



GOVERNMENT  
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PROJECT

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March 23, 2023

The Honorable Dennis Byron  
Chairperson  
United Nations Internal Justice Council  
New York, NY 10017

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

Dear Judge Byron,

We hope this submission will help inform Internal Justice Council's (IJC) recommendations to the General Assembly (GA). We are grateful for your letter date February 20, 2023 inviting Government Accountability Project to submit our recommendations on how to improve the internal justice system at the United Nations (UN). As lawyers who represent UN whistleblowers, we have first-hand experience with how the internal justice system works in practice when there are work-related disputes between the Organization and its staff members. Over the years, Government Accountability Project's attorneys have represented various whistleblowers across UN agencies, programs, and funds.

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

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

We hope that the IJC will consider presenting our recommendations to the General Assembly for their awareness and consideration.

We also note that the IJC's 2022 report mentioned there is a review of the Secretary-General's bulletin on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations which is imminent, and the Council will defer specific recommendation on these points until pertinent stakeholders have had the opportunity to undertake

their consultations. We hope that Government Accountability Project will be consulted on the review of the Secretariat's whistleblower policy.

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

Sincerely,

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## RECOMMENDATIONS

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

#### 1. *CONSISTENCY AND CROSS APPEALS*

In its 2018 Review of whistle-blower policies and practices in United Nations system organizations (JIU/REP/2018/4), the UN's Joint Inspection Unit noted that at least 23 UN entities had produced stand-alone protection against retaliation policies. As a result, the report concluded: "Existing protection against retaliation policies are consequently marked by inconsistencies and limitations in operational effectiveness and tend to vary in terms of the scope of activities and personnel covered, mechanisms and channels for reporting and processes and procedures for mitigating retaliation and handling related claims. They also vary in terms of provisions for confidential and anonymous reporting misconduct and wrongdoing." Such inconsistencies can be confusing to whistleblowers considering making a disclosure and may act as a deterrent.

In addition, it is important that the internal justice system ensures that all staff rules apply equitably for all staff members and signatories of the oath of office, whether at the Secretariat or in Agencies, Funds and Programs, including Heads of Organizations. This will eliminate both double standards across the system and the possibility of individual governing bodies being unduly influenced at any stage by individual AFP heads who (a) may have a vested interest in not wishing to deal with a particular issue, (b) have previously suppressed or are currently suppressing incidences within their Organization, or (c) have been or are presently accused of harassment or retaliation themselves. It will also eliminate blatant cases of conflict of interest and abuse of authority. To illustrate, as one whistleblower reported, in order to avoid accountability for their actions, a USG-level Head of Organization who is paid a UN salary and a member of the UNJSPF persuaded their governing body that the staff rules and associate accountabilities do not apply to them as they are not a staff member. A scandal about one agency affects the whole UN and allowing-cross appeals at another AFP in the UN Common System would help address conflicts of interest and ensure that whistleblowers' concerns are responded to.

#### **Recommendation 1**

**In the absence of having a policy, the Secretariat's policy should apply. The General Assembly should make a recommendation to all Agencies, Funds, and Programs that their whistleblower policies and procedures comply with the Secretariat's policy as a minimum standard. The organizations should standardize their practices to avoid discrepancies and an appropriate oversight body within the UN Secretariat (possibly a new one if necessary) should be designated to oversee compliance with minimum standards and consistency. In the event of an omission or conflict between an agency**

**whistleblower policy and the Secretary's whistleblower policy for the UN Secretariat, the latter shall be controlling.**

### **Recommendation 2**

**The Chair of the Chief Executives Board for Coordination should look into standardizing and coordinating whistleblower protection policies and practices across the UN Common system.**

### **Recommendation 3**

**Whistleblowers should be allowed to appeal to the Ethics Office of any organization in the UN Common System if they feel there is a conflict of interest.**

## **2. *SCOPE OF PROTECTED CLASS***

Blocklisting and non-renewal of contracts are tactics used by retaliators with which they can easily cause damage and escape accountability. Government Accountability Project has evidence of defamatory and scurrilous accusations and characterizations of former employees who are whistleblowers. Unfortunately, there was no investigation, protection, or remedy for those whistleblowers, nor any consequences for the people who caused the reputational damage.

Forty-five percent of the UN workforce is categorized as non-staff, as they are contracted as consultants, contractors, interns, junior professional officers and volunteers and these are even more vulnerable to retaliation due to the threat of blacklisting and nonrenewal of contracts. Although they are somewhat included in sections 2.1 and 8 of the Secretary-General's Bulletin; this is inconsistent across the UN with less than half the UN protection against retaliation policies covering non-staff. The ICAO whistleblower policy, for instance, in section 55, only specifies that employees or contractors working for ICAO are protected from retaliation.

By extension, such risks also apply to Applicants and former employees, which is why these categories are covered in US whistleblower law as well as the EU Whistleblower Protection Directive.

In its present form, the UN Secretariat's whistleblower policy omits individuals who are not staff members. Non-staff may be able to report a UN staff member for retaliation/misconduct but they cannot seek remedies to make them whole for the effects of the harm. While disciplining those who commit misconduct may be used as a means to accomplish the goal of protecting employees, the protection of individuals who are subject to retaliation must be the paramount consideration in any whistleblower policy. The policy states: "Any retaliatory measures against a contractor or its employees, agents or representatives or any other individual engaged in any dealings with the UN because such person has reported misconduct by UN staff members will be considered misconduct that, if established, will lead to disciplinary or other appropriate action." Of note, the scope of

this provision is not included in all AFPs in the UN Common System. The scope of the policy should be expanded to provide remedies for non-employees who are harmed by retaliation. The policies should be consistent across the UN Common System, should include remedies for non-employees, and the scope should be expanded to protect any person who assists whistleblowers irrespective of their dealings with the UN.

