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WHISTLEBLOWER PROTECTION IN THE UNITED NATIONS

Master thesis

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Table of Contents

ABBREVIATIONS

ACC - Administrative Committee on Coordination

DPRK - Democratic People's Republic of Korea

EO - Ethics Office of the United Nation (of the Secretariat)

FAO - Food and Agriculture Organization of the United Nations

ICAO - International Civil Aviation Organization

IGO - Inspector General's Office

ICSAB - International Civil Service Advisory Board

ICSC - International Civil Service Commission

JAB - Joint Appeals Board

JIU - Joint Investigation Unit

UN-United Nations

UNDT - United Nations Dispute Tribunal

UNAT - United Nations Appeals Tribunal

UNOPS - United Nations Office of Project services

UNICEF – United Nations Children's Rights and Emergency Relief Organization

UNFPA- United Nations United Nations Population Fund

UNDP- United Nations Development Program

WPP- Whistleblower protection policy

INTRODUCTION

Main issues

At the UN summit of 2005 one of the issues discussed was to proceed forward with the overall Secretariat and management reform initiatives, which were to be anchored in a culture of ethics, transparency and accountability.[1] Many important improvements have been accomplished since 2005: A new Ethics policy has been established, a dedicated body-the Ethics office (EO) has been created in the Secretariat and a strife for harmonization of ethical standards is underway. Also, a much needed reform of the justice system took place in 2009 with the creation of the Dispute and Appeals tribunals, which replaced the old and ailing justice system with hopes of improving dispute resolution. A vital and integral part of the UN Ethics policy is the protection of staff members against retaliation for reporting misconduct, or as it is increasingly more often referred to - protection of whistleblowers. Many people in the UN faced retaliation for daring to "blow the whistle" after witnessing unlawful behaviour- have been fired from their jobs or their conditions have been significantly reduced and in some cases, even humiliated.[2] Although whistleblower protection before 2005 was not unheard of a system wide and concentrated effort was lacking to ensure prompt and effective help for staff members who faced retaliation for daring to shed light on misconduct.[3] Valuable improvements have already been accomplished, however the harmonized system of integrity still leaves a lot be desired as separately administered funds and programmes are not within the jurisdiction of the EO of the Secretariat. Moreover, the EO, even being the main body that implements the whistleblower protection policy, is immune to scrutiny of the UNDT, which prevent the staff members from challenging their decisions. In addition, the EO cannot boast with an assuring track record, as over 99% of the reports that have ever reached the EO have been dismissed or retaliation has not been found. Problems also abound the UN justice system. For a whistleblower to go through the grievances mechanism may take years, is expensive, resulting in meagre compensations because of the caps on compensation

[1]United Nations, General Assembly, *Implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General; Ethics office; comprehensive review of governance arrangements, including an independent external evaluation of the auditing and oversight system; and the independent audit advisory committee: report of the Secretary-General*, U.N.DOC A/60/568 (28 November 2005), para.1

[2]*Wassertrom v. Secretary General of the United Nations,* Judgment No. UNDT/2012/092, para. 25 and 48. The applicant reported about being subjected to unlawful treatment: his passport was taken away by UNMIK officers, he was escorted to his apartment under armed escort, his car and his home were searched without a proper warrant, his UN ground pass was taken away and office at the UN was cordoned off with crime scene tape. Wanted posters with his name were put up at different places at the UNMIK facilities. The UNDT concluded, that:" [...] the United Nations could not, and would not, have countenanced or condoned such humiliating and degrading treatment of a member of its own staff."

[3] The OIOS had a mandate since 1993 allowed it to receive whistleblower complaints.

awards, which, in the end, could leave the whistleblower with no job, no money and no opportunities. The UN staff is still weary and distrustful as legal loopholes in the internal system still make it difficult for whistleblowers to report misconduct and be efficiently protected.

Actuality of the topic

The topic on whistleblowers and the impact that they have in modern democratic society is especially alive today as paradigms are steadily shifting to a realization that empowerment of staff members to report illegal or potentially harmful activates without fear of retaliation is a potent weapon to combat corruption and other detriments do the democratic society. The UN is the model of solidarity and champion of human rights but for many years has been targeted for failing to safeguard the rights of its own staff. For ten years UN has been rising to meet the highest standards of integrity as is engraved in the UN Charter with different reforms in the Secretariat. The whistleblower protection programme is a part of an ongoing effort to develop and improve accountability and integrity of the UN. However, the effectiveness of the UN WPP is being criticized by UN whistleblowers[4] and NGOS, like the Government Accountability Project (GAP) as not being effectively implemented and not producing necessary results. Many problems still persists and solutions seem to evade internal legislation. A meaningful reform of the application of the WPP is yet to be undertaken.

Novelty of the topic and the extent of examination of the problem

Although whistleblower issues are being widely discussed by many prominent authors in many different contexts, the specific whistleblower situation in the UN Secretariat and its funds and programmes lack the attention that it no doubly requires. Most of the research on the state of WPP comes from UN external audits, report of GA Committees and non- governmental organizations like Government Accountability Project (GAP), which has been tracking the implementation of whistleblower protection programme since its inception 2005.

Significance of the thesis

This thesis provides insight into the development of the whistleblower protection policy of the UN. In the context of a world where WPP are more and more implemented in national laws of countries, it is important to know, how this fundamental human right - to voice ones concerns without fear of reprisals, is adhered to in the Organization, that arguably represents the collective will of the whole world.

[4]On April 8, 2015 nine UN whistleblowers wrote an open letter to the SG expressing their disappointment in the whistleblower protection system and its poor implementation. They urged the review whistleblower protection for UN staff and for those serving in affiliated specialized agencies and international organizations not protected by national laws.
http://whistleblower.org/sites/default/files/%10Letter%20to%20UN-Secretary-General.pdf

Purpose research

The purpose of the thesis is to evaluate the current implementation of the whistleblower protection programme in the UN Secretariat and separately administered funds and programmes.

The tasks of the thesis

1) To study the inception and development of whistleblower protection policies and to uncover main obstacles that impeded the progress.

2) To examine whether the provisions of ST/SGB/2005/21 are sufficient to protect whistelbowers from retaliation.

3) To examine the EO as the body responsible for implementing the WPP and to understand if the current mandate of the EO is effective enough at protecting staff members.

4) To examine the jurisprudence of the UNDT and UNAT in order to understand the effectiveness of staff claims against retaliation for reporting misconduct and the main issues that whistleblowers face when filling claims before the UN justice system.

5) To review the WPP in separately administered funds, programmes and agencies and to evaluate the harmonization efforts.

Methodology

The method of document analysis was used in researching. Inductive reasoning was used to draw conclusions from the EO reports and implementation WPP. Systemisation and generalization of the whistleblower provisions in the UN Secretariat was used to provide criteria for whistelblower status and the minimum standards for evaluating the WPP of separately administered funds and programmes.

Structure

The thesis begins with a historical analysis of the roots of whistleblower protection mechanisms found in the obligations to report in Staff rules, Regulations, Standard of Conduct, Code of Conduct as well as development of the policies of reporting misconduct from 1990 until 2004. In chapter 2 the reform of the internal justice system of the UN is reviewed, problems with the old system and the reformed Dispute and Appeals Tribunals. In chapter 3, the system of protection against retaliation from 2005 is examined, since the present whistleblower protection policy has been created that year. It covers the EO, requests for protection against retaliation, EOs history of finding retaliation, bringing claims of retaliation to the UNDT and UNAT. Also, the most recent and important whistleblower protection cases, analysing the statute of limitations, remedies in the Tribunals. Chapter 4 is dedicated to exemption of funds and programmes and ad hoc ethics offices, the case Artjon Shkurtaj v. Secretary-General[5], which led to the separate policy for funds

[5] *Shkurtaj v. Secretary-General of the United Nations*, UNTD, Judgment No. UNDT/2010/156 (31 August 2010).

and programmes. Also, the harmonization efforts through the Ethics panel and the Ethics network and Standards of the Ethics function in funds and programmes. The last chapter provides a short glimpse onto the status of whistleblower protection in the Republic of Lithuania.

Propositions of the Thesis

To effectively implement the UN whistleblower protection program there is a clear need for meaningful changes in the current whistleblower protection provisions, the statute and proceedings before the UNDT. These changes should include: EO decisions and actions have to subject to scrutiny of the UNDT, longer statute of limitation period, protection of witnesses, removal or increase of caps on compensation awards.

1 THE DEVELOPMENT OF WHISTLEBLOWER PROTECTION IN THE UNITED NATIONS

This chapter covers the inception and development of whistleblower protection polices or protection against retaliation for reporting misconduct. This chapter contains a historical analysis of Staff rules and Regulations to provide a general framework, the origins of protection against retaliation from provisions in the Standard of Conduct, the call for greater transparency from UN General Assembly (GA) to the establishment of the first internal investigation unit with the first mandate to receive whistleblower reports.

1.1 Staff Rules, Regulations and Standards of Conduct

To fully convey the status of whistle-blowers in the UN it is necessary to understand the legal obligations of staff of United Nations overall. Therefore, a brief introduction is needed to the basic and most important documents that embody the rights and duties of the international civil servant.

The staff of the United Nations is guided by the provisions of UN Charter, the Staff regulations and Staff rules. These are UN legislative acts and have legal power. Rules and regulations of the UN are the main documents that staff members must adhere to in the line of their duties. Breach of these documents have legal consequences and may entail investigations by specialized units, disciplinary procedures or bringing civil claims before the UN justice system.[6] The Staff regulations embody the fundamental conditions of service the basic rights, duties and obligations of the United Nations Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat.[7] The regulations are established by the General Assembly, pursuant Article 101 paragraph 1 and promulgated by the Secretary General.[8]

[6]Staff rule 110.1 defines misconduct as follows: "Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or /... T/IC/1996/29 Page 3 other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to unsatisfactory conduct within the meaning of staff regulation 10.2, 8/ leading to the institution of disciplinary proceedings and the imposition of disciplinary measures for misconduct."

[7]United Nations Secretariat, Secretary-General's bulletin, *Staff Regulations*, U.N.DOC ST/SGB/2009/6 (27 May 2009), Scope and purpose.

[8]United Nations Charter, Article 101.

The Staff Rules are provided and enforced by the Secretary-General, pursuant to the authority granted to him by Staff regulations 12.2.[9] This legal document encompasses aspects like: duties, obligations and privileges, classification of posts and staff, salaries and related allowances, appointment and promotion, annual and special leave etc.

Specific provisions in Staff Regulations and Rules addressing the necessary conduct of staff and performance of civil servants is referred to as the "Code of Conduct". It is an integral part of the Staff Regulations and Rules.

In addition to these legal acts, there exists Standards of Conduct, which is more akin to customary practices of the UN and hence do not have real legal power. The first Standards of conduct have been prepared in 1954.

1.1.1 UN Standards of Conduct and Code of Conduct

In 1954, at the request of the Administrative Committee on Coordination (ACC), the then International Civil Service Advisory Board (ICSAB)[10] prepared a Report on Standards of Conduct in the International Service. The report did not have the force of law as it was a discussion of expected standards, rather than a set of rules that bound staff. It reflects the philosophical underpinnings of the international civil service and inform its conscience.[11] Yet, it was not only very well written but highly regarded over all the years, particularly for its sections on "Basic considerations," especially integrity, and "Conduct within a Secretariat." For instance, in 1982, incoming Secretary-General Javier Péréz de Cuellar, in his first meeting with the UN staff, commended the ICSAB standards and had them reissued and distributed to all UN staff, "so that they use it as a guide in their daily life" and can "conduct themselves at all times in a manner befitting their status as international civil servants."[12] The UN standards of conduct for staff of 1954 obliged staff to set out the relevant facts of an irregular situation, gave them the right to record their views in the official files, called on supervisors to exercise "scrupulous care…in allowing the views of their junior officers to be heard, particularly where those views are opposed

[9]United Nations Secretariat, Secretary-General's Bulletin, *Staff Rules: Staff Regulations of the United Nations and provisional Staff Rules*, U.N.DOC ST/SGB/2009/7 (16 June 2009).

[10]The ICSAB preceded ICSC.

[11]United Nations International Civil Service Commission, *Standards of Conduct in the International Civil Service*, New York, 2013.

[12]IOWATCH, UN Code of Conduct (19 April 2005), p. 1.

to their own". They also stated that "the subordinate official…has the right, which should be safeguarded, to record his views in the official files …"[13]

In 1986 the ACC issued a new preface to the report describing some of the important changes that had occurred since the report was first issued. Each organization of the UN system had over the years developed staff regulations and rules, which in legislative form, reflected these principles adapted to the specific need of the particular organization.[14] For example In the Legal Counsel of the Food and Agriculture Organization of the United Nations (FAO), the 1954 Standards had been incorporated into the personnel manual section and had a certain legal effect. They were often cited in Tribunal cases as being fundamental to the rules and regulations of the organizations. They were almost a constitution, without, however, a specific legal force. The Staff Rules and Regulations of UN drew inspiration from them.[15]

The tone and content of the 1954 edition evoked an earlier era, yet the underlying raison d'être for the *Standards* and principles themselves, largely stood the test of time. ICSC has twice revised the *Standards*, first in 2001 and again in 2013, which was approved by the United Nations General Assembly in its resolution 67/257.The ICSC *Framework* sets the tone, stating that "although organizations' internal cultures may vary, they face similar ethical challenges".

1.1.2 Code of conduct

Since the conduct of the staff was provided in a number of different documents - Staff Regulations, Rules, non-binding Standard of conduct, UN charter and Convention on the Privileges and Immunities of the United Nations, which included many more aspects of administration of Staff, there was a necessity for a single document, that would clearly provide the rules of conduct without any confusion. In 1998 the Secretary General issued a bulletin called "*Status, Basic Rights and Duties of United Nations Staff Members*"[16] that promulgated a "Code of conduct" that consisted of relevant parts of UN Staff Rules, Regulations, and the UN Charter, the

[13] United Nations International Civil Service Advisory Board, *Report On The Standards Of Conduct in the International Civil Service 1954*", U.N.DOC COORD/CIVIL SERVICE/5 (October 1954), reprinted May 1986, para. 12-16.
Also was reprinted in full as Annex V in Secretary-General's Bulletin, *Status, Basic Rights and Duties of United Nations Staff Members,* U.N.DOC. ST/SGB/1998/19 (10 December 1998)

[14]United Nations, General Assembly, *Proposed United Nations Code of Conduct: report of the Secretary-General*, A/52/488 (17 October 1997), para. 4-5.

[15]United Nations, General Assembly, *"Addendum Comments of the International Civil Service Commission on the report of the Secretary-General entitled 'Proposed United Nations Code of Conduct": report of the International Civil Service Commission For The Year 1997*, (A/52/488)", 20 May 1998 Supplement No. 30 (A/52/30), para 4

[16]United Nations Secretariat, Secretary-General's Bulletin, *Status, Basic Rights and Duties of United Nations Staff Members,*U.N.DOC. ST/SGB/1998/19 (10 December 1998), annex I, article 5.

Convention on the Privileges and Immunities and the 1954 Report on the Standards of Conduct[17]. The 1954 Standard was still not legally binding, rather an illustrative guide to expected standards of conduct. However, the Secretary General did not underestimate the importance of the Standards reminding, that the report was continually cited by successive Secretaries-General and by the United Nations Administrative Tribunal when assessing conduct of staff.[18] Another positive addition was that each provision of the Staff Regulations and Rules set out in the in the Code was followed by a commentary. The commentary was designed to explain individual provisions and to help the staff member understand each provision by placing it into context. The Commentary was not a part of Staff Regulations and Rules and was not a legal "norm" or imperative, nor did it have the legal force of a rule. It was an official guide published by the Secretary-General for the use of management and staff on the scope and application of the rules. So staff was encouraged to rely on the commentary to guide their actions since management used it in interpreting and applying the Code. [19] The bulletin with its annex was issued to every staff member who was subject to the Staff Regulations and Rules, including staff members of separately administered organs and programmes. This was a much more clear and comfortable way of reference for the staff, because the bulletin contained only relevant provisions, relating to conduct of Staff members.

In 2001 the ICSC issued an updated version of Standards of conduct. Importantly, it included the a duty for the international civil servants to report any breach of the organization's rules and regulations to a higher level official, whose responsibility it is to take appropriate action. An international civil servant who was to make such a report in good faith had the right to be protected against reprisals or sanctions.[20] Following the new Standard, Secretary–General issued a new Code of Conduct annexed to the bulletin ST/SGB/2002/13 that replaced ST/SGB/1998/19 and included the 2001 Standards.[21] The purpose of the update was ensure that staff are made aware of the new Standards of Conduct which replaced the 1954 report of the ICSAB. [22] As its predecessor, the 2001 Standard was not a legally binding document. It rather aimed at „[...]

[17]The code was added as annexes to the bulletin: annex III Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations: provisions relating to status, basic rights and duties of United Nations staff members, with commentary; annex IV. Scope and Purpose of the United Nations Staff Regulations, article I of the United Nations Staff Regulations and Related Rules from Chapter I of the 100 series of the Staff Rules, with commentary; annexV, Report on standards of conduct in the international civil service 1954; report of the International Civil Service Advisory Board, 1986 edition.

[18]ST/SGB/1998/19, *supra* note 17, annex 1, art. 7.

[19]Ibid., art. 5.

[20]International Civil Service Commission, *Standards of conduct for the international civil service*, (January 2002), art. 19.

[21]United Nations Secretariat, Secretary-General's bulletin, *Status, Basic Rights and Duties of United Nations Staff Members*, U.N.DOC ST/SGB/2002/13 (1 November 2002), annex, part V.

[22]Ibid., section 1.

providing for the international civil service standards that, like those of 1954, become an indispensable part of the culture and heritage of the organizations and are of similarly enduring quality. „[23]

In 2013 the Standard of Conduct has been updated once more to address the developments of a decade. Article 20 addressed retaliation against whistle-blowers similarly to the 2001 version, although it added something familiar -"An international civil servant who reports such a breach in good faith or who cooperates with an audit or investigation has the right to be protected against retaliation for doing." This sentence is lifted from the 2005 bulletin ST/SGB/2005/21 "*Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations*" which is the main instrument in defending whistle-blowers form retaliation today.

1.2 Development of the policies of reporting misconduct from 1990 until 2004

In the 1990 the GA called for real mechanisms to be established in order to facilitate safe and anonymous reporting by staff of misconduct in the UN. On the 21 December 1990 the GA issued the resolution A/RES/45/235, where it, intern alia, requested the Secretary-General and the executive heads of United Nations organizations and programmes:"[...]to consider, in consultation with the Board of Auditors and the Advisory Committee, effective measures to facilitate reporting by staff members on a confidential basis of any inappropriate use of the resources of a United Nations organization or programme, and to report to the GA at its forty-sixth session in this regard;"[24]Also, in resolution A/RES/46/183 of 20 December 1991 the General Assembly required the Secretary General „to report to the General Assembly at its forty-seventh session, through their respective governing bodies, on the implementation of effective measures to facilitate reporting by staff members on a confidential basis with due regard to considerations of privacy, of any inappropriate use of the resources of a United Nations organization or programme.[25] These were strong indicators of awareness by the member states of the necessity create enable staff to safely forward important information on breaches that might have a negative effect on the organization.

As requested by the GA resolution the Secretary-General submitted his report where he argued against establishing new mechanisms for improving reporting.[26] He reasoned that

[23]International Civil Service Commission, *Standards of conduct for the international civil service*, (January 2002).

[24]United Nations General Assembly, *Financial reports and audited financial statements, and reports of the Board of Auditors*, U.N.DOC A/RES/45/235 (21 December 1990), para 13 (b).

[25]United Nations, General Assembly, *Financial reports and audited financial statements, and reports of the Board of Auditors*, U.N.DOC A/RES/46/183 (20 December 1991), para.17 (b).

