision on the recommendations of the Ethics Office to the complainant, the Ethics Office and the department or office concerned within 30 days.

8.7 Complainants will be informed on a confidential basis of any disciplinary sanctions imposed for the retaliatory action.

Section 9
Review of Ethics Office determinations

9.1 If, following a determination by the Ethics Office under section 7.5 or 7.6 above that there is no prima facie case of retaliation or threat of retaliation, the complainant wishes to have the matter reviewed further, he or she may, within 30 days of notification of the determination, refer the matter, in writing, to the Alternate Chair of the Ethics Panel of the United Nations.

but *not* under
Section 8.4 or 8.5

Members of the
Ethics Panel are,
by definition, **not**
"independent."

9.2 The alternate Chair of the Ethics Panel will thereupon undertake an independent review of the matter, which shall include review of action previously taken by the Ethics Office and a determination of any additional action required, including whether referral for investigation is warranted under section 8.1 above. The Ethics Office will implement the recommendations of the alternate Chair of the Ethics Panel, including any recommendation to refer the matter to OIOS for investigation.

Section 10
Review of administrative decisions under chapter XI of the Staff Rules

10.1 The action, or non-action, of the Administration on a recommendation from the Ethics Office under section 8 above will constitute a contestable administrative decision under chapter XI of the Staff Rules if it has direct legal consequences affecting the terms and conditions of appointment of the complainant and may be contested within the deadlines specified under those Rules.

10.2 Staff members are reminded that they may seek to challenge any administrative decision that they consider to be retaliatory under chapter XI of the Staff Rules. Such recourse must comply with the deadlines specified under those Rules.

10.3 Recommendations of the Ethics Office and the alternate Chair of the Ethics Panel under the present bulletin do not constitute administrative decisions and are not subject to challenge under chapter XI of the Staff Rules.

Section 11
Prohibition of retaliation against outside parties

If established, any retaliatory measures against a contractor or its employees, agents or representatives or any other individual engaged in any dealings with the United Nations because such person has reported misconduct may lead to disciplinary or other appropriate action.

Section 12
Entry into force

12.1 The present bulletin shall enter into force on the date of its issuance.

12.2 Secretary-General's Bulletin [ST/SGB/2005/21](#), entitled "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations" is hereby abolished.

12.3 The provisions of the present bulletin shall prevail over any inconsistent provisions contained in other administrative issuances currently in force.

(Signed) António **Guterres**
Secretary-General