#### **Recommendation 4**

**All UN Common System anti-retaliation protection policies should be extended to applicants, contractors, subcontractors, grantees, and subgrantees, and define what protection looks like outside of administrative measures because retaliation tactics include acts that are not administrative decisions but make the whistleblower's life impossible.**

#### **Recommendation 5**

**Amend the whistleblower policy to include enforceable protection from retaliation across UN Common System, not only from within the respective agency or fund.**

#### **Recommendation 6**

**UN Common System organizations should amend their whistleblower policies to include protection for those perceived as whistleblowers, those about to make a disclosure, third parties who are connected with the whistleblower such as colleagues and relatives and legal entities the whistleblower owns, works for, or is otherwise connected with, those who assist or are associated with whistleblowers, witnesses, and Applicants irrespective of their dealings with the UN.**

### **3. *REFUSAL TO OBEY ILLEGAL ORDERS:***

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

#### **Recommendation 7**

**The UN System whistleblower policies should be updated to protect covered persons from retaliation for refusing to cooperate with orders they reasonably believe violate any mandates from the General Assembly or Governing Bodies, or any institutional or national rule, law, regulation, or code.**

### **4. *ANTI-GAG PROTECTION:***

The use of gag orders prevents accountability and transparency. Whistleblowing needs to be encouraged, as it ensures that misconduct and corruption are disclosed, which is essential for good governance of any organization. The gag orders lead to the direct protection of wrongdoers. It also means that there is no direct accountability for those responsible for the misconduct. They are effectively allowed to escape. The World Bank's

whistleblower policy, as an example, implements this best practice of protecting the superseding right to blow the whistle. UN Common System organizations enforce non-disclosure agreements as part of settlements that, consequentially, allows individuals responsible for misconduct to be shielded by confidentiality and this issue poses a risk of continued violations that could cause new victims or reputational risks to the UN.

#### **Recommendation 8**

**The UN System whistleblower policies should be amended to ban any non-disclosure policy, form, or agreement or other "gag orders," whether written or spoken, that override their right to make disclosures that are protected under the policy. The UN Common System organizations should not be entitled to utilize non-disclosure agreements in disciplinary or ethical matters.**

#### **5. *PRIVACY:***

Section 3 of the UN whistleblower policy requires the Administration to protect the whistleblower's identity to the "maximum extent possible." However, when a whistleblower reports wrongdoing to OIOS and brings a retaliation concern to the Ethics Office, they in turn have to liaise with HR to keep the whistleblower out of harms-way and the finance division to review for illicit financial transactions. This means that when protection measures are applied to individuals, their identity may need to be revealed to certain individuals. The UN Tribunal also requires identity disclosure. So, the language "[m]aximum extent possible" needs to be much more clearly defined with safeguards to ensure sharing the identity of the whistleblower and any identifying information is limited to key persons with strong duties to maintain confidentiality. Further, given the fact that there is no provision of anonymous channels to whistleblower for reporting wrongdoing, training for those to whom the identity of whistleblower must be shared would for whistleblower minimize inadvertent exposure of identity. Also, the standards across AFPs are inconsistent in identity and confidentiality protections. The UN ICAO policy does not mention any protections for the identity of the whistleblower, including identifying information. A whistleblower can complain anonymously, but the only mention of protecting confidentiality is in the ICAO policy is in section 72. This section protects a whistleblower who claims to have been retaliated against from being identified in the Secretary-General's written decision that follows the completion of the Ethics Officer's retaliation investigation and recommendations. This written decision comes months after an internal or external investigation, leaving the whistleblower fully exposed to retaliation during the investigation.

#### **Recommendation 9**

**Establish the right to confidentiality and privacy and the right to anonymity in all UN AFP whistleblower policies. Consistent with global best practices, the policy should cover the whistleblower's identity and identifying information, require written consent for any discretionary releases of such information, and provide timely**



**advance warning for nondiscretionary releases. Additionally, training should be provided to minimize inadvertent exposure of identity or identifying information. The term “maximum extent possible” should be spelled out objectively.**

**6. *MOTIVES:***

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

In instances where the good faith test is used, courts such as in the UK tribunal systems consistently limited the meaning of “bad faith” to “knowingly false disclosures.” Importantly, the EU Whistleblower Protection Directive does not include references to “good faith,” “bad faith,” “malicious,” or “abusive,” and instead use the test of knowingly reporting false information. In Black’s Law Dictionary, there must be a showing of actual or constructive fraud or a design to mislead or deceive another. A bad faith disclosure can’t be an honest mistake but must instead have a sinister motive.

**Recommendation 10**

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

**Recommendation 11**

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

**Recommendation 12**

**"Bad faith," “abusive,” and “malicious,” should be removed from all whistleblower policies or be defined narrowly as "knowingly false disclosures." To prove bad faith, abusive or malicious reporting, there must be a showing of actual or constructive**

**fraud or a design to mislead or deceive another. A bad faith disclosure can't be an honest mistake, but rather there must be a sinister motive.**

**7. SCOPE OF PROHIBITED CONDUCT:**

The Secretary-General's anti-retaliation policy defines retaliation as "any direct or indirect action... taken for the purpose of punishing, intimidating, or injuring an individual because that individual engaged in a [protected] activity". The definition of retaliation has loopholes, as it does not cover both active and passive retaliation, whether direct or indirect, taken, attempted, threatened or tolerated. In addition, the emphasis on the purpose of the retaliator's actions "punishing, intimidating, or injuring" allows for excuse on the grounds that the action taken against the whistleblower had another purpose, such as addressing performance issues or restructuring needs.