[26]United Nations, General Assembly, *Financial reports and audited financial statements*, *and reports of the board of auditors: Measures to facilitate reporting by staff members of inappropriate uses of the resources of the*

considerable problems have been encountered at national levels in civil services of some Member States, as well as in the private sector, when developing and operating effective programmes that encourage reporting of inappropriate uses of resources.[27] Those who report abuses were a frequently target of retaliation since, in many cases and it is difficult to guarantee confidentiality. According to the SG, problems have also arisen in some programmes owing to extensive due process requirements, as well as the submission of unfounded and malicious reports. In addition, such programmes have required the establishment of an administrative structure to receive and investigate reports, with the associated costs. The problems identified above would be compounded in an international organization such as the United Nations, with activities in every part of the world.[28] [...]The difficulties involved in establishing and administering a programme of this nature at the United Nations might therefore outweigh the potential benefits [...].The SG argued that the objectives of paragraph 17 (b) of General Assembly resolution A/RES/46/183 can best be met by strict adherence to existing provisions and by the enhancement of existing internal controls, rather than through the establishment of a new or supplementary programme.[29] The SG was evasive in his response, and argued against the establishment of protection for Staff members who reported abuses, claiming it would cause more problems than benefits.

In 1993 Joint Inspection Unit (JIU), issued a report on accountability, in which it observed, that the UN Secretariat lacked comprehensive tools to combat corruption problems. The Unit reasoned that one of the most important ways to combat waste, fraud, abuse and corruption was through the vigilance and co-operation of those most knowledgeable about programme operations. It advocated for staff involvement in combating misconduct by facilitating reporting through "hotlines" maintained by independent oversight units. JIU called for rigorous confidentiality and protection of the rights of the people under investigation, and of the "whistleblowers" who submit the allegations from immediate or subsequent reprisals.[30] JIU expressed disagreement with Secretary-General's position, and conveyed great regret, that despite GA efforts the Secretariat showed little support for the ideals of greater accountability, that the member states aspired to.[31]

Organization internal controls relating to the payment of allowances and benefits; and efforts to recover outstanding excess income tax reimbursements: report of the Secretary-General, U.N.DOC A/47/5108 (October 1992), para. 8.

[27]Ibid., para.10.

[28]Ibid., para.11.

[29]Ibid., para.12.

[30]United Nations, Joint Inspection Unit, *Accountability and Oversight in the United Nations Secretariat*, U.N.DOC JIU/REP/93/5 (September 1993), para. 80.

[31]Ibid.

It criticized the SG for the reasoning in his report: "The Inspectors believe that the Secretariat should not imply or assert its helplessness to protect staff from vengeful managers. Instead, top management should actively encourage and protect confidential staff reporting […] to combat the debilitating effects of corruption in the UN Secretariat. " [32]

The ideas of previously mention 1990 GA resolutions, which called for establishment of an anonymous reporting mechanism for staff members eluded Staff Regulations and Rules from 1994 till 2004 and also evaded Code of Conduct issued in 1998 and updated in 2002. Instead of the staff rights and the Secretary-General's responsibilities to ensure due process safeguards and protect the rights of all involved in investigations, the 2002 Standard includes only an investigatory obligation: "Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate possible misuses of fund, waste or abuse."[33] Protection of whistle-blowers was added as commentary[34] in the 2002 UN code but the language used to describe was much weaker than the specific whistle-blower protection required by the GA in 1994: "It must be the duty of international civil servants to report any breach of the organization's rules and regulations to a higher level official, whose responsibility it is to take appropriate action. An international civil servant who makes such a report in good faith has the right to be protected against reprisals or sanctions."[35]

1.2.1 Creation of the Office of Internal Oversight Services

For almost 50 years, internal oversight was, at best, underdeveloped in the UN and it was undoubtedly understaffed. Internal auditing, programme evaluation, and monitoring played a marginal role as part of administration and management, lacking independence and authority. The inspection function did not exist within the Secretariat as well as an investigation unit. The bureaucracy had grown without pruning for many years and procedures and structures had become too rigid, frustrating creativity and individual initiative.[36]

In the resolution 48/218 A of 1993 December 23rd the General Assembly, reiterated [...] the need for an enhanced oversight function to ensure the effective implementation of [UN] activities […]. It called for the establishment of an additional independent entity, to enhance

[32]JIU/REP/93/5, *supra* note, 31, para. 84-86.

[33]ST/SGB/2002/13, *supra* note 22, Regulation 1.2 (r).

[34]A commentary, as discussed in chapter 2, is not a legal "norm" or imperative, nor does it have the legal force of a rule.

[35]ST/SGB/2002/13, *op. cit.,* Commentary of Staff rule 101.3, Performance of staff members Rule 101.3 (a) part 19.

[36]United Nations, General Assembly, *Report of the Secretary-General on the activities of the Office of Internal Oversight Services: note by the Secretary-General*, U.N.DOC A/50/459 (2 October 1995), p. 7, *Preface.*

oversight functions in particular with regard to evaluation, audit, investigation and compliance.[37] Also, determined to address alleged cases of fraud in the United Nations in an impartial manner, in accordance with due process of law and full respect for the rights of each individual concerned, especially the right of defence. GA decided to study the possibility of the establishment of a new jurisdictional and procedural mechanism or of the extension of mandates and improvement of the functioning of existing jurisdictional and procedural mechanisms. [38]

A year later, in December 1994, GA decided to establish the Office of Internal Oversight Services in its resolution 48/218 B. Following this resolution the SG established the OIOS. The purpose of the Office of Internal Oversight Services is to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization through the exercise of the following functions: Monitoring, Internal audit, Inspection and evaluation, Investigation, Implementation of recommendations and reporting procedures, support and advice to management and reporting.[39]

Regarding investigations in OIOS, the GA requested the SG to ensure direct and confidential access of staff members to the Office and to ensure that procedures were also in place that protect individual rights, the anonymity of staff members, due process for all parties concerned and fairness during any investigations. Also, that falsely accused staff members were fully cleared and that disciplinary and/or jurisdictional proceedings were initiated without undue delay in cases where the SG considers it justified. For that purpose any necessary amendments to the Staff Regulations and Rules of the United Nations and to the disciplinary hearing procedures were to be included.[40]

The mandate of the Office regarding whistleblower protection is to receive and investigate reports from staff and other persons engaged in activities under the authority of the Organization suggesting improvements in programme delivery and reporting perceived cases of possible violations of rules or regulations, mismanagement, misconduct, waste of resources or abuse of authority. According to the OIOS establishment bulletin, the staff members and others could make suggestions directly to the Office and reports were to be received and handled in complete confidence. Furthermore, arrangements were issued as an administrative instruction. Those procedures and related arrangements were designed to protect individual rights, the

[37]United Nations, General Assembly resolution, *Review of the administrative and financial functioning of the United Nations*, U.N.DOC 48/218 A (23 December 1993), sections II, III.

[38]Ibid.,

[39]United Nations Secretariat, Secretary-General's bulletin, *Establishment of the Office of Internal Oversight Services,* U.N.DOC ST/SGB/273 (7 September 1994), section IV, art. 10.

[40]United Nations, General Assembly, *Review of the efficiency of the administrative and financial functioning of the United Nations*, U.N.DOC A/RES/48/218 B (12 August 1994), para. 6; 7.

anonymity of staff and others, due process for all parties concerned and fairness during any investigation, as well as to protect against reprisals. [41]

Investigations were to respect individual rights of staff members and be conducted with strict regard for fairness and due process for all concerned following the staff and financial regulations, rules and administrative instructions.[42] The designated officials were responsible for safeguarding the suggestions and reports from accidental, negligent or wilful disclosure, as well as for ensuring that the identity of the staff members and others who have submitted such reports.[43] The same procedures and requirements for the protection of the identity of staff and others making suggestions and reports also applied to staff and others who provided information to or otherwise cooperated with the OIOS.[44] Deliberate transmission of false reports or suggestions constituted misconduct.[45] The bulletin prohibited any action taken against staff or others as a reprisal for making a report or disclosing information to, or otherwise cooperating with, the OIOS. [46] Retaliation was considered misconduct, which entails disciplinary proceedings and disciplinary action in respect of a staff member who was proven to have retaliated against another staff member or other person who has submitted suggestions or reports to the Office or otherwise cooperated with the Office.[47]An administrative instruction was issued by the Under-Secretary-General for Administration and Management for the purpose of instructing about the procedures for reporting and the measures for ensuring confidentiality and fairness. Staff were ensured that the established procedures would protect individual rights, anonymity of staff members and others as well as provide due process for all concerned and fairness during any investigation, as well as protection against reprisals and that falsely accused will be fully cleared.[48] In addition, it assured that staff members or others who have, in good faith, reported perceived wrongdoing. The transmittal of false or malicious allegations, with knowledge of their falsity or with wilful disregard of their truth

[41]ST/SGB/273, *supra* note 39, art. 18.

[42]Ibid., art.18 (a).

[43]Ibid., art 18 (b).

[44]Ibid., art 18 (c).

[45]Ibid., art 18 (d).

[46]Ibid., art 18 (e).

[47]Ibid., art 18 (f).

[48]United Nations Secretariat, Under-Secretary-General for Administration and Management, Administrative instruction: *Reporting of Inappropriate Use of United Nations Resources and Proposals for Improvement of Programme Delivery*, U.N.DOC ST/AI/397 (7 September 1994), art. 2.

or falsity, was considered misconduct and dealt with under the Staff Regulations and Rules of the UN.[49] Even details on the channels to use when reporting misconduct were provided[50].

1.2.2 Impact of whistleblower protection policies

Despite an excellent whistleblower protection provisions in the 1994 administrative instructions and SG resolution, 10 years later things were not going so well as regards staff protection. A survey, requested by OIOS, was published in 2004 by Deloitte & Touche LLP that assessed perception of integrity at the UN. This survey revealed, that 65% of UN staff has observed breaches. Only 15% percent agreed that breaches were reported and 17% percent agreed that they were investigated. Less than 15% percent believes GSS, professionals, supervisors and leaders were disciplined fairly and consistently and 44% believed reporting violations was career limiting and/or feared of reprisals (e.g., only 10% felt protected from reprisals, 7% perceived protections that encouraged to report violations).[51] This survey revealed that the staff of UN was highly disillusioned about the situations regarding ethics of conduct in the UN. "Most of the infrastructure to support ethics and integrity is in place; accountability is not."[52]

The survey revealed that UN staff members felt unprotected from reprisals for reporting violations of the codes of conduct - 46% gave unfavourable response to this item while only 12% gave favourable responses. The survey results suggested the need to put effort into overcoming mistrust with a combination of policy review, training and development. It advised to begin reviewing UN whistleblower protection policies and reporting processes compared to best practices and to follow up with a training effort that would inform staff and management of the policies and practices. [53]

The survey revealed that even with OIOS being in charge over whistleblower protection for 10 years, with clear rules and guidance, staff members did not feel adequately protected.

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[49]ST/AI/397, *supra* note 48, art. 4.

[50] „Staff and others who wish to report matters referred to in paragraph 1 of which they have knowledge, or to make a proposal for the improvement of a United Nations operation, may do so on the form provided in the annex to the present instruction and send it to the Reporting Facility, Dag Hammarskjöld Convenience Center (DHCC), P.O. Box 20034, New York, N.Y. 10017, USA Reports may also be made in person at Headquarters to the Investigations Unit, Office of Internal Oversight Services, Room A-6032, 866 United Nations Plaza, by writing to the same office, by fax (No. 212-963-7774), or by telephone ((212) 963-1111). Long distance calls may be made collect. The identity or anonymity of the reporting source will be fully protected." ST/AI/397, *supra* note 48, art. 3

[51]United Nations Organizational Integrity Survey (2004), Final report, Deloitte consulting LLP, p. 59.

[52]Ibid., p. 9.

[53]Ibid., p. 60, para. 10.

2 INTERNAL JUSTICE SYSTEM OF THE UNITED NATIONS

The UN has its own administration of justice system, because it and its officials are immune from legal process. This immunity derives from Article 105 of the UN Charter and the "1946 Convention on the Privileges and Immunities of the UN". Article II, Section 2 of the General Convention provides: "*United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity*." Article *V,* Section 18 further provides that UN officials are immune "*from legal process in respect of words spoken or written and all acts performed by them in their official capacity*."[54]

The immunity of the UN from lawsuits does not, however, mean that UN staff members are deprived of legal recourse to pursue remedies for employment-related claims. Section 29 (b) of the Convention on the Privileges and Immunities of the UN requires it to provide for "appropriate modes of settlement" for "disputes involving any official of the United Nations who by reason of his official position enjoys immunity." The UN has fulfilled this obligation by creating its own administration of justice system to provide an alternative legal regime for the resolution of employment-related claims. For nearly six decades, the administration of justice system at the UN has been comprised primarily of the JAB, the JDC and the UN Administrative Tribunal.[55]

2.1 Internal justice system prior to reform

The appeals mechanism was established in the staff regulations by the GA and in the elaborated in the Staff Rules, promulgated by the SG. The appeals mechanism, as provided by the Staff regulations, consisted of the JAB and the UN Appeals tribunal.[56]

JAB and JCD made recommendations to the SG on administrative and disciplinary matters, respectively. Where there was an allegation of non-compliance with the terms of a staff member's employment, a decision of the SG may have been reviewed by the UN Administrative Tribunal.[57] Due to the participation of staff members in the Joint Appeals Boards and the Joint

[54]Vicien-Milburn, M. (2009). Promoting the Rule of Law within the United Nations. *Int'l Law.*, *43*,p51-57, p. 51

[55]Hwang, P. (2009). Reform of the administration of justice system at the United Nations. The Law & Practice of International Courts and Tribunals, 8(2), 181-224, p. 182.

[56]ST/SGB/2002/1 STAFF RULES Staff Regulations of the United Nations and Staff Rules 100.1 to 112.8Article XI APPEALS Regulation 11.1 and 11.2.

[57]Vicien-Milburn, Maria, *op cit.*, p. 52.

Disciplinary Committees, these bodies were often referred to as "peer review bodies.[58] Decisions of the SG made on the basis of these recommendations may have been appealed to the UN Administrative Tribunal. The JAB, the JDC and the UNAT together constituted the primary components of the administration of justice system in the UN.[59]

Until 1996, the International Court of Justice (ICJ) acted as second instance mechanism concerning decisions of the UN Administrative Tribunal. This review system, introduced by Article II of the UN Administrative Tribunal Statute, was abolished by GA resolution A/RES/5o/ 54 of 2nd December 1995. Since then, there had been no option for unsuccessful or partially successful staff members to have a UN Administrative Tribunal judgment reviewed.[60] "In spite of the possibility to submit decisions rendered by the UN Administrative Tribunal to a highly qualified body such as the ICJ for review, very little use was made of the mechanism. The Committee accepted only three applications between 1955 and 1996**.** Furthermore, the mechanism introduced by Article II of the UN Administrative Tribunal Statute was not completely satisfactory because of its unclear nature and the limited scope of its jurisdiction. Indeed, the proceedings before the ICJ were certainly a form of review rather than an appeal" [61] .Hence, it essentially political rather than judicial body.[62]

2.1.1 Problems with the old justice system

The problems with the system of administration of justice was known quite early on. In the 1984 resolution the GA called for the Secretariat to „ [...] strengthen the various appeals machinery, with a view to eliminating the backlog of cases"[63] By resolution 40/258 A of 18 December 1985, requested the SG, in his efforts to guarantee to staff members a just and expeditious resolution of disputes and grievances, to streamline the appeals procedures and to continue the study on the feasibility of establishing an office of Ombudsman[64].

The 1986 JIU report assessed the condition of the justice mechanism. The inclusion of this item to the work programme for 1986 was mainly due to the various opinions, criticisms and suggestions that had been made on the "delays of justice" in the UN, particularly at Headquarters

[58]Hwang, P., *supra* note 55, p. 184.

[59]Ibid.

[60]Vargiu, P. (2010). From Advisory Opinions to Binding Decisions: The new Appeal Mechanism of the UN system of Administration of Justice. *International Organizations Law Review*, *7*(2), 261-275, p 262.

[61]Ibid., p. 264.

[62]Ibid., p. 268.

[63]United Nations, General Assembly resolution, *Composition of the Secretariat*, U.N.DOC A/RES/39/245, part I(e).

[64]United Nations, General Assembly resolution, *resolutions adopted on the reports of the Fifth Committee: personnel questions, composition of the Secretariat*, U.N.DOC A/RES/40/258 A (18 December 1985), art. 7.

in New York. Excessive delays in the delivery of justice, in the opinion of JIU inspector, were equal to the denial of justice. In this respect, the administration of justice had been in a critical situation and had negative consequences, such as the demoralization of staff members as well as the progressive increase of costs in the UN. [65]

On the JAB, JIU reported that the number of submissions of appeals exceeded the capacity of the JAB Secretariat and resulted in a substantial increase of the backlog.[66]The delays in the administration of justice were attributed not only to the procedure but also to the lack of human resources in the Administrative Review Unit and the Joint JAB-JDC Secretariat of the OPS.[67] Difficulties in forming panels because the members did not serve on a full-time basis and were not always available for various reasons, such as their heavy workload, missions, leave, sickness, etc. JIU regarded it as "[...] quite primitive procedure of "home-made" Justice and is lengthy, slow, costly and time-consuming".[68] Already in this report is states that a creation of a small tribunal had been the suggested earlier.[69]

Informal procedure through the Panel on Discrimination and other Grievances to deal with conciliation that there were continued delays, protracted consultations and reopening of questions already studied by the Panel and sometimes - the very officials who were parties to the dispute who had the ultimate authority to adopt or reject findings[70]

In the report the inspector expressed support for the creation of Ombudsman's office for mediation and conciliation,[71] with independence from the Administration and access to all levels of the Administration, as well as to confidential information[72] and for the idea of creation of a two stage judicial system. It recommending the replacement of the JAB by a Claims Court, with expeditious procedures.[73] The judge was suggested to be elected by the GA on a full-time basis, thereby ensuring the coherent Jurisprudence as well as an efficient settlement and the possibility of a binding decision.[74]

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[65]United Nations, General Assembly, Joint Inspection Unit, *Personnel Questions: Administration of Justice in the United Nations, Note by the Secretary-General,* U.N.DOC A/41/640 (23 September 1986), para. 2.

[66]Ibid., para. 22.

[67]Ibid., para. 23.

[68]Ibid., para. 24.

[69]Ibid., para. 25.

[70]Ibid., para. 51 (a, b).

[71]Ibid., para 54.

[72]Ibid., para 55.

[73]Ibid., para 60.

[74]Ibid., para 61.

The SG was not fond of the conclusions made by the JIU. In his mind, delays in JAB were not because it was primitive, but it was an intrinsically elaborate system, that needed to be streamlined and simplified and a judicial body like a Claims Court would not have solved the problems[75]

As said in SG report A/C.5/42/28 November 1987 the SG stated to the Fifth Committee on 16 October 1987,that he was convinced that in compliance with resolution 41/213, effective action had to be taken to overhaul and streamline the existing system of redress and appeals, which had not developed evenly. "A just and speedy system of dealing with grievance is not only right in itself, and necessary, it is also an indispensable aid to staff/management relations, and to the upgrading of management practices"[76]

Following legislation like 1988 A/C.5/43/25[77] and A/C.5/44/9[78] there were improvements in the internal justice system achieved, including the reduction of the backlog of pending cases, largely due to the introduction of procedural improvements, and the completion of work on the revision of disciplinary rules.[79] The GA urged SG to continue the improvements in A/RES/47/226 II[80].

For a decade further efforts were made to streamline the administration of justice system but it was becoming clear, that the framework of the system itself was inadequate. The system was designed at a time when there were only a few thousand staff members and only a few cases per year. It relied on joint participation of volunteer staff members who advise the SG on appeals and disciplinary cases. The techniques that worked satisfactorily in the past, with fewer staff, fewer duty stations and field missions, fewer cases and less emphasis on accountability on the part of programme managers and their staff, no longer adapted to the circumstances. The need for reform had been recognized by the GA, the Secretariat and the staff.[81]

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[75]United Nations, General Assembly, Joint Inspection Unit, *Personnel Questions: Establishment of an office of Ombudsman in the Secretariat and streamlining the appeals procedures*: *report of the Secretary-General*, U.N.DOC A/C.5/41/14, (3 November 1986), para. 35.

