**The Government Accountability Project’s Comments on the**

**Report on Transparency and Accountability at the United Nations, UN agencies and the**

**Organization of American States**

Beatrice Edwards: Senior International Policy Advisor

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The “Report on Transparency and Accountability at the United Nations, UN agencies and the Organization of American States,” prepared in response to requirements imposed on the Secretary of State by the Department of State, Foreign Operations and Related Programs Appropriations Act, 2017, Division J, P.L. 115-31, Section 7048, is capricious, arbitrary and misleading in its certification that whistleblower protections in place at the agencies covered by the law comply with best-practice standards.

The law in question is explicit: section 7048 of the FY2017 Consolidated Appropriations Act reads in part:

 *(1) Of the funds appropriated under title I and under the*

 *heading ``International Organizations and Programs'' in title V of*

 *this Act that are available for contributions to the United*

 *Nations, any United Nations agency, or the Organization of American*

 *States, 15 percent may not be obligated for such organization or*

 *agency until the Secretary of State reports to the Committees on*

 *Appropriations that the organization or agency is…*

*(B) implementing 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.*

For the past three years, the Government Accountability Project (GAP) has provided comments on the State Department’s certification report. In those comments, GAP cited rulings of the United Nations Appeals Tribunal handed down in 2014 and 2015 (*Wasserstrom vs. The Secretary General; Postica, Nguyen-Kropp vs. The Secretary General*) that exclude whistleblowers who allege retaliation at the United Nations Secretariat from the formal judicial system. This exclusion represents policies and practices that do not meet the best-practice standards for certification by the Secretary of State in compliance with Sec. 7048 (1) (B) (iv and v).[[1]](#footnote-1)

The exclusion leaves whistleblowers who allege retaliation at the Secretariat subject to the determinations of the UN Ethics Office regarding the merit of their complaints. The Ethics Office is neither an independent nor an adjudicative body, in the generally-accepted sense of either term. The Director of the Ethics Office is authorized only to make recommendations to the Secretary General regarding whistleblower allegations.[[2]](#footnote-2) The Office lacks the authority to make an administrative decision in such cases, and therefore cannot operate independently.

Further, for the past three years, whistleblowers’ exclusion from access to an independent adjudicative forum has gone un-remedied at the Secretariat. Despite the adoption of an updated whistleblower protection policy (SGB/2017/2) in January, 2017 by Secretary General Antonio Guterres, the shortcoming remains largely unaddressed.

Under Sec. 10, SGB/2017/2, whistleblowers whose allegations are determined by the Ethics Office to include *prima facie* evidence of retaliation and are referred for full investigation may now appeal to the formal judicial system for relief if the investigation carried out fails to validate their claims, or if the Secretary General fails to act on a recommendation from the Ethics Office regarding their claims. Figures provided by the UN Ethics Office, however, show that in the year under review, 6 cases of 25 were referred for investigation. For the current year, then, with the new policy in place, under 25 percent of whistleblowers who alleged retaliation could access a formal judicial forum, should they have chosen to do so.[[3]](#footnote-3) This record is presented as an improvement over the practices implemented between 2014 and 2016, when no such allegation was admissible for consideration by the formal justice system. Nevertheless, more than 75 percent of whistleblowers who seek protection from retaliation in their appeals to the Ethics Office remain without access to judicial relief. The restrictive application of the reform set out in SGB/2017/2 leaves the legal deficit largely un-remedied.[[4]](#footnote-4)

Moreover, as previously noted, one of the landmark cases dismissed as unreceivable by the UN Appeals Tribunal (UNAT) in 2015 *(Postica, Nguyen-Kropp vs. The Secretary General*) involves two investigators in the oversight division of the Secretariat: the Office of Internal Oversight Services (OIOS). The investigators had established in the lower level tribunal that, after reporting their supervisor for improper handling of a misconduct disclosure, they were subjected to a retaliatory investigation. The UN Dispute Tribunal validated their claim and awarded compensation. In other words, the facts of the case appealed by the Secretary General to the UNAT are undisputed –only the receivability of the complaint was contested.

In this case, the Secretary General availed himself of the exclusion of whistleblowers from access to the formal judicial system to annul a ruling that sought to eliminate the effects of retaliation, one of the provisions required for the Secretary of State to certify that the United Nations meets best-practice standards for protecting whistleblowers.[[5]](#footnote-5)

In dismissing the case, the UNAT not only left the whistleblowing investigators exposed to continuing retaliation, but also failed to remove a compromised supervisor from a position of authority over many other investigations. For the past two years, the US State Department has accepted this circumstance in the Secretariat’s oversight office, and approved it, despite the requirements of US law.

In recent years, serious abuse and accountability problems have surfaced in the Office of the High Commissioner for Human Rights (OHCHR), a division of the Secretariat. GAP represents two of three whistleblowers at the OHCHR, and represented the third until he departed the UN system under duress. Two of these whistleblowers reported child sexual abuse by peacekeepers in the Central African Republic (CAR), operating under UN Security Council mandate.

The case of the third whistleblower was so poorly handled by the OHCHR and the OIOS, and the nature of the misconduct he disclosed was so heinous, that the Secretary General faced serious and widespread public criticism. In failing to support the staff member who disclosed the sexual abuse of children in the CAR, he exposed the Organization to incalculable reputational damage. Ultimately he was obliged to convene a Panel of Independent Experts to review the case. The Panel vindicated the whistleblower, Anders Kompass.