**Recommendation 13**

**All UN Common System whistleblower policies should define retaliation as "*Any act or omission, which causes detriment because of whistleblowing.*" The scope of prohibited conduct should be broad enough to cover any active or passive retaliation, whether direct or indirect, taken, attempted, threatened, recommended, or tolerated; and retaliation outside of just the employment context such as cyberbullying, blocklisting, or stalking causing prejudice that could chill the exercise of the rights in this policy.**

**8. BURDEN OF PROOF:**

The evidence threshold that whistleblowers must meet to prove retaliation, or to merely have their retaliation complaint investigated, needs to be modernized. Most UN policies require that the Ethics Officer find – and thus that the whistleblower show – there is a *prima facie* case that reporting wrongdoing “was a contributing factor in causing the alleged retaliation or threat of retaliation” to refer a retaliation complaint for full investigation. This is not an objective standard. This threshold is difficult to meet, particularly without access to discovery, which partly explains why most retaliation complaints are not even referred for internal investigation (less than a quarter of the 278 retaliation complaints made to various UN agencies between 2012 and 2016). Under best practice and international standards, as illustrated by the EU Directive, such *prima facie* test in proceedings before a court or other authority is satisfied if the whistleblower engaged in protected activity, and a prejudicial action occurred. By comparison, it is difficult to justify the higher requirements set by the UN policies, only to trigger internal investigation. That standard should be codified in the UN policy.

Once the *prima facie* case is established, the UN policy does have a best practice burden of proof for the employer -- demonstrating by clear and convincing evidence that the same action would have occurred absent whistleblowing. Recently the European Union Directive's Recital provided further guidance for national laws on how to interpret the employer's reverse burden of proof. It states at Section 32 (para.71), that after the whistleblower has proven a *prima facie* case, the “burden of proof should shift to the person

who took the detrimental action, who should then demonstrate that the action was not linked in any way to the reporting or the public disclosure.” That clarification should be codified in the UN policy.

#### **Recommendation 14**

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

#### **9. ACCESS TO DUE PROCESS:**

As a prerequisite for due process, whistleblowers have to survive a gauntlet of multiple approvals by the Ethics Office and OIOS. Government Accountability Project's client Jim Wasserman's Kafkaesque road to nowhere illustrates how administrative relief is an obstacle to due process, rather than a remedy to exhaust (preliminary agencies can and routinely do veto due process access).

Even at the Tribunal Level whistleblowers are up against dysfunctional forums that are not independent, are biased against employees, and are hopelessly backlogged. What's more, some UN AFPs and specialized agencies do not have any independent, external due process mechanism available to them. The International Labor Organization Tribunals are more labor friendly than the UN Tribunals, however the ILO only has jurisdiction over a minority of AFPs in the UN Common System such as the UNWTO, the WHO, UNESCO, FAO, WFP, WTO, WIPO, and UNIDO. Complaints with the ILOAT can only be filed if the decision impugned is final and the person concerned has exhausted other means of redress open to them under the applicable Staff Regulations, or where the Administration fails to take a decision upon any claim of an official within 60 days from the notification of the claim to it, the person concerned may have recourse with the ILOAT.

There have and can be instances where a staff member requests an administrative action or decision and there's no response within a reasonable amount of time, which could be detrimental to someone who is seeking a benefit or entitlement, for instance.

Furthermore, there have been instances where a whistleblower won their case but the individuals who retaliated against them were promoted or retired with full benefits without any individual accountability.

#### **Recommendation 15**

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

**administrative remedies requirement, an employee's access to due process should not require administrative approval.**

#### **Recommendation 16**

**The General Assembly should recommend that UN AFPs in the Common System submit to the ILO's jurisdiction. Allow whistleblowers to appeal decisions of the UN Appeals Tribunal to the International Labor Organization Administrative Tribunal (ILOAT), an option which should also be applied to any UN AFPs and Specialized Agencies under the Tribunal's jurisdiction.**

#### **Recommendation 17**

**Adopt a rule and procedures for either a default decision in favor of the employee who request an administrative action or decision and do not receive a response within six months or allows them to challenge the nonresponse as a decision appealable to the UN Tribunal.**

#### **Recommendation 18**

**The UN Dispute and Appeals Tribunal rules should be amended to give priority to whistleblower cases over all other cases.**

#### **10. RELIEF:**

The Office of Staff Legal Assistance lacks the funds and capacity to handle the caseload, especially if more staff feel empowered to enforce their rights under a more functional system. Meanwhile, whistleblowers who wish to hire outside counsel to represent them have a difficult time getting legal help because attorneys cannot recover their fees if they prevail at the tribunal, thus contingency fee arrangements are seldom possible.

We are also concerned about management always opting to pay compensation in lieu of reinstatement, which can be addressed by amending article 9 (1) of the statute of the Appeals Tribunal. There is not one example of a person ever having been reintegrated into the UN, no matter the errors made by managers, or retaliation which have resulted in termination. The compensation of two years net based pay is entirely inadequate. The NAATO tribunal and the ILOAT can order reintegration, and they do. The UNAT's 2019 recommendation states "article 9 (a) of the statute of the Appeals Tribunal, as well as the relevant article of the statute of the Dispute Tribunal, should be amended to read as follows (amended text in bold): (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Appeals Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph. **The selection of the in-lieu compensation by the respondent shall be reasoned and allowed only in exceptional circumstances subject to an appeal and review by the Appeals Tribunal.**" Any temporal salary compensation

does not come close to neutralizing the loss of one's career and going home in disgrace. The whistleblower should be able to have their choice of reinstatement considered.

The 2019, IJC recommended that article 10 (5) (a) of the statute of the Tribunal be modified to read as follows: "Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered. The election available to the respondent to pay compensation shall be subject to prior review and approval by the Tribunal, which shall undertake to ensure that exercise of the election is both reasoned and reasonable under the totality of the circumstances existing at the time of judgment."

The 2022 IJC report mentions that the IJC "intends to approach the following additional matters in the months ahead: (b) carrying out further consultations with the broadest possible range of stakeholders in order to report to the General Assembly on how the widespread choice of compensation over reinstatement may affect the jurisdiction of the Tribunal and the achievement of the main goals of the system of administration of justice, including accountability...." We would like to note here that while we are not aware of the result of this particular consultation and subsequent report to the General Assembly, it is important that UN whistleblowers and the NGOs and attorneys who support them, are included in consultations on the impact of the system of administration of justice and accountability and Government Accountability Project and our network of lawyers, advocates and whistleblowers remain at your disposal for this and any future consultations.