[76]United Nations, General Assembly, *Establishment of an Office of Ombudsman in the Secretariat and Streamlining the Appeals procedures: report of the Secretary-General*, U.N.DOC A/C.5/42/28 (3 November 1987), para. 13

[77] United Nations, General Assembly, *Personnel Questions, Other Personnel Questions, Administration of justice in the Secretariat: report of the Secretary-General*, U.N.DOC A/C.5/43/25 (28 October 1988).

[78] United Nations, General Assembly, *Personnel Questions, Other Personnel Questions, Administration of justice in the Secretariat: report of the Secretary-General*, U.N.DOC A/C.5/44/9 (20 October 1989).

[79]United Nations, General Assembly, *Personnel Questions, Other Personnel Questions, Administration of justice in the Secretariat: report of the Secretary-General*, U.N.DOC A/C.5/45/11 (19 October 1990), para.1.

[80] United Nations, General Assembly resolution, *Resolution adopted but the General Assembly on the report of the Fifth Committee*: *Personnel questions*, A/47/708/Add.2, U.N.DOC A/RES/47/226 (30 April 1993), part II.

[81]United Nations, General Assembly, Human Resources Management, *proposed Programme Budget for the Biennium 1996-1997, Reform of the internal system of justice in the United Nations Secretariat: report of the Secretary-General*, U.N.DOC (27 September 1995), para. 4.

2.2 The reformed system of justice

With persisting problems in the justice system the GA decided to explore the possibility of redesigning the UN justice system overall by forming a redesign Panel, which had to propose a model for a new system for resolving staff grievances in the UN that was independent, transparent, effective, efficient and adequately resourced and that ensured managerial accountability. [82]The Panel proposed the creation of a new, decentralized, independent and streamlined system by strengthening the informal system of internal justice, by providing for a strong mediation mechanism in the Office of the Ombudsman and by merging the offices of the Ombudsman of the UN and its funds and programmes. Also, by establishing a new, formal system of justice that replaced advisory boards with a professional and decentralized first-instance adjudicatory body that issues binding decisions that either party could appeal to United Nations Appeals Tribunal (UNAT) and by guaranteeing "equality of arms", thus ensuring for all staff members access to professionalized and decentralized legal representation. [83]

The SG largely accepted the findings of the Redesign Panel report, but also made some modifications to certain recommendations. The Redesign Panel report and the SG proposals were examined in detail by the GA from 2007–2008. During this period, the SG elaborated on the details of his proposals and responded to questions from the GA in five further reports and the GA adopted three resolutions on the issue of the administration of justice.[84] The GA with the resolution 61/261 establish a new system of administration of justice. It created a single integrated and decentralized Office of the Ombudsman for the UN Secretariat, funds and programmes,[85] a two tiered formal system, consisting of a first instance, the United Nations Dispute Tribunal (UNDT), and an appellate instance, the United Nations Appeals Tribunal (UNAT), rendering binding decisions and ordering appropriate remedies[86] and establish the Office of the Administration of Justice, headed by a senior management-level official, which has overall responsibility for the coordination of the UN system of administration of justice.[87]

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[82]United Nations, General Assembly resolution, *Administration of justice at the United Nations*, U.N.DOC A/RES/59/283 (2 June 2005), para. 49 (a).

[83]United Nations, General Assembly, *Report of the Redesign Panel on the United Nations system of administration of justice*, U.N.DOC A/61/205 (28 July 2006), para. 14.

[84]Hwang, P., *supra* note 55, p. 214.

[85]United Nations, General Assembly resolution, *Administration of justice at the United Nations*, U.N.DOC A/RES/61/26 (30 April 2007) para. 12.

[86]Ibid., para. 19.

[87]Ibid., para. 28.

2.2.1 The Dispute and Appeals Tribunals

The UNDT is the first instance in the two tiered system of justice administration. It is competent to hear appeals of administrative decisions that are alleged to be in non-compliance with the terms of appointment or the contract of employment, decision imposing a disciplinary measures, enforce the implementation of an agreement reached through mediation.[88] An application may be filed by any staff member or former staff member, or in the name of an incapacitated or deceased staff member of the UN, including the UN Secretariat or separately administered UN funds and programmes.[89] The UNDT shall be composed of three full-time judges and two half-time judges. The three full-time judges of the UNDT shall exercise their functions in New York, Geneva and Nairobi.[90]A judge of the UNDT shall be appointed for one non-renewable term of seven years.[91] The judges are appointed by the GA on the recommendation of the Internal Justice Council in accordance with GA resolution 62/228. No two judges can be of the same nationality. Due regard has to be given to geographical distribution and gender balance.[92]To be eligible for appointment as a judge, a person has to be of high moral character and possess at least 10 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions.[93]. A judge of the UNDT is not eligible for any appointment within the UN, except another judicial post, for a period of five years following his or her term of office.[94]

The UNAT is the second instance of the two-tier formal system of administration of justice. It is competent to hear and pass judgement on an appeal filed against a judgement rendered by the UNDT in which it is asserted that the UNDT has: (a) Exceeded its jurisdiction or competence; (b) Failed to exercise jurisdiction vested in it; (c) Erred on a question of law; (d) Committed an error in procedure, such as to affect the decision of the case; or (e) Erred on a question of fact, resulting in a manifestly unreasonable decisions.[95] The UNAT may affirm, reverse, modify or remand the judgement of the UNDT. It may also issue all orders necessary or appropriate in aid of its jurisdiction and consonant with the present statute.[96] The UNAT is

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[88] United Nations, General Assembly resolution, *Resolution adopted by the General Assembly on 24 December 2008, Administration of justice at the United Nations*,*Statute of the United Nations Dispute Tribunal*, U.N.DOC A/RES/63/253 (17 March 2009), Annex I, art. 2(1).

[89]Ibid., art. 3(1).

[90]Ibid., art. 5.

[91]Ibid., art. 4(1).

[92]Ibid., art. 4(2).

[93]Ibid., art, 4(3).

[94]Ibid., annex II, art. 6.

[95]Ibid., annex II, art. 2(1).

[96]Ibid., annex II, art. 2(3).

composed of seven judges. The judges are appointed by the GA on the recommendation of the Internal Justice Council in accordance with GA resolution 62/228. No two judges can be of the same nationality. Due regard is given to geographical distribution and gender balance. To be eligible for appointment as a judge, a person must be of high moral character and posses at least 15 years of judicial experience in the field of administrative law, or the equivalent within one or more national jurisdictions. A judge of the UNAT is appointed for one non-renewable term of seven years. A judge of the UNAT is also not be eligible for any appointment within the UN, except another judicial post, for a period of five years following his or her term of office[97]

[97]Ibid., annex II, art. 3(1).

3 THE SYSTEM OF PROTECTION AGAINST RETALIATION FROM 2005

Staff members expressed concern about the ethics climate within the UN in the 2004 integrity perception survey. Similar concerns were raised by the reports of the Independent Inquiry Committee on the oil-for-food programme[98]. At the 2005 World Summit the heads of state of the governments of the world gathered at the UN headquarters in New York for the opportunity to take bold decisions in the areas of development, security, human rights and reform of the UN.[99] The latter part included establishing effective and efficient mechanisms for responsibility and accountability of the Secretariat and efforts to ensure ethical conduct, more extensive financial disclosure for UN officials and enhanced protection for those who reveal wrongdoing within the Organization. The heads of states encouraged the SG to follow up on the plans to establish an Ethics Office with independent status and develop a system-wide code of ethics for all UN personnel.[100]

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

In 2005 the United Nations Secretary Kofi Annan, in accordance with paragraph 161 (d) of GA resolution 60/1 on the Summit Outcome, promulgated a bulletin called "*Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations*". The preamble of ST/SGB/2005/21 states, that the purpose of the legislation is to ensure that the Organization functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals who report misconduct or cooperate with duly authorized audits or investigations. The bulletin established a policy that incurred a duty on staff members to report any breach of the Organization's regulations and rules and that an individual who made such

[98] A/60/568, *supra* note 1, para. 4.

[99]United Nations, Department of Public Information, *The 2005 World Summit: An Overview*, July 2005.

[100]United Nations, General Assembly resolution, *2005 World Summit Outcome*, U.N.DOC A/RES/60/1 (24 October 2005) para. 161(d).

a report in good faith had the right to be protected against retaliation[101]. This protection applies to any staff member regardless of the type of appointment or its duration, volunteers and interns.[102]

However the policies do not apply to contractors, UN police officers, UN peacekeepers, victims and any other person who provides information about misconduct that could undermine the UN mission. GAP was consulted in the drafting of the UN protection against retaliation policy At that time, they raised concerns about the exclusion from the policy of contractors. In discussions, the then Under-Secretary-General for Management's office assured us that contractors would have whistleblower protections. Unfortunately, ten years after the adoption of the original policy, amendments have not yet been made.[103] According to GAP, 2.1 WPP „should be revised to extend protection to anyone who reports misconduct of any kind involving UN operations, not just violations of certain rules and regulations by a "United Nations staff member." Best practice whistleblower standards established in international and national law require that whistleblower rights cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity that undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties."[104]

Multiple internal channels have been provided for the staff to report misconduct - the Ombudsman, OIOS, the Assistant Secretary-General for Human Resources Management, the head of department or office concerned or the focal point appointed to receive reports of sexual exploitation and abuse.[105] These are all internal mechanisms for reporting misconduct and it is clearly encouraged by the wording of the provision: "Except as provided in section 4 below, reports of misconduct should be made through the established internal mechanisms"[106] This ensures protection from institutional conflict of interests and that properly authorised bodies within the UN system, with the power to take appropriate action, have the opportunity to consider and if necessary take action on complaints of misconduct made by concerned staff members.[107] The

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[101] United Nations Secretariat, Secretary-General's Bulletin, *Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations*, U.N.DOC ST/SGB/2005/21 (19 December 2005), para. 1.1.

[102]Ibid. art. 2.1.

[103] S.Walden, B.Edwards, *Tipping The Scales: Is The United Nations Justice System Promoting Accountability In The Peacekeeping Missions Or Undermining It*? Government Accountability Project (September 2012), p. 39.

[104]Ibid., p. 40.

[105]ST/SGB/2005/21, *op cit*., section 3.

[106]Ibid.

[107] *Staedtler v. Secretary-General of the United Nations*, UNDT, Judgment No.UNDT/2014/057 (30 May 2014), para. 111.

bulletin also provides external mechanisms for reporting misconduct. These are an exception, which means that for a staff member to be able to resort to these options, it has to either

1. be necessary to avoid:

(i)A significant threat to public health and safety; or

(ii)Substantive damage to the Organization's operations; or

(iii) Violations of national or international law; and

2. Or the use of internal mechanisms is not possible because:

(i) At the time the report is made, the individual has grounds to believe that he/she will be subjected to retaliation by the person(s) he/she should report to pursuant to the established internal mechanism; or

(ii) It is likely that evidence relating to the misconduct will be concealed or destroyed if the individual reports to the person(s) he/she should report to pursuant to the established internal mechanisms; or

(iii) The individual has previously reported the same information through the established internal mechanisms, and the Organization has failed to inform the individual in writing of the status of the matter within six months of such airport; and

3. Or the individual does not accept payment or any other benefit from any party for such report.[108]

GAP suggested the need to expand the list of offices to which a protected disclosure can be made. The list should also include the Conduct and Discipline Unit/Team (which may be the focal point, but not necessarily) and the whistleblower's supervisors.[109]

The bulletin lays down specific procedures to staff members who have been retaliated against for reporting misconduct. If a staff member believes that she has been retaliated against for reporting misconduct or cooperating with a duly authorized audit or investigation, she should forward all information and documentation available to support her complaint to the EO as soon as possible.[110] In order for the whistleblower protection to apply, the staff member must have engaged in a protected activity, which means that she had to:

1) Reports the failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules, or other relevant administrative issuances.[111]

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[108]UNDT/2014/057, *supra* note 107, para 4.

[109]Walden, B.Edwards, *Tipping The Scales: Is The United Nations Justice System Promoting Accountability In The Peacekeeping Missions Or Undermining It*? Government Accountability Project (September 2012), page 40, para 5.

[110]ST/SGB/2005/21, *supra* note 101, para. 5.1.

[111]Ibid., section 2.

2) Cooperated in good faith with a duly authorized investigation or audit.

Also, for the protection to apply, the report of the misconduct has to be made through established internal channels or external channels if reasons satisfying the conditions exist. If a staff member does not report the complaints of misconduct to the established mechanisms specified in ST/SGB/2005/21 does not avail himself of the opportunity to have his complaints of misconduct investigated by a competent body and to exhaust all internal remedies before making his complaint to the EO. [112]

Dissemination of unsubstantiated rumours is not a protected activity. As is reporting false information that is intentionally misleading, which by itself constitutes misconduct and may result in disciplinary or other appropriate action.[113] In order to receive protection, the report should be made as soon as possible and not later than six years after the individual becomes aware of the misconduct. The individual must submit information or evidence to support a reasonable belief that misconduct has occurred.[114]

Retaliation has three essential elements: participation in a protected activity, being subjected to a detriment, and a causal connection between the protected activity and the detriment suffered.[115] If a staff member engages in a protected activity, for instance the filing of a complaint to the head of a department or office, and is thereby subjected to detrimental action such as a change in office space, an unprecedented and unjustified downgrading of a performance evaluation report, or a counter complaint and investigation, then a causal link may exist.[116] The causal link between the report and the person making the adverse decision can be direct or indirect. Often it might be that the report or protected activity is not directly against the decision-maker but against a person whose interests the decision-maker seeks to protect and the retaliatory act may have been procured by a person who has power or influence over the decision maker. Any interpretation that would permit the Administration to evade the protection afforded to employees by claiming that the causal link between the report and the person making the adverse decision is not direct would completely undermine the effectiveness of the prohibition against retaliation and could rarely if ever be proven.[117] The Bulletin specifically places the burden of proof in a retaliation claim on to the administration. The same principle applies when reporting possible retaliation to the EO and

[112]UNDT/2014/057, *supra* note 107, para. 116.

[113]Ibid., para. 2.3.

[114]Ibid., para. 2.1.

[115]*Nguyen-Kropp Postica v. Secretary-General of the United Nations*, UNDT, Judgment No. UNDT/2013/176 (20 December 2013) para. 127.

[116]Ibid., para. 130.

[117]Ibid., para. 134.

bringing an action before the justice system- the EO has to establish a *prima facie* case itself and applicant/staff member must raise a *prima facie* case before the UNDT at which point the burden shifts onto the respondent to prove by clear and convincing evidence that it would have taken the same action absent the protected activity.[118]

Staff members are encouraged to bring retaliation claims to the EO, however administrative decisions of retaliatory nature can be challenged separately before internal justice systems, such as decisions concerning non-renewal, non-promotion, performance evaluation, etc.“ Staff members are able to take parallel courses of action, both before the EO and before internal recourse systems, because otherwise they could be prevented from accessing the full protection of the law that allows them to seek judicial redress in regard to administrative decisions alleged to be in violation of the terms of their contract of employment.[119]

Retaliation against an individual because that person has reported misconduct on the part of one or more UN officials or cooperated with a duly authorized audit or investigation of the Organization constitutes misconduct which, if established, will lead to disciplinary action and/or transfer to other functions in the same or a different office.[120]Any retaliatory measures against a contractor or its employees, agents or representatives or any other individual engaged in any dealings with the United Nations because such person has reported misconduct by United Nations staff members will be considered misconduct that, if established, will lead to disciplinary or other appropriate action.[121]

3.2 The Ethics Office

The United Nations EO was established in 2006 to “assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability“.[122] In developing the draft policy for protecting staff against retaliation for reporting misconduct a review was carried out of whistleblower protection legislation in many Member States, including the United States of America, the United Kingdom of Great Britain and Northern Ireland, Australia, Canada, South Africa, New Zealand, Israel and South Korea. The inclusion of the UN new programme of protection against retaliation as part of

[118]UNDT/2013/176, *supra* note 115, para. 133.

[119]Ibid., para. 123,124,126.

[120]ST/SGB/2005/21, *supra* note 101, section 7.

[121]Ibid., section 8.

[122]United Nations Secretariat, Secretary-General’s bulletin, *Ethics Office — establishment and terms of reference*, U.N.DOC ST/SGB/2005/22 (30 December 2005), para.1.2.

the proposed functions of the EO was a result of the proposal of an interdepartmental working group made up of representatives of the OIOS, the Office of Human Resources Management, the UNDP, the Office of Legal Affairs and the Department of Peacekeeping Operations, the Office of the Ombudsman and a consultant recommended by Transparency International. [123]

The main responsibilities of the EO are as follows[124]:

(a) Administering the Organization's financial disclosure programme;

(b) Undertaking the responsibilities assigned to it under the Organization's policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations;

(c) Providing confidential advice and guidance to staff on ethical issues (e.g., conflict of interest), including administering an ethics helpline;

(d) Developing standards, training and education on ethics issues, in coordination with the Office of Human Resources Management and other offices as appropriate, including ensuring annual ethics training for all staff;

(e) Such other functions as the Secretary-General considers appropriate for the Office.

The EO is within the UN Secretariat reporting directly to the SG.125 The head of the EO is appointed by the SG and is accountable to the SG in the performance of his or her functions.[126]

The EO, like the Office of the Ombudsman, the Board of Auditors and secretariat of the Advisory Committee on Administrative and Budgetary Questions, is under the budget section on programme budget, overall policymaking, direction and coordination. It is located outside the Executive Office of the SG in order to guarantee its independence and to ensure that the staff of the EO are recruited in a transparent manner through established procedures. As with the Ombudsman, it is proposed that the head of the EO be appointed at the level of Assistant Secretary-General for a fixed, non-renewable five-year term.[127]

The EO does not have investigation functions.[128]It serves as an independent, confidential and impartial entity dedicated to providing timely and quality advice, assists staff in upholding the highest levels of efficiency, competence and integrity by providing advice on relevant standards of conduct and by clarifying staff and Organizational obligations.[129] The Secretariat's financial

[123]A/60/568, *supra* note 1, para. 11

[124]ST/SGB/2005/22, *supra* note 122, art. 3.1.

[125]Ibid. art. 1.1.

[126]Ibid., section 2.

[127]A/60/568, *supra* note 1, Annex I, A; C 22.

[128]Ibid., B 13.

[129]United Nations, General Assembly, *Activities of the Ethics Office: report of the Secretary-General*, U.N.DOC A/68/348 (23 August 2013), para. 12.

disclosure programme administered by EO, serves as an essential means to identify, manage and mitigate the risk of personal conflicts of interest for the purpose of protecting the integrity of the Organization. Under the programme, designated staff members, including all staff at the D-1 level and above and those whose principle duties involve procurement and investment, are obliged to file annual disclosure statements. One of the most important functions of the EO is its leading role in developing and setting standards of conduct and facilitating annual training on ethics issues, in collaboration with the Office of Human Resources Management. And lastly, the EO ensures confidential and prompt attention to requests for protection against retaliation for having reported misconduct. [130] The Office consults with the individuals concerned and assesses, whether their requests fall within the protection mandate of the Office.