The Panel also exposed the closed-door collaboration among the High Commissioner for Human Rights, the Executive Office of the Secretary General, the Under-Secretary for OIOS, and the Director of the Ethics Officer in retaliating against Kompass.[[6]](#footnote-6) The second whistleblower, Miranda Brown, reported to the US Government the child sexual abuse allegations and abuse of authority by the UN leadership. The same Director of the Ethics Office singled out for criticism by the Panel, determined Brown’s fate and denied her protection.

The exposure of this structural and practical lack of independence in the Ethics Office has not been addressed by the Secretariat in the years since it came to light. On the contrary, the Secretary General’s Chief of Staff resigned her UN post without reprimand to accept an appointment as Foreign Minister in her country of origin. From there, she campaigned for the post of Secretary General. The High Commissioner for Human Rights remains in place, and both the USG for OIOS and the Director of the UN Ethics Office retired as they had anticipated with full benefits, despite the criticisms of the Panel. In fact, the Ethics Office Director was granted a waiver of the mandatory retirement age, so that her pension contributions could vest, by the Secretary General’s Chief of Staff, Susana Malcorra. Malcorra’s definitive role in a decision affecting the financial future of the Ethics Office Director further demonstrates the lack of independence of the Ethics Office in relation to UN senior management.

The recently-adopted policy (SGB/2017/2) perpetuates the existing conflicted structure. The Ethics Office remains authorized to determine only whether, in its assessment, retaliation has occurred and to transmit a recommendation for resolution of such a dispute to the Secretary General. Despite, therefore, the lack of structural independence at the Ethics Office of the Secretariat, this office is the arbiter of retaliation complaints. Such a structure is not compliant with best-practice whistleblower protections, which require access for whistleblowers alleging retaliation to an independent decision-maker.

In short, cases adjudicated independently and exposed in the media have demonstrated the lack of professionalism and illicit cooperation in putatively independent United Nations oversight offices in 2014, 2015, and 2016, yet the Secretariat has taken no effective steps to rectify the situation. Nor has the US Secretary of State taken effective measures to implement US law in this regard.

Nor does the United Nations Secretariat or any United Nations agency provide access to external arbitration for whistleblowers. As acknowledged in correspondence from the Executive Office of the Secretary General to a GAP client, providing access to external arbitration would require a resolution of the UN General Assembly.[[7]](#footnote-7) Despite the fact that US law requires the Secretary of State to certify that organizations covered by the Consolidated Appropriations Act provide such access as a condition of full disbursement of the annual US contribution to each one, the Secretary of State’s report for the current year is silent on this point, as it has been in past years.

The report of the Secretary of State is clearly misleading as a response to Sec. 7048 (1) (B) (iv, v). Whistleblowers at the UN Secretariat lack access to:

* an independent adjudicative body,
* external arbitration, and
* results that eliminate the effects of retaliation.

Finally, GAP asserts that the report in question is capricious. As reported in previous comments, relevant US law does not require accounts of ethics training, mandates and outreach, yet the Secretary of State reports extensively on these activities. The report also tends of focus on reviews in progress and anticipated amendments to existing policies. The law, however, focuses on policies applied and practices implemented; it does not require future amendments to policies or anticipate additional reforms.

The circumstances at the Secretariat and the content of the Secretary of State’s report represent a clear failure to enforce the law. It has been 12 years since the UN Secretariat first adopted SGB/2005/21 and established the UN Ethics Office. The internal justice system was reformed in 2009 in compliance with the “Report of the Redesign Panel on the United Nations System of Administration of Justice” (A/61/205, referenced in GA Resolution 61/261). It is now seven months since the adoption of SGB/2017/2, and the working group studying the new policy has yet to present its draft amendments. The working process is not transparent, and civil society organizations such as GAP have been denied access to any account of the proceedings.

1. Response by the Government Accountability Project to the State Department’s Findings that the Internal Justice System of the United Nations Adequately Protects Whistleblowers, Thad Guyer, Esq. September, 2015. [↑](#footnote-ref-1)
2. It is, in fact, this specific limitation that exempts Ethics Office determinations from review by the UN formal judicial system. Because the determinations are only recommendations, they cannot be disputed in the justice system. [↑](#footnote-ref-2)
3. Although we cannot be sure which SGB was applied to which cases, as the referenced Ethics Office report covers only part of the current calendar year, we assume that the 6 cases referred for investigation could be reviewed by the UN judicial system because SGB/2017/2 abolished SGB/2005/21, making all cases recently decided subject only to the provisions in the new policy (SGB/2017/2). [↑](#footnote-ref-3)
4. For a full discussion of the role of the UN Tribunal system in adjudicating allegations of reprisal and the logic underlying its reform in 2009, see GAP‘s comments for 2015, referenced above. [↑](#footnote-ref-4)
5. www.whistleblower.org; “International Best Practices, retrieved August 28, 2017. [↑](#footnote-ref-5)
6. Taking Action on Sexual Exploitation and Abuse by Peacekeepers Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic. Marie Deschamps, Hassan B. Jallow, Yasmin Sooka. 17 December 2015. [↑](#footnote-ref-6)
7. On April 30, 2015, Patrick Carey, the Director of the Office of the Chef de Cabinet wrote to an attorney for Miranda Brown, a witness in a WIPO retaliation complaint (who has herself been subjected to retaliation) and in a whistleblower dispute at the OHCHR: “Since the System, as established by the General Assembly does not provide for recourse to arbitration for the resolution of claims of United Nations staff members, no legal basis exists for submitting your client’s claims for external arbitration…If the Secretary General were to accept your proposal for external arbitration, he would be acting *ultra vires* and in contravention of the legal framework established by the General Assembly.” [↑](#footnote-ref-7)