The lack of reinstatement also affects settlements. The UN has a respected mediation program which the UN legal office and agencies almost never want to use, since they view two years of pay as the worst-case scenario remedy for ruining someone's career. As with any wrongful termination case, the employer will be far more reasonable in settlement talks if they fear reinstatement. In fact, we have only participated in one mediation program because every other time the legal office or agency said it would not be helpful. It is because they do not fear reinstatement. As stated in the IJC's 2022 report, "Mediation services are on a course to the bottom at a moment when the international community aims to increase the use of mediation to promote judicial efficiency, solve conflicts and reduce the human and financial costs attached to unresolved conflicts and litigation." (ICR Report 2022, para. 28.)

### **Recommendation 19**

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

### **Recommendation 20**

**We second the IJC's 2022 report recommendation that special attention be given to a 12-month pilot project to test the main goal of judicial mediation, which is to avoid unnecessary litigation and reduce costs. Additionally, we recommend that all Tribunal Applicants be given the opportunity to attend compulsory mediation.**

#### **11. INTERIM RELIEF**

The procedures for seeking interim relief/suspension of action are flawed. Arts. 2.2 and 10.2 of the Statute of the UN Dispute Tribunal govern applications for suspension of action pending management evaluation, and suspensions of action at any time during the proceeding. The process is too complicated. The Tribunal can only hear and pass judgement on an application for suspension of action that is pending a management evaluation. Article 10.2 has an additional limitation, the Tribunal can't suspend the implementation in cases of appointments, promotions, or termination. Suspensions of action are especially needed for instances of termination which makes this right's existence false advertising. Such standards eliminate nearly all applicants who would seek interim relief/suspension of action. It is hardly a surprise that nearly all applications for suspension of action fail. Applicants cannot meet the burden to provide sufficient evidence to substantiate their *prima facie* allegations against their employer at this stage as there is not access to discovery at this time. Furthermore, Staff, and the Tribunal, have struggled in dealing with requests for suspension of action when the proposed suspension of action is short. In *Kitagawa v. Secretary-General of the United Nations* Kitagawa only had 24 hours-notice of the decision. The requirement that the decision be pending to access interim relief must be abandoned. This places an unfair burden on both staff and the Tribunal. Applicants also fail to get suspensions of action because the MEU issues a decision before the UN Tribunal makes their decision. This creates a decision-roulette and applicants should not have to gamble their fate when requesting relief. It is a waste of everyone's time. Furthermore, most employees who sought interim relief at the Tribunal were self-represented. It is imperative that the UN provide legal advice and assistance, financial resources to hire attorneys if necessary (as attorneys in the current rules cannot get their legal fees recovered if they prevail) and other assistance like psychological counseling would be beneficial as well.

##### **Recommendation 21.1**

**The burden of proof for suspension of action requests should be changed to requiring the applicant to prove a substantial likelihood of a *prima facie* case by preponderance of the evidence that they made a report or disclosure in line with the whistleblower policy and suffered a detriment.**

##### **Recommendation 21.2**

**Additionally, the rules should be amended to remove the requirement that the applicant file a Management Evaluation before seeking relief from the Tribunal.**

##### **Recommendation 21.3**

**Applicants should be allowed discovery rights and Judges should be provided guidance that a party's failure to comply with discovery may result in sanction and Judges may also draw adverse inferences if a party does not produce evidence.**

#### **Recommendation 21.4**

**Finally, the rules should be amended to allow applicants to request interim relief for any adverse actions taken, any other detriment or potential harm or threat (such as the need to preserve or test evidence before it is destroyed or dispersed), as well as adverse actions proposed.**

#### **12. ESSENTIAL SUPPORT SERVICES FOR RIGHTS:**

Training for judges, managers, and employees is important to make sure that everyone understands their rights (as noted in the ICJ's 2022 report, only 55.7% of respondents were familiar with the whistleblowing policy), the procedures available, and how to create a positive tone at the top to address the culture of retaliation and fear of reprisal within the UN common system. Without regular training, rights will be misunderstood, procedural losses will continue, and ethical employees will continue to be purged from the UN while management can continue the status quo of not fearing consequences if they retaliate against employees.

#### **Recommendation 22**

**The whistleblower policy should be amended to reflect the requirement that the rights under the policy should be posted prominently in workplaces, both physically and electronically, using a wide range of media channels, and that regular trainings should be provided for employees, managers, and judges. (See also recommendation #30 re: training for Ethics Offices and OIOS personnel) We also support and reference the IJC's 2022 report paras. 24-27 and Recommendation #4.**

#### **13. FORMALIZED REVIEW PROCESS:**

#### **Recommendation 23**

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

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

#### **(a) TRANSPARENCY:**

*14. PUBLISH ALL JUDGEMENTS AND ORDERS:*

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

**Recommendation 24**

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

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

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

**Recommendation 25**

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

(b) PROCEDURES FOR CHALLENGING NEW RETALIATORY ACTIONS

*16. RETALIATION AFTER CONCLUDED CASES:*

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

**Recommendation 26**

**The rules should be amended to allow whistleblowers to challenge new instances of retaliation that they believe occurred because of their protected speech without requiring the factfinder to make a new finding concerning the merits of the proven protected activity. Judgements that find in favor of the applicants/whistleblowers**



**should include a prohibition on repetitive actions of retaliation, such that a new violation would be an extension of the prior case.**

*17. RETALIATION DURING OPEN CASES:*

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

**Recommendation 27**

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

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

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

**Recommendation 28**

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

*19. STAFF ASSOCIATION STANDING:*

Currently, cases filed by representatives of staff associations are treated as filings by those named representatives rather than the entities those representatives serve. As staff representatives are subject to elections and re-elections, new representatives may be disqualified to represent the case if they have not been named throughout the entire process.

As some cases have taken years to resolve, it is possible that the entire case may be invalidated if all the representatives have been changed.