3.2.1 Requests for protection against retaliation

Complaints to the EO of retaliation for reporting misconduct may be made in person, by regular mail or by e-mail, by fax or through the EO helpline.[131] The function of the EO is to receive complaints of retaliation or threats of retaliation, to keep a confidential record of all complaints received and to conduct a preliminary review of the complaint to determine if the complainant engaged in a protected activity and there is a *prima facie* case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.[132] After performing an initial assessment on the request for protection against retaliation, the EO can dismiss complaint as not falling under its mandate or not warranting a preliminary review. For those cases that warrant preliminary review, the EO investigates whether there is a *prima facie* case of retaliation. The EO will seek to complete its preliminary review within 45 days of receiving the complaint of retaliation.[133] If EO has determined that a credible case of retaliation exists, it refers the matter to OIOS or, where appropriate, to an independent panel and will immediately notify in writing the complainant that the matter has been so referred.[134]

The investigation should be completed within 120 days. Once the investigation has been completed, and the EO has received the investigation report, it will inform in writing the complainant of the outcome of the investigation and if retaliation has been established, the EO can make recommendations to the head of department or office address the negative consequence of

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[130]United Nations, General Assembly, *Activities of the Ethics Office: report of the Secretary-General*, U.N.DOC A/61/274 (18 August 2006), art. 43.

[131]ST/SGB/2005/21, *supra* note 101, art. 5.1.

[132]Ibid., art. 5.2.

[133]Ibid., art. 5.3.

[134]Ibid., art. 5.5.

retaliation. Such measures may include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, or, if requested by the individual, transfer to another office or function for which the individual is qualified, independently of the person who engaged in retaliation.[135] Should the EO not be satisfied with the response from the head of department or office concerned, it can make a recommendation to the SG. The SG will provide a written response on the recommendations to the EO and the department or office concerned within a reasonable period of time. [136]

Pending the completion of the investigation, the EO may recommend that the SG take appropriate measures to safeguard the interests of the complainant, including but not limited to temporary suspension of the implementation of the action reported as retaliatory and, with the consent of the complainant, temporary reassignment of the complainant within or outside the complainant's office or placement of the complainant on special leave with full pay.[137] If the EO finds that there is no credible case of retaliation or threat of retaliation but finds that there is an interpersonal problem within a particular office, it will advise the complainant of the existence of the Office of the Ombudsman and the other informal mechanisms of conflict resolution in the Organization.[138]If the EO finds that there is a managerial problem based on the preliminary review of the complaint or the record of complaints relating to a particular department or office, it will advise the head of department or office concerned and, if it considers it necessary, the Management Performance Board.[139]Where, in the opinion of the EO, there may be a conflict of interest in OIOS conducting the investigation, the EO may recommend to the SG that the complaint be referred to an alternative investigating mechanism. [140]

In the UN whistleblower case *„Rahman v. Secretary-General of the United Nations"* it was determined by the EO that a staff member, who worked as Chief of the Division of Management in UNCTAD, was retaliated against by being removed from his duties as Chief of the Division of Management, after he raised concerns to his management about possible

[135]ST/SGB/2005/21, *supra* note 101, art. 6.1.

[136]Ibid., art. 6.2.

[137]Ibid, art. 5.6// In case Wasserstrom v. Secretary-General the staff member was granted special leave with pay and protected status as a "whistleblower" pending investigation by OIOS. After the completion of the enquiry, OIOS presented its report and conclusions on 11 April 2008 to the Ethics Office, finding that no retaliation had occurred. The Ethics Office accepted the OIOS report and, based upon it, did not make any recommendation to "the head of the department or office concerned and the Under-Secretary-General for Management". Judgment No. 2014-UNAT-457.

[138]Ibid., art. 5.8.

[139]Ibid., art. 5.9.

[140]Ibid., art. 5.10.

misconduct.[141]The EO advised the staff member, that in response to the OIOS report, it found that he had been the victim of retaliation by two staff members in the Office of the Secretary-General of UNCTAD, and recommended to the Under-Secretary-General for Management that disciplinary measures be instituted against them and that, in addition, it had recommended to the SG of the UN that he receive a lateral transfer to another UN office, maintaining his grade level and managerial responsibility.[142] After initially deciding to reassign the Applicant to UNCTAD in Geneva as of 1 June 2012, the SG decided on 30 April 2012, in response to the Applicant's objections, to assign him to a D-1 post as Principal Officer of UN-OHRLLS in New York.[143] Under sec. 6 of ST/SGB/2005/21, the EO only makes recommendations, either to the head of the department or office concerned or to the SG. In this case, after noting that the Applicant's return to UNCTAD in Geneva could result in new retaliation against him, the EO recommended that the Secretary-General grant him a transfer to another United Nations office. Having pointed out that the principle of competitive selection would make the assignment of the Applicant to another office difficult, the Secretary-General decided to transfer him to New York to a D -1 post as Principal Officer of UN-OHRLLS. The Tribunal holds that in deciding to transfer him to New York until the date of his retirement, in conformity with the desire initially voiced by the Applicant, the Secretary-General carried out the recommendation of the EO as well as possible and protected the Applicant from retaliation on the part of the UNCTAD staff members, which was the objective to be met. While it is unfortunate that as of the date of the present decision, the Applicant will not yet have his job description in hand, that is no basis for contesting the decision of the Secretary-General, nor is the fact that the post would be funded by UNCTAD on a temporary basis only.[144]

3.2.2 Statistics of finding retaliation by Ethics offices

The EO releases annual reports to the SG and, through the SG, to the GA of its activities, evaluations and assessments. The EO responds to requests regarding general ethics advice, the financial disclosure programme, protection against retaliation, training and outreach, standard-setting and policy support. Ethics advice, including relating to the financial disclosure programme, continues to account for most requests for services received.[145] Request for EO offices assistance

[141]*Rahman v. Secretary-General of the United Nations*, United Nations Dispute Tribunal, Judgment No. UNDT/2013/097/Corr.1, (9 July 2013).

[142]Ibid., para.103.

[143]Ibid., para.104.

[144]Ibid., para.106.

[145]United Nations, General Assembly, *Activities of the Ethics Office: report of the Secretary-General*, U.N.DOC A/69/332 (20 August 2014), para. 10.

has been rising since its inception. From 1 August 2013 to 31 July 2014, the EO received 924 requests for its services, representing an increase of 15 per cent over the previous cycle and 4 per cent from 2011-2012.[146] The Office has been operational for almost a decade and its record of protecting against retaliation has not been astonishing. The EO was admittedly understaffed at the start and there was a lot of confusion about the jurisdiction, competences as illustrated by the controversy that surrounded case Artjon Shkurtaj 2007, which will be discussed the following chapter in more detail. Initially, the Office consulted extensively with the Office of Human Resources Management, the Office of Legal Affairs, the Office of the Ombudsman, the secretariat of the JAB and the OIOS in establishing its procedures for dealing with complaints of retaliation. Considerable advisory support was provided by the GAP, an international non-governmental organization devoted to whistle-blower protection.

Based on the reports produced every year by the EO from August 2006 to July 2012, the EO initiated 106 retaliation complaint preliminary reviews and of those, the Office determined 9 *prima facie* cases of retaliation and referred them to OIOS for formal investigation. The EO determined that retaliation had been established for one of them.[147] From 1 August 2012 to 31 July 2013, the EO initiated 15 preliminary reviews and completed 12 preliminary assessments, and referred 3 of the cases to OIOS. Regarding two other cases referred in 2011-2012, the EO completed its review of the investigation report and supporting materials for one of the cases, and determined that retaliation had indeed occurred. Pursuant to this finding, the Office recommended disciplinary action to the Administration against the investigation subject and that specific remedial actions be taken to eliminate the adverse impact on the complainant of the retaliation that was experienced. The Office's review of the investigation report for the second case is ongoing. [148] According to these reports until July 2013, EO has established only 2 cases of retaliation in the meaning of ST/SGB/2005/21.

In 2009, OIOS declined to proceed with an investigation of a *prima facie* case submitted by the EO, based upon the operational independence provided to it by the GA in its resolution 48/218 B. The EO was of the view that in order to implement fully the policy of protection against retaliation, as set out in Secretary-General's bulletin ST/SGB/2005/21, an investigation was necessary in order to allow the Administration to discharge its burden of proof and enable the Organization to take corrective measures, if retaliation was then established. An opinion from the Office of Legal Affairs confirmed that, based upon the above-mentioned Assembly resolution,

[146]A/69/332, *supra* note 145, para. 8.

[147]United Nations, General Assembly, *Activities of the Ethics Office: report of the Secretary-General*, U.N.DOC A/67/306 (14 August 2012), para. 47.

[148]A/68/348, *supra* note 129, para. 46.

OIOS did have the discretionary authority to decide whether or not to investigate a matter and could not be compelled to investigate a case referred by the EO, even though the Secretary-General has, by the issuance of ST/SGB/2005/21, mandated OIOS to conduct an investigation.[149]Because of this lacuna staff may be sceptical about the ability of the EO to provide meaningful protection.[150] The EO requested the GA either to amend the mandate of OIOS to include a specific obligation to investigate all *prima facie* cases or to allow for the establishment of an alternative investigating mechanism in circumstances where, owing to a conflict of interest or its own discretion OIOS did not investigate a matter for which the EO determined a *prima facie* case of retaliation.[151] During the 2010-2011 cycle the alternative investigation panel, was established pursuant to ST/SGB/2005/21, to investigate a referred *prima facie* finding of retaliation by the EO. The panel was established, subsequent to a recommendation by the EO to the Executive Office of the SG, on the basis that a conflict of interest would be created in the event that OIOS were to conduct the investigation. The panel functioned as an effective alternate investigating mechanism and completed its investigation within its stipulated time frame. The support provided to the panel by the EO, the Executive Office of the Secretary-General and OIOS demonstrated the continuing commitment of the Organization to fully implementing its policy of protection against retaliation.[152]

Many reports submitted to EO described workplace conflicts and interpersonal disputes. The EO reports that- "the policy continued to be used by staff as a labour dispute mechanism, in parallel with existing recourse mechanisms such as the Management Evaluation Unit, or a complaint under the SG's bulletin on prohibition of discrimination, harassment, including sexual harassment, and abuse of authority (ST/SGB/2008/5), rather than as a protection mechanism for the reporting of serious misconduct harmful to the interests of the Organization. The Office has a similar experience in its receipt of requests for advisory services, nearly 25 per cent of which involve allegations of wrongdoing other than retaliation."[153]

In order to enhancing the Organization's ability to promote the reporting of serious misconduct, protect whistleblowers from retaliation and prevent retaliation from occurring, the Secretariat initiated an external expert review of its protection against retaliation policy in 2012-

[149]United Nations, General Assembly, *Activities of the Ethics Office: report of the Secretary-General*, U.N.DOC A/64/316 (21 August 2009), para. 66.

[150]United Nations, General Assembly, *Activities of the Ethics Office: report of the Secretary-General*, U.N.DOC A/65/343 (1 September 2010), para. 34.

[151]Ibid., para. 83.

[152]United Nations, General Assembly, *Activities of the Ethics Office: report of the Secretary-General*, U.N.DOC A/66/319 (23 August 2011), para. 30.

[153]A/69/332, *supra* note 145, para. 47.

2013. Completed in the 2013-2014 reporting cycle, the expert review makes several recommendations, pursuant to emerging global best practices and considering the intent and purpose of the policy as originally formulated. Following receipt of the finalized review, the EO, in consultation with the Department of Management, the Office of Legal Affairs and OIOS, prepared a proposal on a revised protection against retaliation policy. The proposal is under review by the Executive Office of the SG. Thereafter, proposed amendments to the text of the SG's bulletin will be considered by the Office of Human Resources Management and submitted for consultations in accordance with the Organization's normal practice.[154]

3.2.3 Bringing retaliation claim to the UNDT and UNAT

An alternative recourse for an alleged whistleblower is to lodge a complaint with the internal justice system. Under its Statute, the Tribunal is competent to hear and pass judgment on an application filed by any staff member to contest an administrative decision that is in non-compliance with his/her terms of appointment or his/her contract of employment (art. 2.1 (a), of the Statute). The Statute specifies that the terms "contract" and "terms of appointment" include all applicable regulations alleged non-compliance.[155] ST/SGB/2005/21, article 6.3 provides that: "The procedures set out in the present bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms. An individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding."[156] This allows staff members to bring a claim to the UNDT if she alleges that the administration has taken a decision with retaliate purposes.

"Rule 11.2 of the Staff Rules stipulates that a staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), are, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision. The rule requires the staff member who submits a request for management evaluation to indicate which administrative decisions, explicit or implicit, he or she is contesting."[157] "A request for a management evaluation are not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff

[154]A/69/332, *supra* note 145, para. 48.

[155]*Oummih v. Secretary-General of the United Nations*, United Nations Dispute Tribunal, Judgment No. UNDT/2014/004, 15 January 2014, para. 54.

[156]ST/SGB/2005/21, *supra* note 101, art. 6.3.

[157]UNDT/2013/097, *supra* note 141, para. 95.

member received notification of the administrative decision to be contested."[158] Even if the applicant thinks the request for management evaluate would be rejected by the MEU, this requirement still has to be fulfilled, otherwise a claim before the tribunal will be rejected.[159]

A staff member can bring a claim against an administrative decision on the ground of improper retaliatory motive stemming from a report of misconduct.[160] When a request for protection against retaliation is brought to the EO, it is the duty of the Office, do determine, whether *a prima facie* case of retaliation exists. When a staff member submits a claim to the UNDT, the same standard applies to the justice procedure, except that it is the applicant that has to prove the *prima facie* case before the judge. After *prima facie* case is determined, the burden of proof shifts to the respondent to prove the same action would have been taken in the absence of the protected activity. The cases before the tribunals are civil in nature therefore the standard of proof required for both parties to prove their positions is "a preponderance of the evidence" or on "a balance of probabilities". It must be more probable than not, but not equal, for the burden to be discharged.[161] So, when a party making an assertion of an improper or retaliatory motive behind an administrative decision has established a *prima facie* case the burden shifts to the opposing party to establish on a balance of probabilities that the actions taken were not prompted by extraneous or improper motives.[162]

3.2.4 Can an Ethics offices decision be contested before the UNDT?

There have been a number of cases before the tribunals by brought by staff members challenging unfavourable decisions of the EO. Whether such a decision can be brought to judicial review depends on whether it is considered an administrative decision, with direct legal consequences for the staff member.

In case *Servas v. Secretary-General of the United Nations*, a staff member requests rescission of a decision dated 26 March 2012 by which the EO refused to consider that the settlement agreement she had concluded on 29 June 2011 with the International Trade Centre (ITC), following mediation, constituted a protected activity within the scope of the SG bulletin

[158]*Servas v. Secretary-General of the United Nations*, UNDT, Judgment No. UNDT/2012/195 (11 December 2012) para. 33.

[159]Ibid., para. 35.

[160]*Gehr v. Secretary-General of the United Nations*, UNAT, Judgment No. 2014-UNAT-475 (17 October 2014) para. 19.

[161]*Tadonki v. Secretary-General of the United Nations*, UNDT, Judgment No.: UNDT/2013/032 Date: 26 February 2013, para. 144.

[162]Ibid., para. 145.

ST/SGB/2005/21.[163] When reasoning, whether the EO decision could be contested the judge invoked the Nwuke 2010-UNAT-099 criteria, where the UN Administrative Tribunal ruled that an OIOS decision not to undertake an investigation was an administrative decision appealable to the UNDT, reasoning the following: "So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT ?".[164]The Tribunal took the same approach with regard to the decision of the EO in Servas case and examined whether the contested decision could affect her rights directly.[165]The UNDT reasoned that by taking that decision, the EO effectively put an end as far as it was concerned to the action brought before it by the Applicant and therefore considered that the decision affected the Applicant's rights directly within the meaning of the Nwuke 2010-UNAT-099 case law[166]. In arguing that the decision is not an administrative decision subject to appeal, the responded also submitted that given the independence of OIOS, the SG cannot be held responsible for the unlawfulness of decisions over which he has no power. The UNDT admitted that the GA intended the EO and OIOS to have a large degree of independence, the SG's bulletin ST/SGB/2005/22 of 30 December 2005 (Ethics Office — establishment and terms of reference) provides that The EO is established as a new office within the UN Secretariat reporting directly to the SG and as such SG is administratively responsible for any breaches or illegalities EO might commit. The UNDT also considered, that: "[...] in an organization like the UN it would be inconceivable for one of its offices to be able to act without potentially engaging the liability of the Organization and thus of the SG, in his capacity as Chief Administrative Officer. "[167]

Similar arguments have been raised in case Staedtler v. Secretary-General against OIOS where the Office had refused to investigate a claim, and it's decision was brought to the UNDT. The tribunal ruled on the receivability, that the key characteristic of an administrative decision subject to judicial review is that the decision must "produce direct legal consequences" affecting a staff member's terms or conditions of appointment. "What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made,

[163]UNDT/2012/195, *supra* note 158, para 1.

[164]Ibid., para. 25.

[165]Ibid., para. 26.

[166]Ibid., para. 28.

[167]Ibid., para. 30.

and the consequences of the decision.[168] The UNTD ruled that, whether a decision can be appealed depends on the content of the report provided to OIOS and what applicant seeks to challenge.[169] If the outcome of a potential investigation would impact the organization or other accused staff members, but not the applicant[170], then an appeal is not receivable.[171] If a decision of OIOS directly impacts the rights of the applicant, it constitutes an administrative decision.[172] For example if an applicant is being subjected to deliberate negative treatment in his workplace and OIOS refuses to investigate the matter, the refusal is an administrative decision, because it affects the applicant's terms of appointment.

In Staedtler v. Secretary General of the UN the UNTD accepted a claim against the EO citing Hunt Matthes case UNDT/2013/085, where it was held that the Tribunal's role is to review the actions taken and decisions made by the EO in its preliminary evaluation of the Applicant's complaint in the light of the legal obligations of the EO and the relevant and factually reliable information that it had in its possession[173]. The cited Hunt Matthes case however was vacated by the UNAT months later, on the basis that it erred *ratione materiae.*[174]

3.2.5 Current position of the UNAT on the receivability of EO decisions

UNDT argued many times for the receivability EO recommendations for judicial review. Yet the UNAT jurisprudence provides a different position as its most recent decisions have been against interpreting EO recommendations as administrative decisions.

3.2.5.1 James Wasserstrom vs Secretary General

An important case for protection of whistle-blower is James Wasserstrom vs Secretary General. The former Head of the Office for the Coordination of Oversight of Publicly Owned Enterprises in the UN Interim Administration Mission in Kosovo ("UNMIK") complained to the EO that he had been retaliated against for whistleblowing pursuant to ST/SGB/2005/21.[175] He had complained to the OIOS alleging misconduct and subsequently his office was closed and with his

[168]*Staedtler v. Secretary-General of the United Nations*, UNDT, Judgment No. UNDT/2014/123 (13 October 2014), para. 39.

[169]Ibid., para. 44, 45.

[170]Ibid., para. 46.

[171]Ibid., para. 47.

[172]Ibid., para. 49.

[173]*Hunt-Matthes v. Secretary-General of the United Nations*, Judgment No. UNDT/2013/085, para. 106.

[174]*Hunt-Matthes v. Secretary-General of the United Nations*, UNAT, Judgment No. 2014-UNAT-444 (27 June 2014) para. 29.

[175]UNDT/2012/092, *supra* note 2, para. 1.

assignment UNMIK ended. Also, an unauthorized and unwarranted investigation was commenced against him in the course of which he was treated in a manner that was appalling and in breach of his rights to due process.[176] The EO found a *prima facie* case and submitted the case to OIOS for investigation. After receiving the conclusions from OIOS, that the applicant had not been retaliated against, the EO dismissed the Applicant's complaint.[177]UNDT held that OIOS failed to carry out the investigation of the matter in accordance with the standards required. ST/SGB/2005/21 provided that the burden of proof rest with the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity.„[...] in the Investigation Report, ID/OIOS merely stated that it found: "no evidence that these activities would have been retaliatory within the meaning of [ST/SGB/2005/21]".[178] The Tribunal found that the Administration had not properly established that retaliation had not occurred. The EO should have ensured that clear and convincing evidence actually existed before dismissing the Applicant's complaint. The EO should not just have merely adopted the Investigation Report and recommendations of ID/OIOS but carried out its responsibility to exercise the correct legal test and appears to have abrogated its responsibility to address the correct legal test. The Tribunal clearly stated, that it was for the Respondent to rebut the claims by providing clear and convincing evidence, that it would have taken the same action, absent the protected activity. [179] The Tribunal found, that the Ethics Office's uncritical acceptance of the Investigation Report constituted an error of law and procedure within the meaning and intention of ST/SGB/2005/21. [180] The Tribunal also criticized the EO for not challenging the blatant disregard for due process in the investigations of the international prosecutor and the pre-trial judge in the Mission, which obviously had exceeded their mandate.[181] There would appear to have been a fundamental failure on the part of the EO to ask the simple question as to why the Applicant was treated in such a way. The applicant complaint was upheld and The Tribunal concluded that the EO failed to investigate properly and reach the mandatory standard of „clear and convincing evidence". [182]

Although the Tribunal did not come to the conclusion that there was retaliation, the case was largely heralded as a successful defence of a whistleblower in the UN. The tribunal strongly argued for a true and effective investigation by the concerned bodies. It emphasized the burden of

[176]UNDT/2012/092, *supra* note 2, para. 2.

[177]Ibid., para. 3.

[178]Ibid., para. 37.

[179]Ibid., para. 38.

[180]Ibid., para. 39.

[181]Ibid., para. 45.

[182]Ibid., para. 49.

proof and proof by clear and convincing evidence that it would have taken the same action absent the protected activity. Judges pointed out the inadequacies in the EO not just merely adopt the Investigation Report and recommendations but to investigate themselves and the contrary action amounts to an error of law and procedure. Unfortunately this judgment was overturned by UNAT on the 27th June 2014.

The SG appealed the decisions of UNDT directed at the conclusion that the EO's determination of no retaliation constituted an administrative decision that fell within its jurisdiction. [183] The SG submitted that the UNDT erred in finding that Mr. Wasserstrom's application challenging the EO determination of no retaliation was receivable. He was of the opinion that the EO conclusion was not a decision taken by the Administration and it did not carry direct legal consequences for the terms and conditions of Mr. Wasserstrom's appointment. [184] UNAT came to the conclusion: „We agree with the Secretary-General that the Ethics Office is limited to making recommendations to the Administration. Thus, the Appeals Tribunal, with Judge Faherty dissenting, finds that these recommendations are not administrative decisions subject to judicial review and as such do not have any "direct legal consequences".[185]

The UNAT by majority decided to reverse the Judgment on Liability and to vacate the Judgment on Relief due to the erroneous receipt of Mr. Wasserstrom's application. However, the award of USD 15,000 costs against the SG was unanimously upheld.[186]

3.2.5.1.1 Opinion of dissenting Judge

The presiding Judge Mary Faherty disagreed with the conclusions of the UNAT. She reasoned that the 21 April 2008 finding by the EO of no retaliation had a direct consequence for Mr. Wasserstrom's terms of employment and conditions of service because that finding brought the complaint he had initiated pursuant to ST/SGB/2005/21 to an end and thus prevented him, rightly or wrongly, from pursuing or being afforded any of the remedies provided for in Section 6.1 of ST/SGB/2005/21. Thus, the EO's determination of no retaliation clearly and unequivocally impacted on Mr. Wasserstrom's terms and conditions of employment.[187]

Citing the case of Koda, the judge stated that [...] notwithstanding an entity's operational independence, once it is part of the Secretariat, any decision capable of affecting an employee's

[183] *Wasserstrom v. Secretary-General of the United Nations*, UNAT, Judgment No. 2014-UNAT- 457 (27 June 2014), para 6.

[184] Ibid., para. 7.

[185] Ibid., para. 41.

[186] Ibid., para. 43.

[187] *Wasserstrom v. Secretary-General of the United Nations*, *Judge Faherty's Dissenting Opinion on the Receivability Issue*, UNAT, Judgment No. 2014-UNAT- 457 (27 June 2014) para. 27.

terms of employment and conditions of service "may be impugned". As the EO's finding of no retaliation affected Mr. Wasserstrom's terms of employment and condition of service, I see no basis to insulate the EO from the test which the Appeals Tribunal applied in Koda."[188] She finally summarized as follows:" Taking into consideration the entitlements provided to staff members pursuant to Sections 2, 5 and 6 of ST/SGB/2005/21, it is inconceivable that a finding of the Ethics Office pursuant to its statutory mandate can be otherwise than an "administrative decision" capable of review by the Dispute Tribunal. To hold otherwise would render nugatory the substantive protection and remedies afforded to staff members under ST/SGB/2005/21." [189]

This decision is a serious blow as stated by the GAP: "[...] U.N. whistleblowers will no longer be able to challenge the decisions of the EO, an admittedly dubious channel for redress, which has historically failed to protect 99 percent of the whistleblowers who have sought its support, including Wasserstrom. Without a clear and effective procedure for protecting whistleblowers, the UN fails to meet international best practices [...] the UN significantly weakened the rights of its own employees [...].As a result of this judgment, some cases filed by U.N. whistleblowers will likely be thrown out by the Tribunal. This judgment may also further exacerbate the chilling effect that prevents U.N. employees from speaking out about misconduct. This is a sad day for whistleblowers and those who wish the U.N. was more accountable and effective." [190]

3.2.6 Conclusions about receivability issue

As it stands now, EO decisions are not receivable *ratione materiae*, because they are deemed not having a direct effect on staff members, thus not making them administrative decisions, subject to appeal.

Based on the jurisprudence the recommendations of the EO cannot be challenged before the UNTD. In the Hunt-Matthes case[191], the UNAT determined that the UNTD erred *ratione materiae* in receiving the claim as being covered by ST/SGB/2005/21. That is because it had

[188]2014-UNAT- 457, *supra* note 187, para. 39.

[189]Ibid., para. 41.

[190]*UN Tribunal Weakens Whistleblowers' Rights, Disregards U.S. Appropriations Law*,Government Accoutnablitity Porject (September 03, 2014) http://whistleblower.org/press/un-tribunal-weakens-whistleblowers-rights-disregards-us-appropriations-law#sthash.Ogff29qL.dpuf

[191]The UNAT concluded that the UNDT had also erred in law when it determined that Ms. Hunt-Matthes' claims of retaliation were covered by ST/SGB/2005/21 since her claims were based on events occurring in 2004, before ST/SGB/2005/21 went into effect. The UNAT concluded, that UNDT had violated the principle prohibiting retrospective effect of law.

already been established in case James Wasserstrom vs Secretary General [192], that EO determination was not an administrative decision, subject to judicial review. An administrative decision is "a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules and regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences".[193] The UNAT concluded that EO recommendation had no "direct legal consequences" on the terms or conditions of Ms. Hunt-Matthes' appointment.

Because of this it was deemed not to be an administrative decision subject to judicial review. [194] The EO is currently not in the jurisdiction of the justice system of UN. The EO unit is currently functioning without any judicial review as said in Servas: „[...]able to act without potentially engaging the liability of the Organization and thus of the Secretary-General, in his capacity as Chief Administrative Officer." That is a negative point for whistleblower protection efforts, that The EO is not held to highest standards of scrutiny.

3.3 Is the UN Staff right to protected against retaliation being implemented correctly?

The SG bulletin ST/SGB/2005/21 clearly provides, that UN staff members have the right to be protected against retaliation: "It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation." [195] also : "[…]An individual who cooperates in good faith with an audit or investigation has the right to be protected against retaliation[...][196] Also, there is clear provisions, that retaliation is forbidden and considered misconduct by itself. [197] The protection against retaliation policy does not only state, that retaliation is forbidden, but the staff member has a right to be protected against retaliation. This is an important distinction that will be addressed later. In legal terms wherever there exists a right in any person, there also rests a corresponding duty upon

[192]2014-UNAT-457, *supra* note, 183, para. 41.

[193]2014-UNAT-444, *supra* note, 174, para. 29.

[194]Ibid., para. 28.

[195]ST/SGB/2005/21, *supra* note 101, art. 1.1.

[196]Ibid., art. 1.2.

[197]Ibid., art. 1.3 and section 7.

another person. For this reason there must exists a duty to protect the staff members. A duty in the legal sense means an obligations of performance[198]. This leads to a conclusion that there rests an obligation on the administration to protect from retaliation. From the provisions of ST/SGB/2005/21 it is clear that the system of protection against retaliation has been set up consisting of the EO, OIOS and SG. The EO decides if there is *prima facie* case, the OIOS investigates and then again the EO takes a decision whether there has been retaliation or not and makes suggestions to the SG. All of these units have a part in fulfilling the administrations obligations to protect staff from retaliation. If any of these units fail to fulfil their part of the duties, the person's right to be protected against retaliation is breached. An inalienable part of a right of an individual is the ability to defend his rights before a court or tribunal. If his rights are breached, he must be able to address his grievances and demand that that right would be restored.

In UN currently the EO can fail to fulfil its obligations, as it did in Wasserstrom where the UNDT heavily criticized the lack of professionalism expected for EO, and it cannot be challenged before the court. The administration may fail to protect the whistleblower and not be held accountable.

One other argument is that the staff member does not lose his/her rights to address the retaliatory decision of a manager or a superior directly to the UNDT and that means he retains the right for protection. But the internal justice system does not deal with protection. It is a grievances mechanism which aims to rectify a situation to a state that it was before a breach of legal norms. So, the argument that a staff member has protection regarding his right to claim before the justice system is not valid. The staff member might win a case against a retaliatory manager but he will have defended his right not to be retaliated against, which is different from right to be protected against retaliation. The first one is a negative obligation – a manager has the duty not to retaliate and staff member has the right not to be retaliated against. And the second one a positive, triggered after retaliation already occurred following which the staff member gains the right to be protected from retaliation by intervention of an authorized body, namely the EO. And this is the right that has to be available for defence in UNDT. If the administration fails to intervene to protect, the member has to be able to raise a claim against this alleged failure. In the current context the staff has more a right to seek protection of the EO than the right to be protected. If EO dismisses a claim or finds no retaliation, than it cannot be brought before UNDT.

[198]The Law Dictionary, Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. http://thelawdictionary.org/duty/

3.4 Status of whistleblowers for witnesses who testify before the UNDT

The issue of protecting whistleblowers who testify before the Tribunals has been raised in several cases. There is a strong case for the need to include testifying before the UNDT as a 'protected activity' in terms of ST/SGB/2005/21, so that the EO could receive complaints and protection may be afforded to witnesses who fear retaliation for the provision of testimony before the UNDT. Having been promulgated in 2005, ST/SGB/2005/21 naturally does not make reference to the UNDT. In other words, it expressly covers those who report misconduct or cooperate with authorized audits or investigations, but is silent in respect of those who testify before this court.[199]

ST/SGB/2005/21 makes it a duty of staff members to report any breach of the UN regulations and rules, and to cooperate with duly authorized audits and investigations. There is also an internal justice mechanism established to ensure "respect for the rights and obligations of staff members and the accountability of managers and staff members alike." Read together, the relevance of the EO in respect of the protection of witnesses who testify before the UNDT seems to the to be obvious.[200]

In case „Rees v. Secretary-General of the United Nations" some witnesses before the spoke of fears of possible retaliation by the UN against those who chose to or were asked to give evidence to UNDT. One witness in particular felt particularly vulnerable given that he only had one month left on his contract and that he had heard nothing of its renewal. The former staff representative who gave evidence spoke of the concerns of staff members who would otherwise have been prepared to speak on behalf of the Applicant but who were too apprehensive about the possible adverse consequences to them.[201] The judge of the case - Coral Shaw took such concerns seriously and stated : „If staff members and others are constrained from appearing before the Tribunal or from giving full and honest evidence because of a perception or fear of retaliation this strikes at the very heart of the independent and transparent system of administration of justice mandated by the General Assembly resolution 63/253."[202]

The Statute and Rules of Procedure of the UNDT are silent on the protective measures which may be ordered for the purposes of witness protection. The Rules do however, give the court the broad power to at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and

[199] *Kasmani v. Secretary-General of the United Nations*, Judgment No. UNDT/NBI/2009/6725 (16 February 2010), para. 25.

[200] Ibid., para. 26.

[201] *Rees v. Secretary-General of the United Nations*, UNDT/2011/156 (6 September 2011), para. 94

[202] Ibid., para. 95.

expeditious disposal of the case and to do justice to the parties.[203] Acknowledging that there may indeed be matters of crucial importance on which the Rules are silent, Article 36 states that all matters not expressly provided for in the rules of procedure shall be dealt with by decision of the Dispute Tribunal on the particular case, by virtue of the powers conferred on it by article 7 of its statute.[204]

In the context of national laws the protection of witnesses is generaly associated with criminal proceedings where witnesses fear of being identified because there often a is a threat to the life or security of the witness, so that anonymity is required if the witness is to testify fearlessly.[205] The fears of witnesses testifying before this UNDT are very different. Witnesses appearing before this court will, most always, fear for their livelihood, they will fear intimidation and retaliation in the exercise of their functions, and to the very security of their jobs. In these cases, it is not the public that these witnesses will fear, rather, it is the Secretary-General or agents acting under his authority.[206]

The GAP recommends that the to ammend the UN Secretariat protection against retaliation policy (ST/SBG/ 2005/21), and the corresponding policies at the UN funds and programmes, to include protections against retaliation for those who testify before the Tribunal – including witnesses or victims who may not be employed by the organization – as well as those who use the internal justice system.[207]

3.5 Statute of limitations and compensation awards

Another problem identified by the GAP project is a short statute of limitations for accessing the justice system. A complainant must file a management evaluation request with the Management Evaluation Unit (MEU) in the Office of the Under-SG for Management within 60 days of receiving an administrative decision that they wish to contest. This step is required before most complainants can file with the justice system. However, according to best practice whistleblower policies from around the world, six months is the minimum functional statute of limitations for whistleblowers to become aware of or act on their rights and one-year statutes of limitations are consistent with common law rights and are preferable.[208]

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[203]UNDT/NBI/2009/6725, *supra* note 201, para. 27.

[204]Ibid., para. 28.

[205]Ibid., para. 32.

[206]Ibid., para. 33.

[207] S.Walden, B.Edwards, *supra* not 103. p. 49.

[208]Ibid., p. 38. para. 1.

This especially problematic regarding peacekeeping cases, where people in the field are more isolated and may not have easy access to information about their rights. Indeed, UNDT has dismissed numerous cases from the peacekeeping missions due to the fact that the complainants missed the required deadline.[209]

3.5.1 Case Dzuverovic vs Secretary-General

The problem with the statute of limitations is illustrated by case Dzuverovic. On 13 November 1994, Ms. Dzuverovic joined the UN-HABITAT, based in Nairobi, on a two-year fixed-term appointment as a Programme Management Officer (PMO) at the P-3 level. Her appointment was extended several times.[210] On 7 November 1995, Ms. Dzuverovic wrote to OIOS alleging irregularities in recruitment and procurement practices in her unit. Her supervisor responded to the allegations on 15 November 1995, and requested her immediate transfer. [211] On 1 August 1996, Ms. Dzuverovic requested that OIOS conduct an investigation into the circumstances of the preparation of her performance evaluation and her transfer to IAVD. OIOS was unable to take action "due to financial constraints and limited resources".[212] The applicant was reassigned several times[213] and was finally separated from the Organization on 4 June 1999. On 3 October 2000, she filed an application before the former UN Administrative Tribunal contesting the non-renewal decision. The former UN Administrative Tribunal rendered its judgment on 23 July 2002, upholding the non-renewal decision but awarding compensation of three months' net base salary for decisions that were taken "throughout Ms. Dzuverovic's career in the Organization … which proved to be to the detriment of her career opportunities". [214] On 13 September 2011, Ms. Dzuverovic filed a request for management evaluation of the contested decision. On 4 November 2011, the Management Evaluation Unit (MEU) rejected her request on the basis that it was not timely and not receivable and, moreover, raised the issue of res judicata with respect to matters already adjudicated by the former UN Administrative Tribunal. [215] It has been established in the UNDT and the UNAT jurisprudence, as well in the provisions of the UNDT Statute, that the UNDT does not have the power to suspend or waive deadlines regarding time limits for management

[209]S.Walden, B.Edwards, *supra* note 103.p. 49, para 4.

[210]*Dzuverovic v. Secretary-General of the United Nations,* UNAT, Judgment No. 2013-UNAT-338 (28 June 2013), para. 2.

[211]Ibid., para. 3

[212]Ibid., para. 5.

[213]Ibid., para. 6

[214]Ibid., para. 9.

[215]Ibid., para. 11.

evaluation.[216]The UNDT concluded that Ms. Dzuverovic's application was not receivable because she did not timely seek management evaluation, within 60 calendar days from the date of notification of the contested administrative decision, as required by Staff Rule 11.2(c). Specifically, the UNDT found that Ms. Dzuverovic "was in receipt of the contested decision on 26 August 2010" and did not file her request for management evaluation until 13 September 2011 – "exactly one year and 18 days after the contested decision was conveyed to her". UNDT reasoned that "Whatever the substantive issues for determination were and however morally compelling these appear, the Tribunal is constrained by the applicable time limits under art.8 of its Statute. There is always a specified time in which an aggrieved staff member or persons representing the estate of a former staff member may bring a case to the formal system of the internal justice system. The Tribunal, being a creature of statutory law, cannot go beyond its mandate. [217] Even after coming to that conclusions, the UNDT admitted the unfortunate circumstances that led to this position:" It goes without saying that justice in certain cases cannot always be fully and effectively served through the formal system of the administration of justice."[218]. Also: "In the instant case, certain troubling issues stand out in bold relief. So much so that although it appears that substantive justice for the Applicant may have fallen through the cracks in the formal and informal justice systems and consequently eluded her for more than a decade, it has become necessary for the SG in his good offices to take a compassionate view to these issues[219] The UNDT, acknowledging the unfair treatment of Ms. Dzuverovic, even went so far as to recommend in its judgment that the SG would for sympathetic review with a view to bringing substantive justice and closure to the case.[220]

This was a clear example of how a person can be denied justice in the UN. Most peculiar thing was, that JAB actually found irregularities in the OIOS decision not to investigate the matter and in the various transfers of the Applicant and moreover, admitted that the report of misconduct might have had influence, upheld the decision not to renew the applicant's contract anyway.[221]

In a February 2012 resolution, the GA decided, that "the time limit for completing management evaluations may be extended by the UNDT for a period of up to fifteen days in exceptional circumstances when both parties to a dispute agree." Although this is progress, it still does not go far enough to address this problem.

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[216]*Dzuverovic v. Secretary-General of the United Nations,* UNDT, Judgment No. UNDT/2012/105 (12 July 2012) para. 53.

[217]Ibid., para. 58.

[218]Ibid., para. 60.

[219]Ibid., para. 61.

[220]Ibid., para. 74.

[221]Ibid., para. 69.

3.5.2 Compensation awards

Whistleblowers in the UN system can face years of protracted litigation to enforce their rights, only to obtain minimal compensation that does not correct the full consequences of the retaliation.[222] The Statute of the Tribunal is silent on the issue of damages except to specifically exclude the award of exemplary or punitive damages and to limit compensation, both pecuniary and non-pecuniary, to a maximum of two years' salary unless the case is exceptional.[223] It is well-established jurisprudence, both of the UNDT and UNAT, that once the Tribunal has made a determination of liability against the Organization, the applicable principle in determining entitlement to compensation is that the applicant be placed, as far as money can do so, in the same position she or he would have been had the contractual obligation been complied with. Compensation cannot be awarded where no harm has been suffered. Accordingly, it is for the Applicants to prove that the breaches of contract caused loss or injury. [224]UNDT artice 10 para. 5(b) provides that UNDT may order: „Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The UNDT may, however, in exceptional cases order the payment of a higher compensation, and shall provide the reasons for that decision."