### **Recommendation 29**

**Per the IJC's 2019 Recommendation No. 72, which says “*Reaffirming previous recommendations of the Council, staff associations should be granted standing to intervene in cases of systemic importance to staff. In appropriate cases, these associations should be permitted to apply in their own right to seek redress for interference with the right of association of their members*” (emphasis added) Government Accountability Project recommends that "in their own right" be redefined to mean that appeals filed by staff representatives are recognized as cases filed by the associations, irrespective of who represents those associations over time.**

#### **20. IMPROVE HANDLING OF RETALIATION COMPLAINTS AND COMMUNICATION:**

UN whistleblowers are frustrated with the Ethics Office, OIOS and communication breakdowns; and lack of enforcement of the existing policies is at the crux of the systemic problem. To improve the handling of retaliation complaints, the Joint Inspection Unit recommended in its 2018 Review of whistle-blower policies and practices in United Nations system organizations (JIU/REP/2018/4) the development of standard operating procedures, with specific checklists and protocols for investigation, support services and communication. Coupled with mandatory training conducted by qualified trainers on whistleblower rights and how to improve communication and working relationships with whistleblowers, the performance of these offices and trust from whistleblower and UN personnel more generally may improve.

### **Recommendation 30**

**The UN should require the Ethics Office and OIOS to adopt standard operating procedures and mandatory training of their staff on whistleblower rights and how to improve communication and working relationships with whistleblowers.**

#### **(c) REFORM THE OFFICE OF INTERNAL OVERSIGHT SERVICES (OIOS)**

#### **21. EQUAL ACCESS TO PROCEDURES ACROSS UN AFPs:**

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

### **Recommendation 31**

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

## 22. *INDEPENDENCE:*

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

### **Recommendation 32**

**OIOS should be restructured to ensure that their funding levels, postings, and promotions cannot be influenced by anyone they have the authority to investigate. They should have earmarked funding in a budget that is independent of discretionary cuts by potential targets of their investigations.**

## 23. *TIMEBOUND INVESTIGATIONS:*

In addition to lengthy delays in UNAT and UNDT cases, significant delays can often occur within the organization before an appeal can be filed. Since an appeal cannot be filed before a management decision has been made, such internal delays are sometimes used as intentional tactics to deny the victims justice. For example, an investigation of a retaliation complaint may take more than a year to complete, and the organization may take another year or more to decide on the conclusion of the investigation and its recommendation. Meanwhile, the victim may continue to suffer ongoing retaliation without the possibility of filing an appeal.

### **Recommendation 33**

**Investigations of retaliation complaints should be time bound to 90 days for investigation and 30 days for management decision after the investigation. Although extensions may be necessary to complete an investigation, after 180 days the complainant should have the right to kickout their case to the tribunal for *de novo* review (see Recommendation #15).**

## 24. *BANNING RETALIATORY INVESTIGATIONS:*

Almost routinely, whistleblowers have been subjected to retaliatory investigations against them after they make a disclosure, which misdirects the energies of investigative agencies from investigating serious corruption to investigating the messenger, which is a waste of time and resources of these investigative/accountability agencies. This process starts the hunt to find a so-called “legitimate independent justification” to terminate the whistleblower to deflect from and delegitimize their legitimate complaints. This has a chilling effect that deters people from choosing to making disclosures.

#### **Recommendation 34**

**Opening a retaliatory investigation should trigger a whistleblower's appeal rights and they should be able to file a complaint that their rights were violated in retaliation for whistleblowing and should not need to wait until an administrative action is taken or proposed against them to file such a complaint. Furthermore, the whistleblower should be allowed to file a request for injunctive relief with the Tribunal, and the Tribunal's rules should be amended to allow them to grant such injunctive relief that suspends such investigative inquiries while the whistleblower's complaint is being reviewed by the appropriate authority.**

#### **25. CONFLICTS OF INTEREST:**

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

#### **Recommendation 35**

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

#### **26. INTEGRITY OF INVESTIGATION PROCEDURES:**

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

#### **Recommendation 36**

**OIOS should be directed to create a system to ensure that all witnesses for victims are invited and permitted to testify.**

#### **27. PROTECTION OF RECORDS:**

After testimony is given, every person who testifies receives either a recorded copy of the interview or a written transcript. Government Accountability Project has received a confidential disclosure that, in at least one instance, OIOS changed and deleted significant parts of the recording. Furthermore, the transcripts are written and can be edited by OIOS.

This process should be amended to deny OIOS any direct contact with any transcripts or recordings in an editable state.

#### **Recommendation 37**

**The procedures for handling OIOS's witness transcripts and records should be amended to ensure that they are not tampered with. Those who testify must have the opportunity to review the draft record for accuracy and correct any errors. Certified reporters and recorders who are independent of OIOS should record and transcribe interviews and handle the transcription and audio files directly as well as subsequent distribution to the parties to ensure that they are unaltered.**

#### **28. INDEPENDENT REVIEW:**

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

#### **Recommendation 38**

**OIOS's decisions should be audited by an independent and external evaluator who will identify issues and recommend reforms to address any issues of bias that interfere with the fair and correct implementation of the rules meant to protect staff from retaliation. OIOS's detailed track record should be reported to the General Assembly on an annual basis.**

#### **(d) REFORM THE ETHICS OFFICE**

#### **29. INDEPENDENCE:**

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

#### **Recommendation 39**

**The Ethics Office should be restructured to be independent and free from the Secretary General or Executive Agency Heads. This should include freeing their financial resources, posts, promotions, performance evaluations, and contract**

**renewals. The Ethics Offices should only report directly to the GA who shall control their budget and have the authority to decide on any disciplinary actions proposed against Ethics Officers, including removal.**

**30. *CONFLICT-FREE INTERIM PROTECTION PROCEDURES:***

Presently, the procedure for interim protective measures is inherently conflicted. As a result, managers named in complaints have also been responsible for coordinating the temporary placement of the person who had a pending case against them. This discretion has been abused as a tool for further retaliation. Once the Ethics Office establishes a prima facie case, they recommend interim protective measures to the SG, which includes the option for the staff member to move to another department to work while remaining in his or her post until the investigation and formal finding is established. The focal point for protection against whistleblower retaliation sits with the USG DM. The Ethics Office only has the role of establishing whether or not retaliation has occurred and making recommendations to the SG accordingly. When the prima-facie case is established, the placement and protection of the whistleblower rests with the UN Administration – not the Ethics Office. This procedure has caused issues whereby the whistleblowers were placed in temporary jobs that the retaliator had influence over and where abuse and harassment of the whistleblower continued.