The two-year cap on compensation "constitutes a major impediment for whistleblowers, as well as a denial of justice in some cases, particularly in those where harassment and discrimination took place." The Tribunals' Statutes preclude many types of remedy (such as mandatory reinstatement) and severely restrict financial compensation and award of costs.[225] For example local UN staff have low salaries, and since awards before the Tribunals are usually based on a portion of the complainant's salary, local staff may receive only a few thousand dollars for a case that took years to argue. According to one attorney, "for local staff it is the worst of all discrimination and very unfair… those who are local staff get almost no compensation and that's why you see very few of these cases coming up in the internal justice system, simply because they have no means to be represented."[226]

In addition, the UNAT tends to reduce compensation awarded by UNDT in general. According to a 2011 UN Advisory Committee on Administrative and Budgetary Questions report (A/66/7/Add.6): "During the period from 1 July 2009 to 31 May 2011, 38 judgments of the Dispute Tribunal awarded compensation equal to, or more than, six months net base salary, although a

[222]S.Walden, B.Edwards, *supra* note 103, p. 37.

[223]UNDT/2013/176, *supra* note 115, para. 145.

[224]Ibid., para. 146.

[225]S.Walden, B.Edwards, *op cit.,* p. 37, para. 3.

[226]Ibid., para. 1.

number of these were subsequently reduced or vacated by the Appeals Tribunal… Upon enquiry, the Advisory Committee was informed that the judgments overturned by the Appeals Tribunal to date had resulted in a reduction in awarded compensation of approximately $1,880,000."[227]

GAP recommends to revise the UNDT and UNAT Statutes to remove caps on compensation awards and to allow the judges to award the relief necessary to make the successful complainant whole. The judges should also be allowed to award costs to successful litigants, including reasonable legal fees and travel expenses.[228]

[227]S.Walden, B.Edwards, *supra* note 103, p. 46, note 40.

[228]Ibid., p. 37.

4 EXEMPTION OF FUNDS AND PROGRAMMES AND AD HOC ETHICS OFFICES

In 2007 reports in media outlets started appearing about alleged mismanagement in the UN Development Program (UNDP) operation in North Korea.[229] Just a few years prior the UN was hit by the Oil-for-Food scandal, where it was found that the Iraqi government was able to manipulate this program and gain around 1.8 billion dollars illicitly[230]. Rocked by another scandal UN Secretary Ban Ki-Moon called for an urgent, system wide and external inquiry into all activities done around the globe by the UN funds and programmes.[231] The allegations about mismanagement in the DPRK operations come to light in 2006 after an UNDP contractor working in DPRK office blew the whistle on what he believed were serious violations of UNDP regulations.

4.1 Artjon Shkurtaj v. Secretary General of the United Nations

Mr. Shkurtaj, an Albanian national worked in the UNDP office in DPRK from 6 March 2005 to 5 July 2005 under an SSA contract as Operations Manager.[232]In 2005 and 2006, during his employment with UNDP in DPRK, he raised concerns and allegations with respect to some financial and administrative aspects of UNDP's operations in DPRK.[233] "Mr. Shkurtaj's SSA was extended four times until the end of May 2006. On 1 June 2006, he was given a six-month appointment of limited duration as Operations Manager with the UNDP office in DPRK".[234] On 27 September 2006, two months before the expiration of his appointment of limited duration, Mr. Shkurtaj was relocated to New York to work with the Centre for Business Solutions, Bureau of Management at UNDP headquarters and on 26 March 2007, his contract lapsed and was not renewed".[235]

Subsequently to his unexpected lay-off Mr. Shkurtaj wrote a letter to the UNEO claiming retaliation. He explained, that he reported misconduct through external channels – the United

[229]The UNDP North Korea Scandal: How Congress and the Bush Administration Should Respond; The Heritage Foundation, 22 January 2007.

[230]Manipulation of the oil for food programe by the Iraqi government , independant inquiry commitee into the United Nations oil for food programme, Paul A. Volcker, Chairman Richard J. Goldstone, Member Mark Pieth, Member October 27, 2005.

[231]Statement attributable to the Spokesperson for the Secretary-General on UNDP, New York, (19 January 2007).

[232]UNDT/2010/156, *supra* note 5, para. 4.

[233]Ibid., para. 6.

[234]Ibid., para. 4.

[235]Ibid., para. 5.

States Mission to the UN. Before he had done so, he complained through his chain of command. Only when "[…] no action was taken to cease such misconduct […][236]he reported the misconduct to an entity outside of the established internal mechanisms.

Mr. Shkurtaj believed, that the reports about the misconduct of"[…] violation of multiple rules and regulations as well as criminal conduct by the UNDP [...] receipt and non-disclosure of counterfeit currencies, the payment to the Government of DPRK in hard currency, as well as the management of UNDP programs by Government officials of the DPRK, and other related violations" - were the reason for his contract being allowed to expire as of the end of March 2007[237]

The applicant filed a complaint to the EO under ST/SGB/2005/21, to protect against retaliation. The Director of the EO examined the complaint and came to the conclusion that there was a *prima facie* case of retaliation. However, it was soon to become clear, that UNDP was not within the jurisdiction of the EO. In the letter of 17 August 2007 from Robert Benson, the Director of EO, to Kemal Dervis, the UNDP Administrator, the EO Director acknowledged, that from a purely legal perspective the EO did not have the jurisdiction to address a request for protection from retaliation in relation to cases arise from UNDP yet undertook to investigate the matter due to, and among other things, an absence of applicable protection from retaliation policy within UNDP .The Director of the EO argued in favour of the case being subjected to ST/SGB/2005/21. [238] On 21 of August 2007, UNDP issued a response to the letter of EO Director and announced, that UNDP was proceeding to arrange an additional and complementary external review to take place under the auspices of UNDP's Executive Board, which would have been complementary to the external audit that was ongoing and could be led by a highly respected individual or team outside the UN system. The complementary review had to look into issues relating to UNDP's operations in DPRK that were not covered in the second phase of the external audit, including Mr. Shkurtaj's allegations. [239]

It seems that the conflict of jurisdictions was not known until the UNDP refused to cooperate. The Director of the EO was admittedly not aware of this jurisdictional incompatibility and said to have gone through "an intense learning curve" vis-à-vis the different organs and

[236]UNDT/2010/156, *supra* note 5, para 8.

[237]Ibid.

[238]Letter from Robert Benson, Director of UN Ethics office to Kemal Dervis, Administrator of UNDP (17 August 2007).
http://www.innercitypress.com/Dervis17Aug07.pdf

[239]United Nations Development Programme Newsroom, UNDP statement on DPRK (21 August 2007)

http://content.undp.org/go/newsroom/2007/august/undp-statement-on-dprk-20070821.en

specialized agencies, and had been informed that some funds and programmes were administered separately."[240]

The denial of jurisdiction to the EO earned harsh criticism from the United States government. On July 5th 2007 lleana Ros-Lehtinen, the US Chairman of the House Committee on Foreign Affairs, wrote a letter to the SG urging him to intervene and protect the whistleblower and investigate the matter of possible retaliation. The SG replied on 16th July 2007 via his Chef de Cabinet Vijay Numbiar and explicitly stated, that the matter was to be investigated by the EO: "As for the case of Mr. Shkurtaj, the EO, which is responsible for implementing the whistleblower policy, is currently examining his case according to procedures established in the SG. For the whistle-blower policy to work as it was intended, the EO must be able to conduct its work free from any interference from the SG's office."[241] There was no mention of any jurisdictional problems. The letter led to confusion as it showed that UN staff did not know how exactly the system-wide application of ethics worked.

Later, when the jurisdictional conflict arose, lleana Ros-Lehtinen once again addressed the SG with a letter sent on the 6th of September 2007. She urged the UN leader to "[…] fulfil his public commitments to greater transparency, and warned that defiance by UNDP of an EO ruling further undermines the credibility of UN reform efforts."[242] The US congresswoman expressed harsh criticism for the misleading information in the correspondence and conveyed her disappointment: "[...] I was shocked to learn that the EO investigation has been halted [...] This development is unacceptable and indefensible. Allowing a UN system entity to claim immunity from the EO process, when faced with the prospect of an adverse ruling would represent the complete evisceration of that much-touted reform."[243]

This case remains a fundamental test of the UN's whistle-blower protection policy, which has been heralded by the UN as one of the hallmarks of UN reform in recent years. The wrath of US government was not just a complaint. Previously, due to the DPRK scandal, US Congress had voted to cut funding of UNDP by 20 million dollars.[244]

It is true that based on the ST/SGB/1997/1 "Procedures for the promulgation of administrative issuances", SG's bulletins do not apply to funds and programmes unless explicitly

[240]Press Conference by Director of Ethics Office on Secretary-General's New Bulletin (3 December 2007). http://www.un.org/News/briefings/docs/2007/071203_Benson.doc.htm

[241]Letter form Chef de Cabinet Nambiar to US representative lleana Ros-Lehtinen (16 July 2007).

[242]Ros-Lehtinen Urges UN Secretary-General to Honor Prior Assurances on North Korea Whistleblower. Thursday, September 6, 2007; website of House Foreign Affairs Committee

http://archives.republicans.foreignaffairs.house.gov/news/story/?725

[243]Ibid.

[244]Ibid.

provided.[245] Yet in the absence of any Ethics office in the UNDP at the time of the case in question, the investigation and protection against retaliation of the staff of UNDP was vulnerable to arbitrariness and lack of standardized ethical rules if the case would be decided in the UNDP's own external review. Especially considering, that the EO had already been established in 2006 and was well equipped and much more trustworthy regarding impartiality and experience.

In a letter of 21 August 2007 to Robert Benson the United States representative for UN Management and Reform conveyed criticism to UNDP for refusing to cooperate with the EO: "UNDP's failure to cooperate with the EO is counter to good governance, is contrary to key UN rules and directly and fundamentally undermines serious efforts at UN reform".[246] The SG eventually took the side of the UNDP and separate jurisdictions and welcomed the fact they decided to appoint an independent reviewing body to cover the issues not covered by OIOS. He agreed that legally, the EO did not have jurisdiction over UNDP.[247] It was an uncomfortable surprise and contrasted with the expectations of many. The SG would not stand up for the rights of his EO to examine claims of all UN personnel and his vision of a system-wide application of ethics. It was understood by the general public as either unwillingness or inability to act. "[248]From the daily news briefings, the SG's position is clarified:" [...] there is no lack of resolve. There are realities within this Organization [...]. There are some limitations the SG cannot overcome. "[249]At a press conferences at the UN headquarters on 28th of August 2007 SG Ban Ki-Moon commented on DPRK whistleblowing incident, expressing hopes that that: "[…]the General Assembly looks at this issue again and gives clear guidelines so that the Ethics office can have a broader jurisdiction covering funds and programmes, and other agencies."[250]

"On 11 September 2007, UNDP announced the establishment of an ad hoc investigative body, the External Independent Investigative Review Panel (EIIRP), to review, inter alia, "[the applicant's] allegations related to these operations and the alleged retaliation, [and] make every effort to establish the facts, including about the specific events in DPRK and regarding application of relevant protection policies"[251]

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[245]United Nations Secretariat, Secretary-General Bulletin, Procedures for the Promulgation of Administrative Issuances, U.N.DOC ST/SGB/1997/1 (28 May 1997), art. 3.4.

[246]United States representative for United Nations Management and Reform letter to Robert Benson 21 August 2007.

[247]Daily Press Briefing by the Office of the Spokesperson for the Secretary-General (22 August 2007) http://www.un.org/News/briefings/docs/2007/db070822.doc.htm

[248]Daily Press Briefing by the Office of the Spokesperson for the Secretary-General (23 august 2007)

[249]Ibid.

[250]Transcript of press conference by Secretary-General Ban Ki-Moon at the United Nations headquarters, SG/SM/11133 (28 august 2007) http://www.un.org/News/Press/docs/2007/sgsm11133.doc.htm

[251]UNDT/2010/156, *supra* note 5, para. 14.

In the November 2007 SG's issued a bulletin called "*UN system-wide application of ethics: separately administered organs and programmes*". The bulletin established, that separately administered organs and programmes will have their own Ethics offices, each of them headed by an Ethics officer, who are function independently and report directly to the Executive Head of the respective separately administered organ or programme.[252] The importance of these rules cannot be underestimated as the separate Ethics offices, among other functions, have undertaken the responsibilities assigned to the EO in accordance with the policy for the protection of staff against retaliation of the respective separately administered organ or programme[253]. The ultimate goal and principle of an Ethics offices of separately administered organs or programmes of the UN, established by the Executive Head of the organ or programme, pursuant to the Bulletin, is to cultivate and nurture a culture of ethics, integrity and accountability, and thereby enhance the trust in, and the credibility of, the UN, both internally and externally.[254] This decision has exempted the separately administered organs and programmes from the scrutiny of an independent single UN EO. In the daily press briefing on 21 August 2007, carrespondent made a compeling obeservation about the state of whisltelblower protection regarding Artjon Shkurtaj case: "There is this huge push for system-wide coherence at the moment. And in every country the idea is one UN, one leadership, one plan, one budget, but what, 15 different systems of accountability and whistle-blower protection, is that the UN's position at the moment?"[255]

As to the case of Artjon Shkurtaj, the UNDP set up the EIIRP to examine the allegations concerning the operations of the UNDP office in DPRK, including the application's allegations of retaliation against him. It found, that no retaliation had occured. Pursuant to the EIIRP's terms of reference, the investigation report was subsequently provided to the EO for review and recommendations. The Director of the EO concurred with the EIIRP's findings and conclusions and did not recommend any additional investigation. However, the EO found that the applicant was not given a chance to reply to the adverse findings concerning his credibility and trustworthiness and recommended compensation.[256] UNDT concluded, that „[...]Accordingly, the applicant effectively received the same or substantially similar safeguards that he would have been entitled to had he been employed by the UN Secretariat and covered by ST/SGB/2005/21 at the

[252]United Nations Secretariat, Secretary-General's bulletin, *United Nations system-wide application of ethics: separately administered organs and programmes*, U.N.DOC ST/SGB/2007/11 (30 November 2007), Section 2, 2.

[253]Ibid., section 3 (e).

[254]Ibid., art. 1.1.

[255]Daily Press Briefing by the Office of the Spokesperson for the Secretary-General (21 August 2007) http://www.un.org/News/briefings/docs/2007/db070821.doc.htm

[256]UNDT/2010/156, *supra* note 5, para. 44.

time, which safeguards appear to be reasonable."[257] However, UNDT did find that there was :[...]a violation of the applicant's procedural right to be made aware of—and to have the opportunity to respond to—the adverse findings concerning his credibility and trustworthiness."[258]The UNDP was ordered to pay fourteen months' net base salary, based on the applicant's salary as at the starting date of his appointment of limited duration, as compensation for this procedural violation and the resulting harm. In addition to this sum, the respondent shall pay the applicant USD 5,000 as compensation for the delay in considering the EO's recommendation.[259] The award was subsquently reduced to 6 months of net based sallary by the UNAT in 2011.[260]

4.2 UN Ethics panel and the Ethics network

UN Ethics Panel (EP, previously UN Ethics Committee) was established by ST/SGB/2007/11.[261] The Panel consists of the heads of the Ethics offices of the separately administered organs and programmes of the UN and the EO of the UN Secretariat. The purpose of the UN Ethics Panel is to establish a unified set of standards and policies of the UN Secretariat and of the separately administered organs and programmes, and consult on certain important and particularly complex cases and issues having UN-wide implications raised by any Ethics office or the Chairperson of the Ethics Panel[262]. The EP is tasked to bridge the gap between the UN Secretariats ethics policies and the policies of the UN funds and programmes and ensure coherence in their application.[263] The Panel is chaired by the head of the EO of the UN Secretariat, who provides functional leadership to all Ethics officers of the separately administered organs and programmes, in order to promote the building and developing of capacity, including adequate levels of professionally qualified resources and ensure adherence to consistent methodology in the delivery of ethics related services. [264]The EP meets in formal sessions to consider ways to enhance consistency in the application of ethics standards. In 2008 the EP provided substantive and technical support to the SG in the development of a system-wide Code of Ethics for UN personnel,

[257]UNDT/2010/156, *supra* note 5, para. 45.

[258]Ibid., para. 47.

[259]Ibid., para. 51.

[260]*Shkurtaj v. Secretary-General of the United Nations*, Judgment No.: 2011-UNAT-148 (8 July 2011), para. 31.

[261]ST/SGB/2007/11, *supra* note 252, art. 5.1.

[262]Ibid., art. 5.3.

[263]Ibid., art. 2.3.

[264]A/65/343, *supra* note 150, para. 62.

mandated by the GA in resolution 60/1, paragraph 161 (d), on the 2005 World Summit Outcome and in resolution 60/254, paragraph 16 (a).265

The EP also reviews the annual reports of the EO of the UN Secretariat and the separately administered organs and programmes and make recommendations for the future.[266]

4.2.1 Ethics panel and whistleblower protection

To ensure independence of all matters associated with the discharge of duties and responsibilities of the Ethics office of the separately administered organ, the head of a separately administered organ may refer any matter within the Ethics offices' area of responsibility, at any time, to the Chairperson of the EP for advice and guidance, and are inform the Executive Head of the separately administered organ or programme of the referral made.[267]Also, a staff member can refer a matter to the Chairperson of the EP if Ethics office of the fund or programme does not, within forty-five days, formally consider a request of the staff member. In addition, the staff member may refer the matter to the Chairperson of the UN EP after a final determination, if she wishes the matter to be reviewed further. The Chairperson, after consultation with the EP, may undertake his or her own independent review of the matter and provide a written report to the Executive Head of the separately administered organ or programme. Independent reviews include review of the actions already taken by the concerned Ethics office, determination of what additional actions are required, including, whether referral for investigation is warranted based on the requirements of the policy for protection against retaliation of the concerned Ethics office, and provision of recommendations to the Executive Head of the concerned separately administered organ or programme. [268]

4.2.1.1 Ethics Network

On 21 June 2010, in Rome, the first session of the UN Ethics Network was convened. The EP extended an invitation to Ethics offices of UN specialized agencies and selected international financial institutions to participate in the first UN system-wide ethics meeting. 21 UN entities, participated: the UN Secretariat, UNDP, UNFPA, UNHCR, UNICEF, UNOPS, UNRWA, WFP, FAO, IAEA, the IMF, the ITU, the Pan-American Health Organization (PAHO), the UNESCO, the UNIDO, the UPU, the WHO, WIPO, the World Bank, the WMO and the WTO.

[265]A/64/316, *supra* note 149, para. 71.

[266]ST/SGB/2007/11, *supra* note 252, art. 5.4.

[267]Ibid., art. 4.1.

[268]Ibid., art. 4.3.

The participating agencies agreed to establish a UN system-wide network, consisting of Ethics officers and related professionals. Meeting once or twice annually, to collaborate in exchange of successful practices, issuance of model guidance, the exchange of materials in areas such as surveys, ethics training, financial disclosure, ethics advisory services, outreach and ethics communication, internal benchmarking services, peer review and programme assessment, career development and strategic planning.[269]

In 2010 the Network has focused its collaborative efforts on the development of a compendium of practices in relation to the functions of an Ethics office and on the exchange of experience and materials in the areas of surveys, ethics training, and financial disclosure and ethics advisory services. The Director of the EO served as the Co-chair of the Network during its first year of operation.[270]

4.3 Whistle-blower protection in separately administered funds, programs and agencies.

The UN system is comprised of the UN itself and more than 30 affiliated organizations — known as programs, funds, and specialized agencies — with their own membership, leadership, and budget processes. These groups work with and through the UN to promote worldwide peace and prosperity. The programmers and funds are financed through voluntary rather than assessed contributions. The Specialized Agencies are independent international organizations funded by both voluntary and assessed contributions.[271]

The ST/SGB/2007/11 bulletin provides, that funds and programmers must have an Ethics office to cultivate and nurture a culture of ethics, integrity and accountability, and enhance the trust in, and the credibility of, the UN, both internally and externally. [272]

A JIU report published in 2010 reviewed the state of the Ethics function in separately administered funds and programmers. For the most part, the terms of reference promulgated for the Ethics function by the organizations conformed to the JIU suggested standards. However, a major concern of the Inspectors was that in some organizations this amounted to no more than a paper exercise. Budget data demonstrated the low level of commitment to the Ethics function in many of the agencies, with zero funding in 2010-2011 in ICAO, WMO, IMO, WIPO and UNWTO. The funding levels in ILO and IAEA were minimal in relation to the size of these

[269]A/65/343, *supra* note 150, para. 70.