**Recommendation 40**

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

**31. *CONFLICT-FREE REFERRALS FOR INVESTIGATION:***

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

**Recommendation 41**

**The Ethics Office should be directed not to refer cases to OIOS when there is a conflict of interest with the OIOS. The Secretary General's Bulletin should also be amended to allow complainants to have an enforceable right to challenge investigations they believe to be conducted by an investigator or agency that has a conflict of interest. The complaint may be filed with the appropriate authority or authorities with jurisdiction to receive them. Complainants should be allowed to file a complaint with the Tribunal to appeal adverse decisions on conflicts of interest and should be allowed to seek an injunction from the Tribunal if an investigation proceeds with a conflict of interest present.**

32. *TRANSPARENCY:*

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

**Recommendation 42**

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

33. *INDEPENDENT REVIEW:*

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

**Recommendation 43**

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

(e) ELIMINATE THE MANAGEMENT EVALUATION UNIT (MEU)

**34. SIMPLIFIED PROCESS FOR COMPLAINTS:**

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

**Recommendation 44**

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

**(f) JUDICIAL REFORMS**

**35. TRIBUNAL INDEPENDENCE:**

Whistleblower Emma Reilly was working as a human rights officer at the Human Rights Council in 2013 when she discovered a senior staff member, Eric Tistounet, gave the Chinese government the names of Chinese human rights defenders planning to attend a session of the Council in Geneva, thus placing the human rights defenders in great danger. She was retaliated against and harassed after making disclosures, and seven years later, she is still waiting for justice. Ms. Reilly's case amply demonstrates the inherent conflict of interest in the current structures. Ms. Reilly complained that the Principal Registrar and Executive Director of the Office of Administration of Justice (OAJ) had engineered the removal of the judge who heard her case, inter alia by misleading the GA. This not only cost the organizations hundreds of thousands of dollars in lost time, but it also delayed justice being done. OIOS declined to investigate, for reasons unknown. Ms. Reilly's lawyer, from OSLA, could not assist in her request for recusal of the judge because of a conflict of interest. One of the alleged wrongdoers is the Second Reporting Officer of every OSLA lawyer. The Registrar (whose First Reporting Officer and Second Reporting Officer are the subjects of Ms. Reilly's complaint) then unilaterally decided that Ms. Reilly was prohibited from filing a motion for correction of the judge's order or from appealing said order. Ms. Reilly has no means of appealing this unilateral decision of the Registrar or reporting his clear conflict of interest.

Furthermore, the independence of the UNDT and UNAT are compromised by the OAJ maintaining its office within the Chambers of the Judges in New York. Not only are the optics wrong, the risk of intermeddling by the Executive Director (ED) and the Principal Registrar (PR) are very great. OAJ, being the supervisor of OSLA, also presents a further conflict. The UN Tribunal system is the only system where the administration of the system



is found to lack the separation from the actual tribunals. They administer the staff of the Tribunals, not the Tribunals themselves. The regulations of the UN provide for OAJ to be independent, but the ED and PR have an internal reporting line. They are not independent. There is even an MOU between the ED and the SG, which should not exist if independence was a matter of fact and not a paper fiction. The continued refusal of the ED to relocate is a matter which needs to be addressed directly by the General Assembly.

The staff of the UNDT and the UNAT should report to their registrars, with the second reporting officer being a judge. This way the independence of the staff is guaranteed, and they are protected from the influence of the administration.

The assignment of Tribunal Judges involves discussions between the President and the Principal Registrar (PR). The PR should not be included in such decisions because they act for the respondents.

Furthermore, there should be no interference from any Administrator in respect to the assignment of a case to the Judge. It is important that the Tribunal is above suspicion of interference from anyone. The assignment of a case must be left up to judges.

#### **Recommendation 45**

**Staff supporting the Tribunals should report directly to the registrars, with the second reporting officer being a judge, and they should not report to the Administration itself because the Administration is a party to every case.**

#### **Recommendation 46**

**OSLA should be an entirely separate office. Furthermore, the General Assembly should address the Executive Director's refusal to relocate the OAJ.**

#### **Recommendation 47**

**The Principal Registrar should be prohibited from any discussions or decision-making concerning the assignment of Tribunal Judges.**

#### **Recommendation 48**

**The assignment of a case must be left up to Judges to decide. Administrators should be expressly prohibited from any interference or involvement in deciding the assignment of a case to a Judge.**

### ***36. EXPAND THE JURISDICTION OF THE UN TRIBUNALS IN AID OF PROPER ADMINISTRATION OF THE UN***

Consultants and other non-staff/third parties have no standing at the UN Tribunal because they are not staff.

#### **Recommendation 49**

**The Statute should be amended so that any person with involvement as a consultant or providing services to the UN has the right to protection and has standing to go to the UN Tribunals under the Secretary General's Bulletin.**

**Additionally, auditors at the UN Board of Auditors should have standing to go directly to the Tribunal for an injunction ordering the production of any records withheld, requesting a penalty against anyone who destroyed or tampered with evidence/records, an injunction for non-compliance with orders to produce records, or an injunction to preserve evidence that is suspected will be destroyed or otherwise made unavailable to the auditor.**

*37. CONSEQUENCES FOR FAILURE TO SANCTION VIOLATIONS:*

True accountability should involve those responsible for the misconduct being fully dealt with. They should not be able to resign to avoid accountability. Further, there is no effective sanction for offending staff members. There should be. The only effective sanction available would be to cancel or limit pensions. It is also noted that the UN does not appear to refer matters to local courts to be dealt with in a proper criminal manner. An example of the complete failure of the UN systems is the oil for food scandal. The perpetrator simply resigned, with no consequences. When parties violate their obligations under the code of conduct, there are instances where no action was taken by the judge against the offending party or parties. In whistleblower cases, the Respondent invariably refuses to provide any and all information required, so the applicants stand little to no chance of prevailing due to, in part, difficulty obtaining evidence needed to prove their case. In national tribunals, withholding evidence and perjury or deliberately misleading the Tribunal are serious offences which result in automatic consequences. At the UN, there are no consequences for either officials or lawyers who are acting for the Administration, and so these practices are almost systematically used. This constitutes an abuse of power, and the resulting imbalance deprives staff of obtaining any hope of genuine due process and justice.