[270]A/66/319, *supra* note 152, para 68.

[271]United Nations Foundation, UN Agencies, Funds and Programs. http://www.unfoundation.org/what-we-do/issues/united-nations/un-agencies-funds-and.html

[272]ST/SGB/2007/11, *supra* note 252, Section 1.

organizations.[273]The 2010 JIU report revealed that not all funds programs or agencies had Ethics functions or a WPP like it was required by ST/SGB/2007/11. Namely the agencies WIPO, IMO, ICAO, FAO, WHO, UPU, ITU, UNWTO, IAEA. Some of the agencies have established an Ethics office and adopted whistleblower protection policies since the JIU report.

4.3.1 Standards of the Ethics function in funds and programmes

To ensure true effectiveness and independence of the Ethics function, JIU has provided the standards that have to be adhered to when establishing an Ethics function in a fund, programme or agency. It is not enough to have an Ethics function in place, it has to be properly funded and have independence and authority. The research revealed several instances where everything was in place, however based on interviews and further research, the Inspectors concluded that in some organizations the Ethics function amounted to no more than a paper exercise, which enabled the organization simply to "tick the box". Issuing an administrative instrument is not sufficient for the implementation of the Ethics function. Without a real commitment from executive heads and senior management, together with Member States, little can be achieved.[274]

To ensure that the Ethics function operates according to expectations, the JIU provided the standards of operation that the funds, programmes and agencies must adhere to:

(a) Head of Ethics office have to be appointed at a senior level. This signifies commitment to the function, both on the part of the legislative body in its approval of the post in the programme and budget, and of the executive head in making the proposal.[275]

(b) The head of the Ethics office has to be a dedicated full-time post, except in smaller organizations where it could be a dual function, part-time or shared post. A dual function help some smaller agencies support an ethics program. The report criticized ILO, as its Ethics function was with the Legal Advisor. In establishing dual-function posts, the smaller agencies must avoid creating conflicts of interest. Assigning Ethics office responsibilities to the legal advisor of an organization, as has been the case in UPU, carries a significant risk in this regard and should be reconsidered. Conflict of interest may also arise when the function is assigned to the oversight office, as is currently the case in WMO, and should be avoided.[276]

(c) The heads of Ethics offices in UN system organizations should have a professional background in ethics. To ensure that only the best professionals are appointed to head the Ethics

[273]Joint Inspection Unit report, *Ethics in the United Nations System United Nations*, U.N.DOC JIU/REP/2010/3, Geneva 2010, p. 4.

[274]Ibid., para. 3.

[275]Ibid., para. 36.

[276]Ibid., para. 38.

function in UN system organizations, there should be competitive recruitment open to both internal and external candidates on an equal basis.[277]

(d) Recruitment of head of Ethics office should be done through external and internal vacancy announcement.

(e) To ensure transparency of the selection process, staff representative should be closely involved in the selection processes for the head of Ethics office in their respective organizations.

f) Head of Ethics function has a time-limited appointment of two four-year terms or two five-year terms, or one seven-year non-renewable term. To ensure the independence of the Ethics function, rigorous conditions governing the appointment of heads of Ethics offices must be in place, including term limits. The Inspectors found that the majority of the organizations that had appointed heads of Ethics offices had not applied term limits. Moreover, in those that had a requirement for term limits, it was not being strictly observed. For example, although UNICEF had a five-year term limit for the post of ethics adviser, the normal appointment practices of the organization prevail, with an initial appointment of two years renewable up to five years. Likewise in UNESCO, the appointment of the Ethics officer is for an initial period of one year, with a maximum tenure of four years. Such arrangements leave the incumbent dependent on the executive head for the continuation of the appointment, which seriously undermines the independence of the function. This needs to be corrected.[278] The JIU recommended that the legislative bodies should direct their respective executive heads to apply term limits to the appointment of the head of the Ethics of0fice, which should be a non-renewable appointment of seven years, or no more than two consecutive appointments of four or five years, with no possibility of re-employment by the same organization.[279]

(g) Head of Ethics function reports directly to the executive head of the organization.

(h) Annual report of the head of Ethics function are be submitted to, but are not be changed by, the executive head.

(i) Annual report of the head of Ethics function, or summary thereof, goes to the governing body with any comments of the executive head thereon.

(j) Head of Ethics function has informal access to the governing body that is enshrined in writing.

Direct reporting to the executive head is a necessary but not sufficient condition for the independence of the Ethics function. The head of the Ethics office must also have both formal and informal access to the legislative bodies, clearly stated in administrative instruments, to ensure that

[277]JIU/REP/2010/3, *supra* note 273, para. 39.

[278]Ibid., para. 47.

[279]Ibid., p. 12, Recommendation 6.

the independence of the function is not circumscribed by the executive head. Formal access would be through the annual report of the Ethics office, or a summary thereof, which must be submitted to the legislative body without any changes therein by the executive head, whose comments, if any, should be submitted separately. The head of the Ethics office must also have the right to approach the legislative body informally when circumstances so dictate.[280] In the specialized agencies, there were no arrangements in place for reporting on the Ethics function to the legislative bodies at the time this report was prepared. And in no organization did the head of the Ethics office have informal access to the legislative body.[281] The legislative bodies should direct their respective executive heads to ensure that the head of the Ethics office submits an annual report, or a summary thereof, unchanged by the executive head, directly to the legislative body, together with any comments of the executive head thereon.

(k) Bringing claims against executive heads

The legislative bodies should direct their respective executive heads to put forward proposals for an internal mechanism to be established that would set out the modalities for the Ethics office and/or the internal oversight service to investigate or undertake reviews of allegations brought against the executive head of the organization, including reporting the outcome of the investigation or review directly to the respective legislative body.[282]

4.3.2 Good Whistleblower protection policies

Efforts to harmonize the Ethics policies of the UN and its separately funded programs and agencies did provide results. Most of the funds and programmers at this point have created an Ethics function and whistleblower protection policies (WPP). Some of the funds like UNCHR, UNESCO, UNFPA, and FAO have strong WPP which are aligned with ST/SGB/2007/11. A good WPP has to have certain key elements which can be found in ST/SGB/2007/11/ ST/SGB/2005/22 and ST/SGB/2005/21. These elements are discussed below as they are implemented in different funds programmes and agencies.

A whistleblower protection policy must include:

I. Clear definitions of misconduct and retaliation

A WPP must have clear definitions of retaliation and what constitutes protected activity. UNFPA WPP provided: “Retaliation” within the meaning of this policy means any direct or

[280] JIU/REP/2010/3, *supra* note 273, para. 50.

[281] Ibid., para. 51.

[282] Ibid., p. 21. Recommendation 17.

indirect detrimental action recommended, threatened or taken because an individual reported misconduct in good faith or cooperated with an authorized fact-finding activity. When established, retaliation is by itself misconduct" and "Fact-finding activity" within the meaning of this policy includes any authorized audit, evaluation, investigation, inspection, or management review.[283] Similar definitions are given by UNESCO.

II. Provisions on what constitutes protected activity

UNFPA provides: "Staff members have a right to be protected from retaliation. Protection against retaliation applies to any UNFPA staff member who:

a) Reports the failure of one or more individuals to comply with their obligations under the Charter, UN Staff Regulations and Rules, UNFPA Financial Regulations and Rules, the Standards of Conduct for the International Civil Service or other relevant administrative issuances or policies, including any request or instruction from any staff member to violate those regulations, rules, standards, policies or issuances. The individual must make the report in good faith and must submit information or evidence to support a reasonable belief that misconduct has occurred; or

(b) Cooperates in good faith with a duly authorized fact-finding activity.[284] 10

III. Scope

A good policy must have a wide scope of application. A great example is UNESCO policy which applies to any person having a direct contractual link with UNESCO including staff members, "contractors", interns, volunteers and occasional workers. The term "contractor" covers any person who is employed by the Organization under a service contract, a special service agreement, a supernumerary contract, or a consultancy contract.[285] And that of UNFPA only provides that all staff is protected without necessary elaboration.[286]

[283] United Nations Population Fund (UNFPA), *Protection against Retaliation for Reporting Misconduct or for Cooperating with an Authorized Fact-Finding Activity*, (25 November 2014), art. 4, 5.

[284]Ibid., art 10.

[285]United Nations Educational, Scientific and Cultural Organization (UNESCO), *Establishment of a confidential Protected Disclosures System and protection against retaliation for reporting misconduct or wrongdoing and for cooperating with duly authorized audits, investigations or inquiries,* art. 6.

[286]UNFPA, *op. cit.,* art. 3.

IV. Internal and external mechanisms

A good WPP must provide internal and external mechanisms to report misconduct. Included in UNESCO[287] UNFPA.[288]

V. Mechanisms reporting

Means of reporting retaliation should be clearly provided. UNFPA provides that retaliation can be reported by any means, including in person, by telephone or e-mail[289]. UNESCO provide possibility to submit an electronic report, sending an email or calling to a provided phone.[290]

VI. Confidentiality

WPP must provide duties for confidential disclosure and overall handling of the investigation. The claimant's identity and information associated with the investigation must be kept strictly confidentially. FAO provides, that confidentiality of individual and report information protect to the maximum extent possible[291] but UNESCO provision is only that a person to whom information is disclosed „must use his/her best endeavours not to disclose information that might identify the person who made the protected disclosure "[292] and UNFPA only states that the Ethics office are keeping confidential records.[293]

VII. Timeframe for reporting retaliation

Reasonable timeframes must be provided for reporting retaliation. UNFPA WPP states that "staff members who believe that they are the victim of retaliation may submit a formal complaint within six months of the alleged act of retaliation. If the complaint alleges a chain of acts of retaliation, the complaint must be filed within six months of the most recent alleged act of retaliation".[294]

[287]UNESCO, *supra* note 285, para. 9.

[288]UNFPA, *supra* note 283, art. 6, 7.

[289]Ibid., art. 16.

[290] UNESCO, *op cit*., art. 12.

[291]Food and Agricultural Organization of the United Naitons (FAO), Office of the Inspector-General (AUD), *Whistleblower Protection Policy:administrative circular*, DOC. No. 2011/05 (9 February 2011), art. 10.

[292]UNESCO, *op cit*., art. 13.

[293]UNFPA, *op cit*., art. 15.

[294]Ibid., art. 16

VIII. Informing

The EO (or other designated body) must inform the complainant about receiving complaint. Also, the EO must inform the complainant in writing about the outcome after receiving the investigation. These provisions are in UNESCO[295]and UNFPA, which provides further, that "In accordance with ST/SGB/2007/11, if following a final determination by the UNFPA Ethics office of a matter referred to it by a staff member, the staff member wishes to have the matter reviewed further, he/she may refer the matter to the Chairperson of the Ethics Committee in writing. The Chairperson, after consultation with the Ethics Committee, may then undertake his/her own independent review of the matter and provide a report to the Executive Director."

IX. Time frames for *prima facie* assessment

Exact time frames have to be provided for assessment of *prima facie* cases. UNFPA provides 45[296]; days for the in which the Ethics office complete its preliminary review. FAO, UNESCO also provide 45 days.

X. Investigation time frames

Reasonable time frame for submitting report by an investigative unit must be provided. UNESCO WPP gives 2 moths[297] for the completion of the investigation by IOS, its investigative unit, UNFPA provides 120 calendar days.[298] The investigation report should contain all relevant facts, as well as documents and testimonies of witnesses.

XI. Burden of proof

It is of paramount importance, that WPP would explicitly state the burden of proof requirement. The burden of proof must rest on the administration to show by clear and convincing evidence that the same action would have been taken independently of the staff member's

[295]UNESCO, *supra* note 285, art. 19 and 25 respectively.

[296]In accordance with ST/SGB/2007/11 entitled "United Nations system-wide application of ethics: separately administered organs and programmes" (effective 1 December 2007), if the Ethics Office does not formally consider the complaint within 45 days, the staff member may then refer the matter in writing to the Chairperson of the United Nations Ethics Committee.

[297]UNESCO, *op cit*., art. 22.

[298]UNFPA, *supra* note 283, art. 20.

participation in the protected activity. This requirement is present in UNESCO,[299] FAO, and UNFPA.[300]

XII. Interim measures

There must be measures in place to safeguard the complainant while the investigation is ongoing. UNFPA provides measures including but not limited to temporary suspension of implementation of the action reported as retaliatory and, in consultation with the complainant, temporary reassignment of the complainant or placement of the complainant on special leave with full pay.[301]

XIII. Conflict of interest.

There must be provisions on how to proceed with the investigation in cases of conflict of interests. UNESCO provides that in cases of conflict of interests the Ethics office may recommend to the Director-General that the complaint be referred to an alternative investigating mechanism. Same procedure provided in UNFPA.

XIV. Protection for the person from retaliation

Appropriate measures to correct the negative consequences suffered as a result of the retaliatory action must be taken. UNESCO "Such measures may include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, and, if required, transfer to another office or function for which the individual is qualified." [302] Same provision are provided in UNFPA WPP.[303]

XV. Prohibition of retaliation against outside parties

Any retaliatory measures (including threats) against a contractor or its employees, agents or representatives or any other individual engaged in any dealings with the UNESCO because such person has reported misconduct by staff members will be considered serious misconduct that, if

[299]UNESCO, *supra* note 285, art. 7.

[300]UNFPA, *supra* note 283, art. 12.

[301]Ibid., art. 21.

[302]UNESCO, *op cit*., art. 28.

[303]UNFPA, *op cit*., art. 26.

established, will lead to disciplinary or other appropriate action. The same provision is included in by UNFPA[304]

4.3.3 Ethics function and whistleblower protection policies in FAO and ICAO

These organizations are among several other that had no Ethics function or whistleblower programme in place before the JIU report was issued but since then they have established dedicated Ethics functions. Both of these organizations are good examples of separately administered funds and programmes that have reasonable WPP.

4.3.3.1 Food and agricultural organization

FAO has a solid policy against retaliation. It is implemented by the Inspector-General, who receives complaints of retaliation against whistleblowers but also investigates the complaint.[305]The policy is similar to ST/SGB/2005/21 and captures most of the requirements accurately. The scope of protection against retaliation encompasses all staff with interns and volunteers. [306] There are time frames provided for reporting retaliation and completing investigations. The report of retaliation has to be made as soon as possible but no later than 1 year after the incident occurred.[307] The Inspector –General is obliged to send an acknowledgement of having received the report of retaliation within one week. [308] Preliminary review has to be completed in 45 days[309] and, in case *prima facie* case is found, the investigation has to be completed in 120 days. [310] It also includes confidentiality clause that requires protect to the maximum extent possible.[311] A very important point is the burden of proof. The WPP of FAO provides that the policy is without prejudice to the rights of the relevant bodies to apply regulations, rules and administrative procedures, including those governing evaluation of performance and non-extension or termination of appointment. However, FAO management must show by clear and convincing evidence that it would have taken the same action regardless of whether the protected activity had been undertaken by the individual concerned.[312]Complaints may be made in person,

[304]UNFPA, *supra* note 283, art. 29.

[305]FAO, *supra* note 291, art.

[306]FAO., *op cit*., art 1; 5

[307]Ibid., art. 6

[308]Ibid., art. 13

[309]Ibid., art. 14

[310]Ibid., art. 15.

[311]Ibid., art. 10.

[312]Ibid., art. 7.

by regular mail, by phone or by e-mail.[313]To protect the whistleblower there may be interim measures taken pending the completion of the investigation. The Inspector-General may make recommendations to the Director-General that appropriate measures be taken including but not limited to temporary suspension of the implementation of the action reported as retaliatory and, with the consent of the complainant, temporary reassignment of the complainant or placement of the complainant on special leave with full pay.[314] If, in the opinion of the Inspector-General, there may be a conflict of interest in undertaking the investigation, the Inspector-General may recommend to the Director-General that the complaint be referred to an alternative investigation mechanism.[315] If retaliation is found, corrective measures may be initiated, which include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, or, if requested by the complainant, transfer to another office or function for which the individual is qualified, where he/she can work independently of the person who engaged in retaliation. [316] The Administrative Circular even provides protection for outside parties like contractor or its employees, agents or representatives, or any other individual engaged in any dealing with the Organization.[317]

4.3.3.2 International civil aviation organization (ICAO)

ICAO also has established an Ethics function since the JIU report. The framework on ethics has been established as an annex to the ICAO SERVICE CODE.[318]The framework includes the requirement for financial disclosure, provisions on ethics training and advice, reporting misconduct and reporting retaliation against whistleblowers.[319]These are all duties of the Ethics office. It has the mandate to receiving misconduct claims[320] and also claims of retaliation. Reports can be submitted to the Ethics officer using email, facsimile or mail. The Ethics officer will receive, log and take action on all incoming reports.[321]

The provisions in this the annex to the ICAO Service Code are basic compared to the more elaborated whistleblower protection policies like FAO or UNDP. The EO is charged with a

[313]FAO, *supra* note 291., art. 11.

[314]Ibid., art 17.

[315]Ibid., art. 20.

[316]Ibid., art. 21.

[317]Ibid., art. 24.

[318] International Civil Aviation Organization, *The ICAO Service Code*, Doc 7350/9 Amendment No. 4 (4 November 2011).

[319]Ibid., art. 62.

[320]Ibid., art. 45.

[321]Ibid., art. 47.

dual function. It receives claims of misconduct and retaliation claims and conducts preliminary reviews and either proposes an early resolution or refers the case in writing to the Bureau in charge of investigation. [322]Where, in the opinion of the Ethics officer, there may be a conflict of interest in the Bureau conducting the investigation or if, in his view, the matter concerns a serious or complex case, the Ethics officer may recommend to the Secretary General that the matter be referred to an alternative investigating mechanism. [323] Once the Ethics officer has received the investigation report, he will make his recommendations on the case to the Secretary General for final decision. Outcome of investigations on allegations concerning the Secretary General will be reported directly to the Council.[324]There is a general duty for members to report any breach of ICAO's regulations and rules related to the Ethics officer and to cooperate with duly authorized audits and investigations. [325]Protection against retaliation applies to any staff member who:

a) reports the failure of one or more staff members to comply with his obligations under the ICAO Service Code, the Staff Regulations, Staff Rules, Personnel Instructions or other relevant administrative issuances related to misconduct, including any request or instruction from any staff member to violate the above-mentioned codes, rules or standards; and

b) cooperates in good faith with a duly authorized investigation or audit. [326] The scope of protection against retaliation is provided to all staff members of ICAO.[327]The annex also contains provisions on protection of outside parties as it forbids retaliation for reporting misconduct against any other individual engaged in any dealings with ICAO because such person has reported misconduct by ICAO.[328]

The annex does not provide time frames for investigation or an obligation for the Ethics office to inform the staff member. There is also no burden of proof provision, which is one of the most important aspects of whistleblower protection. The burden has to shift onto the administration after *prima facie* case is established. There are also no provisions the possibility to take protective measures to safeguard the complainant while investigation is ongoing. Moreover, the policy provides that disciplinary or other appropriate actions can be taken against the person who committed misconduct or retaliation, but no measures that would protect the whistleblower.

[322]The ICAO Service Code*, supra* note 318, art. 48.

[323]Ibid., art. 49.

[324]Ibid., art. 50.

[325]Ibid., art. 53.

[326]Ibid., art. 55.

[327]Ibid., art. 54.

[328]Ibid., art. 56.

5 Whistleblower protection in Lithuanian law

As an addition to the main topic of this thesis this chapter briefly reviews whistleblower protection policies in the Republic of Lithuania.