**Recommendation 50**

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

*38. PREVENT ABUSES OF JUDICIAL DISCRETION:*

Judges have discretion to deny Applicants' requests for an in-person hearing. Tribunal Judges have been routinely denying these requests and thus have abused their discretion. Decisions on paper can be less favorable for Applicants. Tribunals should make every effort to ensure that Applicants get appropriate due process procedures. The norm in all Tribunal cases must be the hearing of a case utilizing an inquisitorial system that is led by a Judge. The only exceptions should be where the parties and the judges otherwise agree.

The rules should also be amended to provide that the tribunals are inquisitorial in nature. The right to be heard, is not the right to make a written submission. The hearing of appeals allows for the parties to interact with the Tribunal, to put their case, to respond to the questions of the members of UNAT. An appeal is not an academic exercise, it is a right to be fully exercised. The current system where effectively no hearing has ever been held on an appeal is entirely unsatisfactory.

#### **Recommendation 51**

**Absent exceptional circumstances whereby all parties and the Judges otherwise agree to a decision on the written submissions, the rules should be amended to direct Tribunal Judges to have in-person, inquisitorial, due process hearing led by a Judge.**

#### **39. DISCOVERY SHOULD BE ENSHRINED IN THE SYSTEM**

Discovery rarely happens and when it does it is inadequate. Discovery is only successful when Judges intervene and demand the production of documents. There is no process for compelling the production of records. If a party refuses to produce documents requested by investigative offices, that merely amounts to a disciplinary offense after a separate investigation into it is conducted. Punishments in reality have been pitiful. In one instance someone was merely required to attend a three-day course on anticorruption.

Pre-application discovery is unavailable, which makes it difficult for whistleblowers to support their complaints with sufficient evidence. The balance of power is unequal, with the respondent having all of the evidence, and the ability to escape by saying records are confidential. However, staff and their lawyers are subject to confidentiality rules that already provide consequences for violating confidentiality. For instance, a lawyer can be penalized or even disbarred by their Bar Association for violating confidentiality so the excuse of confidentiality should not be a shield respondents are permitted to hide behind. It is only fair for everyone if the respondents have to respond to everything alleged and applicants need to know what has been going on. There is too much information not disclosed that Tribunal Judges discover when they make inquiries, and the entire burden should not be placed on the Judges. It is a standard part of fair trial rights that complainants have access to documentation that may prove their case. To make an allegation without proof is a waste of the Tribunal's time, the applicant's time, and the respondent's time, and it does not do justice between the parties.

#### **Recommendation 52**

**The Tribunal Rules should be amended to allow pre-action discovery so that while an application is underway the parties can exchange evidence to ensure that the parties have mutual knowledge and access to *all relevant facts* that are essential to the proceedings and until such time as discovery is made, the clock should stop tolling in respect to the statute of limitations on filing the complaint. Respondents should be required to produce confidential, non-privileged (attorney-client) records and applicants, attorneys, and respondents should be informed that any unlawful disclosure of the records is misconduct and may result in sanctions. Discovery should**

also be made available for request for interim relief/suspensions of action/injunctive relief.

#### **Recommendation 53**

**The Tribunal rules should be amended to allow Judges to compel discovery and the General Assembly should ensure the penalties for non-compliance are appropriate to deter such non-compliance, such as an automatic judgement against the uncompliant party.**

#### *40. AD LITEM JUDGE REMOVALS:*

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

#### **Recommendation 54**

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

### **(g) APPEALS REFORMS**

#### *41. EQUAL ACCESS TO PROCEDURES:*

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

#### **Recommendation 55**

**Appeals procedures should be unified across the UN Common System**

#### *42. APPEALS JURISDICTION BEYOND ADMINISTRATIVE DECISIONS:*

The UNAT extended its denial of jurisdiction over whistleblower protection in *Wasserstrom* (Aug. 2014) to once again overrule the UNDT in *Postica-Kropp*. In *Wasserstrom*, the UNAT ruled that the Ethics Office that is supposed to protect whistleblowers is limited to

making recommendations to the administration, and that Ethics Office actions are not “administrative decisions” subject to judicial review since those acts do not have any “direct legal consequences” on the staff member. *Wasserstrom* was then used to extend non-jurisdiction over an investigation suffered by OIOS investigators in *Postica-Kropp* that had harassment, intimidation, and retaliatory investigations. By limiting appeals to administrative decisions, the Secretariat prevents staff members from appealing when no formal administrative decision has been issued, but terms and conditions of employment have been violated or altered de facto. Employees must be able to appeal all forms of non-compliance and disciplinary measures, whether formally or informally imposed.

#### **Recommendation 56**

**Amend the whistleblower policy to overrule the narrow judicial precedence denying receivability over retaliation that does not meet the narrow definition of “administrative decision,” and extend protection more broadly to cover “intangible” adverse actions (any action that would dissuade a reasonable worker from raising a concern about a possible violation or engaging in other related protected activity. Adverse actions go beyond ultimate employment decisions like hiring, firing, and compensation decisions. Examples include “outing” a whistleblower by disclosing their identity, an undesirable reassignment, or taking steps that are obviously leading to ultimate adverse decisions) and retaliatory investigations. Consistent with global best practices, the standard must be any active or passive prejudicial action that chills the exercise of rights included in the policy.**

#### **43. INDEPENDENT ETHICS OFFICE APPEALS:**

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

#### **Recommendation 57**

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

#### **(h) ENFORCEMENT OF RETALIATION FINDINGS**

#### 44. NEUTRAL DECISION-MAKING AUTHORITY FOR ACCOUNTABILITY

##### RECOMMENDATIONS:

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

##### **Recommendation 58**

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

#### 45. STANDARDIZE PERSONAL ACCOUNTABILITY:

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

##### **Recommendation 59**

**The UN should establish a committee of external and independent Human Resources professionals to create a set of recommendations, later to be adopted into the UN's code, for personal accountability for rule violations, including for violating confidentiality by disclosing the identity or identifying information of a confidential whistleblower without their consent. Rules should provide adequate consequences for retaliating against a whistleblower that will have a deterrent effect. For example: "A finding by the Ethics Office, OIOS, an Administrative Law Judge, or UN tribunal that this policy has been violated shall result in a proposed two-day suspension for a first offense, and proposed termination for a second offense" (This mirrors the US Kirkpatrick Act). Serious violations should consider immediate removal from employment, disallowing voluntary retirement, and denial of retirement and pension benefits. For retaliators who have already retired or left their position, *ex post facto***

**sanctions, if available, should be applied, including exclusion from future employment or contracts with the UN.**

**IV. PROTECT THE REPUTATION OF THE UN BY ENSURING AUDITS COMPLY WITH INTERNATIONAL STANDARDS**

**46. *QUALIFIED AUDITORS AND COMPLIANCE WITH INTERNATIONAL STANDARDS***

The UN's most important external oversight mechanism has structural flaws that make a mockery of its audits. The UN General Assembly established the UN Board of Auditors (the Board) to conduct external audits of the efficiency of the financial procedures, accounting systems, financial controls, and the administration and management of UN Agencies, Funds and Programs. Therefore, the Board is one of the most important instruments of transparency and accountability at the UN. Protecting the funds of the UN protects the reputation of the UN and such financial governance, accountability, and general governance matters should be a primary interest of the member states. When things go very wrong with one agency it affects the reputation of the whole UN common system because the UN will lose international support if an audit is not done properly, and problems are not detected and reported on time to address the issues before they become a scandal. The Board is comprised of three Member States' Auditors General who directly hire independent contractors to conduct the audits. These contractors are not required to be certified accountants or fraud examiners. Unfortunately, the Board has been conducting substandard audits, which jeopardizes the financial accountability of the UN. Board audits are not compliant with international standards on accounting, and there have been instances where UN employees have attempted to suppress the information in audit reports, further compromising the integrity of the independence and accuracy of the audit's findings. There have also been issues of non-cooperation with auditors by way of withholding records.

The International Auditing and Assurance Standards Board (IAASB) sets high-quality international standards for auditing, assurance, and quality management that strengthen public confidence in the global profession. It is important that the UN Board of Auditors integrates and complies with s IAASB's standards for audit and assurance, professional ethics, financial reporting, and professional skills and competencies.

Similarly, the International Ethics Standards Board for Accountants (IESBA) sets high-quality, internationally appropriate ethics standards for professional accountants, including auditor independence requirements. IESBA's International Code of Ethics for Professional Accountants sets out fundamental principles of ethics for professional accountants, reflecting the profession's recognition of its public interest responsibility, and it provides a conceptual framework to identify, evaluate, and address threats to compliance with the Code's principles and to independence. The IESBA Handbook of the International Code of Ethics for Professional Accountants (including International Independence Standards), Section 120 sets forth a framework of professional values, ethics, and attitudes that could be adopted by the Board. According to the IESBA

Handbook “The circumstances in which professional accountants operate might create threats to compliance with the fundamental principles. Section 120 sets out requirements and application material, including a conceptual framework, to assist accountants in complying with the fundamental principles and meeting their responsibility to act in the public interest. Such requirements and application material accommodate the wide range of facts and circumstances, including the various professional activities, interests and relationships, that create threats to compliance with the fundamental principles. In addition, they deter accountants from concluding that a situation is permitted solely because that situation is not specifically prohibited by the Code.”

Furthermore, The International Federation of Accountants (IFAC) established the International Education Standard for Professional Accountants “Competence Requirements for Audit Professionals,” which apply irrespective of their area of work (management accounting, financial reporting or audit) or sector (public practice, corporate, or public).

#### **Recommendation 60**

**The General Assembly should change the rules to require the auditors selected by the UN Board of Auditors to be certified by a reputable national or international professional association for accountants, that they possess a letter of good standing from the institution, and meet the minimum qualifications set forth by the International Education Standard for Professional Accountants’ qualification requirements for audit professionals. Member states that do not comply with this rule should be removed from the Board.**

#### **Recommendation 61.1**

**The General Assembly should direct the Board to integrate into auditors’ contracts language guaranteeing their compliance with the most recent edition of the IESBA Handbook of the International Code of Ethics for Professional Accountants (including International Independence Standards), and Section 120, which provides a framework of professional values, ethics, and attitudes, should be inserted or incorporated by reference into the contracts.**

#### **Recommendation 61.2**

**Additionally, contracts should contain language that specifies the available reporting channels at the UN and the member state should any breach of conduct, ethics violation, interference, obstruction, retaliation, or other misconduct occur.**

#### **Recommendation 61.3**

**Furthermore, the contracts should give the auditors the right to be protected from retaliation for reporting any breach of conduct, ethics violation, interference, obstruction, or other misconduct.**



**Recommendation 61.4**

**Finally, the contracts should also specify that the auditors must behave in accordance with the UN's Code of Conduct although they are not staff members.**

**Recommendation 62**

**The General Assembly should direct the Board to integrate and adopt the standards of the international standard-setting boards including the International Auditing and Assurance Standards Board, the International Accounting Education Standards Board, the International Ethics Standards Board for Accountants, and the International Public Sector Accounting Standards Board, and their high-quality international standards.**