In 2013 Transparency international issued a report, which assessed the adequacy of whistleblower protection laws of 27 member countries of the EU. [329]Lithuania's whistleblower protection was rated as: "None or Very Limited." The report concluded, that Lithuania lacked a comprehensive law to protect whistleblowers from retaliation and, unlike many or most other EU countries, Lithuania's legal framework did not provide any specific protections for public or private sector whistleblowers. There is also no recognized definition of whistleblowing and whistleblower cases are not categorized as such in official circles. There are no whistleblower provisions in Lithuania's labor, civil servant, criminal, corruption prevention, or environmental or consumer protection laws. While employees are legally protected from unfair dismissal under certain circumstances, whistleblowing is not specifically taken into account. Some government agencies have mechanisms for employees to report wrongdoing, but their effectiveness is highly questionable. The corporate culture of whistleblowing appears underdeveloped, and few codes of ethics or conduct include whistleblower protection.[330]

The discussion on legal regulation of whistleblower protection started in 2005 when a draft law was registered in the Parliament but got stalled there. In 2009, TI Lithuania, in a partnership with law expert Petras Ragauskas, drafted a new piece of regulation on Whistleblower protection. The draft was presented to various institutions, such as Special Investigations Service (SIS), Prosecution Service, Police Department, State Labor Inspectorate, State Tax Inspectorate, Financial Crime Investigation Service, and the President. It was from the beginning agreed that protection is vital and TI Lithuania together with various institutions were looking for the best whistleblower protection regulatory model. On July 2010 the group of MPs called "For civic involvement in creating Lithuania without corruption1"initialized an open discussion with the representatives of Government institutions, who suggested to register the draft Whistleblower protection law. The project was initiated by „Transparency International" Lithuanian chapter and further developed by SIS. On 30th of September 2010, the group of MPs registered the draft

[329] Mark Worth, *Whistleblowing In Europe Legal Protections For Whistleblowers In The EU,* Transparency International, 5 November 2013

[330] Ibid., p. 59.

Whistleblower Protection Law in the Parliament. This draft law, however, was formalized, narrowed down the reporting channels and the guarantees for whistleblowers[331]

This draft was suggested because the necessity for a whistleblower protection law was foreseen in the implementation measures of the 2008-2012 Government programme. Among the implementation measures of the 2008-2012 Lithuanian Republic Government strategy, measure 118 provided to prepare drafts law, which would ensure legal defense for people who report possible criminal actions of their employees and other influential people. Lithuania is also has international obligations whistleblower protection sphere according to art 33 of the UN convention against corruption and art 9 of the Civil Convention on Corruption.[332]

The Government of Lithuania did not approve the draft law. In its resolution 1649 of 11/17/2010**,** the Government explains, that the legal relationship in the draft law is not held to be an object of a separate legal instrument and that the measures of protection provided in the instrument are already laid down in other legal instruments of Lithuania. For that reason, the proposed regulation was deemed to be inconsistent with the applicable law.[333]

5.1 Drawbacks of the proposed draft law on whistleblower protection

The draft law of 2010 was criticized by "Transparently International" as being downgraded and narrowed. The proposed has many deficiencies and is not significantly superior to the one, which a person could get by himself from the existing legal system, more precisely- the criminal legal system.

A whistleblower in the draft law is defined as – current or former employee or other person, who disclosed information on suspected criminal activity of corruptive nature about employers, managers, employees and other persons who are subordinate under the employer and about a subject of public administration.[334] The definition provided, that whistleblower status is attributed to the people who report only criminal acts of corruptive nature. This is a significant narrowing of the application of the law, compared to, proposed definition of "Transparency International" Lithuanian chapter, which defines whistleblowers not only as one who reports crimes associated with corruption, but any illegal actions of the employer. TILC also ads, that only

[331] "Transparency International" Lithuania, *Providing an Alternative to Silence: Towards Greater Protection and Support for Whistleblowers in the EU Country Report: Lithuania*. October 2013, section II.

[332] The Explanatory Note of the Lithuanian Republic Draft Law on Whistleblower Protection, Nr.XIP 2459 (30 September 2015), art.1.

[333] Government of Republic of Lithuania resolution, 17 Novemer 2010, no.1649 „On the draft law of whistleblower protection of the Republic of Lithuania", para. 1,1, 1,2.

[334] Republic of Lithuania Draft Law on Protection of Whistleblowers, 2010, Art 2(4)

reports on infringements that do not directly breach the right of the reported or other people are considered whistleblowing and that a person is can be deemed to be a whistleblower when the report is made by a member of the family. [335]

Because whistleblower status can be provided only for reporting corruption like crimes reporting many other breaches, which may be equally important, will not qualify for whistleblower protection. For example- reports about damage to environment, health sector reports on illegal work etc. - will not be considered a protective activity.[336]

The draft law provides that the reports of whistleblowers can be brought only before the pre-trial investigation officers. As suggested by TILS this adds an additional burden on the whistleblower as it requires him to have reasonable legal literacy and being able to qualify whether an action was criminal or not. Also, this does not encourage to solve the problems from the inside of the organization. Whistleblowers would afforded protection if they report a serious yet not criminal act or a criminal act for which they fail to gather enough evidence. Those who will for example resort to the State Tax Inspectorate, State Labor Inspectorate, National Paying Agency, Environment protection agency, also to specialize EU institutions like OLAF, will not be qualified to receive whistleblower protection status.[337]

In art 3 part 4 the draft law provides that a person is considered to be a whistleblower from the start of the investigation to the end of the criminal process. This association of protection with the criminal process leaves a person vulnerable for retaliation before the start of the process (if it will be commenced at all) and after it ends. For example if the criminal process is terminated for some reason like statute of limitations or if the charges are dismissed for the lack of evidence. Protection has to be directly linked with the fact of reporting misconduct and not with certain processes or timeframes. A person can be retaliated against well after the criminal process has ended and even by different managers if the management changes.[338]

5.2 Most recent developments on the whistleblower draft law

On 13th of March 2013, the Government of Lithuania confirmed the priority implementing measures of the 2012-2016 programme. Measure 324 is to create a state guaranteed

[335] "Transparency International" Lithuanian Chapter, *Republic of Lithuania Draft Law on Protection of Whistleblowers* 2010, art. 2 (5)

[336] Transparency International" Lithuanian Chapter, *On the suggestions of TILC for the draft law on whistleblower protection*, (22 Novembers 2010), art. Art. 3

[337] Ibid., art. 6

[338] Ibid., art. 5

system of protection from negative actions against people who report breaches of corruptive nature.[339]

On the 10th of March 2015, the Seimas has approved the programme of national fight against corruption of 2015-2025. The second goal of the programme provides the necessity to ensure the application of the principle of inevitability of responsibility [340]One of the tasks under this goal is to improve the system of whistleblower protection by dedicating attention to protecting employees and other persons from illegal actions against them after the people report breaches of law. Also, to ensure confidentiality of the whistleblowers personal data and provide possibilities of remunerations for provisions of valuable information about illicit activities[341]

In 2015 the Seimas Committee of Law and Legal Order again decided on proposals of the whistleblower projection draft law.[342] It came to the expected conclusion that the means of protection provided in the project are have already been set in separate laws of Lithuania. For that reason the proposed regulation would be incongruous with the existing laws. The Committee suggested that a more effective protection of whistleblowers could be achieved not by gathering them in one special law but by improving the existing legal base.

The Government of Lithuania had approved the amendment laws proposed by The Ministry of Justice. The amendments were suggested to the Code of Administrative Infringements by adding article 278(5)[343], the Code of Civil Process of Lithuania with article 192(9) and [344]the Law of the Republic Of Lithuania on Administrative Proceedings with article 60(4)[345]. All deal with witness rights in administrative and civil process and provide, that personal information of a witness, who‘s confidentiality is assured according to the law, cannot be disclosed to the other participants of the process. The data of such person should be laid down in a separate protocol and held securely and separately from the case file. Interviews of the protected person are held

[339] The Government of Republic of Lithuania resolution, *On confirmation of the priority implementing measures of the 2012-2016 programme of Lithuanian Government, measure*, No.228 (13 March 2013). *State news*, 2013, No. 29-1406, measure 324

[340] Seimas of the Republic of Lithuania resolution, *On the Confirmation of the National Fight Against Corruption Programme of 2015-2025 of Republic of Lithuania*, No. XII-1537 (10 March 2015), para. 28

[341] Ibid., para. 29.1.1.

[342] Seimas of the Republic of Lithuanian, Committee of Law and Legal Order, *On the Republic of Lithuania Draft Law on Whistleblower Protection: Conclusions of the Main Committee*, DOC No. XIP-2459 (15 April 2015) No. 102-P-14 Vilnius

[343] Ministry of Justice of Republic of Lithuania, Draft Law Amending Articles 276 and 286 of the Lithuanian Republic Administrateive Infringement code.

[344] Ministry of Justice of Republic of Lithuania, Draft Law Amending Articles 192 and 263 of the Code of Civil Process, DOC XIIP-2923 (10 April 2015).

[345] Ministry of Justice of Republic of Lithuania, Draft Law Amending Articles 60 and 86 of the Law On Administrative Proceedings no. VIII-1029, XIIP-2924, (10 April 2015)

separately and visual and sound recordings are made with visual and acoustical barriers to ensure confidentiality.

There are proposed amendments to the Law on Public Administration also. The suggested addition would provide that if a person reports about an administrative, disciplinary or public service infringement of a corruptive nature and reasonably requests not to disclose his/her personal data, the public service subject has to ensure the confidentiality of the personal data from the moment of receiving it.[346]

The Lithuanian Government was advised to arrange a programme implementation inter-institutional plan. To reach the second goal of the 2015-2025 programme, which is to ensure the application of the principle of inevitability of responsibility, the following efforts have to be made: increase intolerance towards corruption, to encourage activity of civil society, to improve the system of whistleblower protection by dedicating attention to protecting employees and other persons from illegal actions against them after the people report breaches of law. Also, to ensure confidentiality of the whistleblowers personal data and provide possibilities of remunerations for provisions of valuable information about illicit activities and at the same time preparing a guide to a corruption free environment.[347]

[346] Ministry of Justice of Republic of Lithuania, Draft Law Amending Articles 2, 14 and 20 of the Law on Public Administration VIII-1234, XIIP-2925 (10 April 2015), art. 2.

[347] Seimas of the Republic of Lithuanian, Committee of Law and Legal Order, *On the Republic of Lithuania Draft Law on Whistleblower Protection: Conclusions of the Main Committee*, DOC No. XIP-2459 (15 April 2015) No. 102-P-14 Vilnius

CONCLUSIONS

1. The whistleblower protection policy in the UN provides a reasonable scope, encompassing all staff members regardless of type of contract or duration, interns and volunteers. It has a sound definition of a whistleblower and has clearly formulated criteria for a staff member to be provided protection for retaliation. ST/SGB/2005/21 provides time frames for investigation of the retaliation report and duty to inform the applicant at various stages. Most importantly, the policy shifts the burden of proof to the administration, which is a crucial development. The policy, however is not without its flaws. One of them is – that testifying or submitting a complaint to the UNDT is not considered a protected activity. ST/SGB/2005 does not provided anything on retaliation for testifying before the Tribunals. This has a possibility to impede justice in the UN by producing a chilling effect, when staff members will be afraid to come forth in cases before the Tribunal. In addition, the sope of the definition does not iclude contractors, UN police officers, UN peacekeepers, victims and any other person who provides information about misconduct that could undermine the UN mission.

2. The EO is the main body that implements the WPP. In terms of whistleblower protection, the EO has failed to meet expectations as it is more of a whistleblower advisory unit than a protection body in the sense, that it has no authority to impact the rights and duties of the staff. The fact that EO decisions cannot be challenge before the UNDT results in a circumstance where the staff have no recourse in case EO does an improper review of a report. This effectively negates the potential benefit of the EO as reports can be dismissed and the staff member cannot challenge those decisions.

3. Shortcomings are also present when whistlebowers submit complaints to the UNDT. The 60 days statute of limitations for management evolution is inadequately short by international best standards and might prevent the staff member from submitting a claim in time. Also, long litigation periods and maximum compensation of 2 year salary and no punitive or exemplary damages discourages the staff from making complaints to the UNDT and do not adequately compensate in case retaliation is upheld.

4. By not including separately administered funds, programmes and agencies in the jurisdiction of the EO and mandating separate Ethics offices to be created in each of them, the Secretariat slowed down and fragmented the implementation of common ethical standards. Harmonization efforts through the Ethics Panel have been successful in a sense, that most of the funds and programmes have established Ethics function along the terms of reference of

ST/SGB/2007, however the fact remains that the implementation of whistleblower protection in funds and programmes is under the supervision of the heads of those funds and programmes appoint the heads of Ethics offices. This cast doubt on the independence of the Ethics office.

RECOMMENDATIONS

1. The scope of the definition of a whistleblower in section 2.1 has to be amended to include witnesses who protection from retaliation testify in court, also protection against retaliation should be extended to apply to contractors, UN police officers, UN peacekeepers, victims and any other person who provides information about misconduct that could undermine the UN mission. The most important criteria for receiving protection should be the content of the information disclosed, not the identity of the person disclosing it. Whistleblower rights should cover disclosure of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity that undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties.

2. To fully implement the right of the staff to be protected against relation, the EO has to be accountable before the UNDT. There are several ways this can be achieved:

a) By altering the definition or interpretation of administrative decision, which would include the recommendation of EO. An EO's decision not to uphold a retaliation claim effects the staff member by denying him the right to avail further measures, provided in ST/SGB/2005/21.

b) by submitting every decisions made by the EO about an official report for protection from retaliation, negative or positive, whether it is to dismiss, find no *prima facie* case, no merit or otherwise to the SG, who would confirm or reject it, that way making every EO decision legally made by the SG, which would open the way to a claim before the UNDT.

3. To effectively implement EO recommendations for protection against retaliation, the EOs recommendations would have to:

a) Have a time-line provided in which the SG would have to make a decision whether to implement the EOs recommendation. The "GAP" suggested the following formulation: "Should the Ethics office not be satisfied with the response from the head of department or office concerned, it can make a recommendation to the SG. The SG are make and communicate the decision to adopt or reject the Ethics office's recommendations within 30 days to the Ethics office, complainant and the department or office concerned. In the absence of a response within the specified time period, the recommendations of the Ethics office become effective.

b) Become binding with the possibility of the SG recite the decisions upon an appeal of a party.

4. To change the statute of limitations to no less than 6 months to file for management evaluation of an administrative decision.

5. Caps on compensation awards in the UNDT should be extended or lifted altogether and punitive and exemplary damages considered.

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SUMMARY

The UN has strived for reform to adapt to a changing world. A more transparent and effective accountability system was needed to foster the ideals of integrity and highest ethical standards. Protection of whistleblowers in UN has been one part of the reforming UN and it improved significantly since the 1994 establishment of OIOS. In 2006, a new policy of protection against retaliation was adopted, more focused and fleshed out. However, almost 10 years later the flaws of the system are clearly visible. The thesis analysed the application of the WPP in order draw conclusions about the effectiveness of this policy. The EO, which supervise the WPP, is an advisory institution only and its decisions are deemed not to impact the rights of the staff member directly and thus cannot be challenged before the UNDT. Bringing a claim challenging retaliation before the UNDT is a usually a long process, which may incur high costs on the staff member. In addition, the caps on awards and the lack of punitive or exemplary damages can often diminish any potential benefit. Often the whistleblower who claims retaliation is left in a worse position than he/she was before. Several times the staff tried to challenge the EO findings and won in the UNDT, just to have the decisions subsequently overruled by UNAT. The current statute of limitations, which provide only 60 days to seek management evaluation of a retaliatory decision is not enough for the whistleblower to gather all necessary documents and evidence to support his claims and the scope of application of WPP does not encompass witnesses, contractors and peacekeepers.

SANTRAUKA

Jungtinės Tautos siekė reformuotis, kad prisitaikytų prie kintančio pasaulio. Tam, kad būtų puoselėjami aukščiausi integralumo ir etikos standartai, reikėjo įdiegti skaidresnę ir efektyvesnę atskaitingumo sistemą. Pranešėjų apsauga – tai dalis Jungtinių Tautų reformų, kurios pradžią galima laikyti 1994 metų Generalinės Asamblėjos iniciatyvas. 2005 metais buvo priimtas biuletenis SG/SGB/2005/21, kuri įkūnijo ilgai lauktą pranešėjų apsaugos politiką – konkrečią, su aiškiomis nuostatomis ir taikymo sritimi. Įkurtas specialus Etikos kabinetas, kuris priima prašymus taikyti pranešėjo statusą. Per 10 šios politikos taikymo metų išaiškėjo pranešėjų apsaugos sistemos trūkumai. Etikos kabinetas, kuris atsakingas už pranešėjų apsaugos politikos įgyvendinimą, yra tik patariamoji institucija ir jos priimti sprendimai, pagal Tribunolų išaiškinimus, teisiškai nedaro įtakos personalo statusui. Dėl šios priežasties Jungtinių Tautų darbuotojai negali užginčyti Etikos kabineto sprendimų Ginčų tribunole. Didelis trūkumas yra tai, kad į pranešėjų apsaugos sistemos taikymo sritį neįeina liudininkai, kurie teikia parodymus Tribunolams, taip pat taikdariai ir rangovai. Terminas, per kurį galima pateikti administracinį sprendimą vadovybės peržiūrai, yra 60 dienų, o tai per trumpas laiko tarpas, kad pranešėjas galėtų tinkamai paruošti visus reikiamus dokumentus. Pranešėjui bylinėjimasis Ginčų tribunole yra ilgas ir brangus procesas, o teismo kompensacijos yra ribojamos. Tai gali atgrasyti pranešėjus nuo bandymo apginti savo teises.

ANNOTATION

This thesis reviews whistleblower protection mechanisms in the UN – history and development of WPP, current application in the Secretariat and separately administered funds and programmes and identifies problems and makes conclusions about possible improvements. The first chapter is dedicated to examining the roots of whistleblower protection, which lie in provisions of staff rules and regulations, and Standards of Conduct, and also to the development of actual provisions that ensured reporting of misconduct and the right to be protected for doing so. The second chapter covers the basic history of the internal recourse system and how it was reformed to the current two tiered justice system of the UN. In the third chapter the current whistleblower protection mechanism is analysed, addressing the issues of effectiveness of the Ethics office, and the justice system with analysis of relevant whistleblower case law. The fourth chapter reviews how the Ethics system is being implemented in separately administered funds, programmes and agencies and the standards that need to be adhered to. The fifth chapter briefly reviews the situation of whistleblower protection in Lithuania.

ANOTACIJA

Magistriniame darbe aprašyta vidinė Jungtinių Tautų pranešėjų apsaugos sistema. Pirmasis skyrius skirtas aprašyti pranešėjų apsaugos pradmenis ir vystymąsi Jungtinėse Tautose - kaip jie atsispindėjo personalo įstatuose ir taisyklėse, elgesio standartuose. Antrasis skyrius skirtas atskleisti vidinį ginčų sprendimo sistemos vystymąsi ir Jungtinių Tautų vidinę ginčų sprendimo sistemos reformą. Trečiame skyriuje analizuojami dabartiniai pranešėjų apsaugos mechanizmai – pranešėjų apsaugos politika nuo 2005 metų, Etikos kabineto, kaip pagrindinės įstaigos atsakingos už pranešėjų apsaugą, efektyvumas. Taip pat gilinamasi į Jungtinių Tautų Tribunolų jurisprudenciją, analizuojamos problemos teikiant skundus Ginčų tribunolui. Ketvirtas skyriuje apžvelgiamas pranešėjų apsaugos politikos įtvirtinimas atskirai finansuojamų Jungtinių Tautų institucijų sistemoje. Penktajame skyriuje trumpai apžvelgiama pranešėjų apsaugos situacija Lietuvoje ir kokie pasiūlymai yra pateikti Seimui.