

# BACKGROUND

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## The U.S. Should Enforce the Law to Improve U.N. Whistle-blower Protections

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### Abstract

*The United Nations and its employees enjoy broad immunities that insulate them from external accountability under national laws unless those immunities are waived. This places an extremely heavy responsibility on the U.N. to self-scrutinize, self-police, correct, and punish wrongdoing by the organization and its employees. However, U.N. oversight and accountability have been weak historically. As a result, whistle-blowers are particularly vital to U.N. accountability. By reporting mismanagement, abuse, or criminality, whistle-blowers alert the organization and its member states to problems that might not otherwise come to light. The U.N. adopted whistle-blower protections and established the Ethics Office over a decade ago. However, whistle-blowers in the U.N. continue to face retaliation. To encourage international organizations to address this problem, Congress passed a law withholding 15 percent of U.S. contributions unless the Secretary of State reported that they had adopted best practices on whistle-blower protection. If the U.S. wishes to protect whistle-blowers in international organizations, then it should withhold funding from organizations with inadequate protections and communicate clearly to them the improvements they must make to avoid withholding in the future.*

Members of Congress from both parties have expressed concern that whistle-blower protections in the United Nations system have failed to prevent retaliation, thus dissuading others from coming forward. This concern is based on incidents in disparate parts of the U.N. system where individuals have been retaliated against for reporting misbehavior, mismanagement, criminality, and sexual exploitation and abuse by U.N. officials and peacekeepers.

### KEY POINTS

- International organizations like the U.N. enjoy privileges and immunities that place a heavy responsibility on them to self-police, correct, and punish wrongdoing.
- Whistle-blowers are vital to this effort but historically have been inadequately protected in the U.N. The new policy issued in January 2017 still falls short.
- The U.S. should withhold funding from the U.N. and other organizations with inadequate protections and communicate to them the improvements they need to make.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3199>

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To address this problem, Congress passed a law withholding 15 percent of U.S. contributions to individual international organizations unless the Secretary of State reported that they had adopted best practices on whistle-blower protection. The U.S. has utilized this pressure in only one instance, for the World Intellectual Property Organization (WIPO), despite the fact that whistle-blower protections in the U.N. and in many U.N. organizations do not meet the best practices standard set forth by Congress. If the U.S. is serious about fixing this problem, it should:

- **Withhold** 15 percent of contributions where standards fall short and
- **Communicate** to international organizations how to improve their policies in order to meet U.S. expectations, and thus avoid future withholdings, and require the organizations to prove that they are enforcing these rules.

### **Whistle-blowers Are Critical to U.N. Accountability**

In the U.S., numerous options exist for reporting unethical behavior, abuse of authority, illegal actions, or other wrongdoing; federal and state statutes include whistle-blower laws, such as the Whistleblower Protection Act of 1989, to protect those disclosing wrongdoing from retaliation. These options not only exist, but the obligations and protections are enforced.

Within the executive branch, the Office of Special Counsel is charged with investigating and prosecuting retaliation against government employees.<sup>1</sup> The Special Counsel is nominated to a five-year term by the President, which is longer than the President's term in office, and requires Senate confirmation. According to statute, he or she can be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. Another option within the executive branch is the inspectors general in individual departments and agencies, which are independent and empowered to conduct investigations at their discretion.

External to the executive branch, Congress has constitutional powers to check executive branch excesses, is empowered to hold hearings to give voice to those reporting wrongdoing, and can pass legislation to address serious issues. In cases of serious abuse, Congress has the power to impeach civil officers of the government. Finally, measures exist to insulate the judiciary and law enforcement from political pressure to ensure that they can investigate and pursue allegations of illegal behavior free from undue influence, interference, and retaliation.

However, such is not the case with the United Nations. U.N. organizations enjoy broad autonomy under the 1946 Convention on Privileges and Immunities of the United Nations. Lower-level U.N. officials have immunity for actions taken in the course of their duties and senior U.N. officials have immunity approximating that of foreign diplomats. In both cases, immunity is rarely waived unless serious, overwhelming evidence of criminal acts is uncovered. In practice, U.N. organizations are expected to police and enforce standards internally, but they lack the type of checks, balances, and independent accountability built into the U.S. system.<sup>2</sup> Moreover, U.N. organizations strongly resist efforts by donor nations to conduct audits of their activities.

An example of how this lack of independence serves to repress accountability was the treatment of the Procurement Task Force (PTF). Following the Iraqi Oil-for-Food scandal, the U.N. General Assembly established the PTF in 2006 as an ad hoc investigatory unit within the U.N. Office of Internal Oversight Services (OIOS)—the U.N.'s quasi-inspector general—to address fraud and corruption in the U.N. Secretariat and peacekeeping procurement. The PTF, under the leadership of former U.S. federal prosecutor Robert Appleton, pursued this mandate in an aggressive and independent manner. Between 2006 and 2008, the PTF issued 20 reports of serious corruption, including against a senior Singaporean staff member and two Russian staff members, and debarred several Russian companies. In retaliation, Singapore successfully led an effort to eliminate the PTF's funding and mandate at the

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1. Office of the Special Counsel, "About Us," <https://osc.gov> (accessed March 8, 2017).

2. For instance, international organizations typically have "legislative" bodies composed of member states, but they do not operate with the same level of scrutiny over daily operations, nor do they have oversight hearings like the U.S. Congress. Most international organizations have a unit that looks and acts like an inspector general, but almost universally this unit lacks the independence of a true inspector general. Likewise, the judicial aspects of the system lack the independence of the U.S. system.

end of 2008.<sup>3</sup> When the PTF was terminated, its uncompleted cases were transferred to the Investigations Division of OIOS, which pursued them halfheartedly and closed the vast majority of them with no action.<sup>4</sup>

The absence of external accountability can create a permissive environment for abuse of power, favoritism or discrimination, illegal behavior, or gross negligence that could have dire consequences (e.g., introducing cholera to Haiti<sup>5</sup>).

Because of this, whistle-blowers are particularly vital to accountability in the U.N. system. By reporting unknown or concealed mismanagement, abuse, or criminality, whistle-blowers alert the organization and its member states to problems that might not otherwise come to light. However, because U.N. whistle-blowers often face retaliation, they frequently have to place the interests of the organization above their self-interest. Inadequate protection can have a chilling effect on whistle-blowing.

This problem has been known for years. Following serious failures like the Iraqi Oil-For-Food corruption scandal, then-Secretary-General Kofi Annan announced an effort to improve accountability and transparency. This effort culminated in the promulgation of whistle-blower protections in ST/SGB/2005/21,<sup>6</sup> as well as the establishment of the Ethics Office in 2006 to enhance a “culture of ethics, transparency and accountability” and to fulfill the “Organization’s policy for the protection of staff against retaliation for reporting misconduct

and for cooperating with duly authorized audits or investigations.”<sup>7</sup>

The Ethics Office has proven to be a weak instrument. While it receives complaints, it has no investigatory power or expertise. It receives complaints and conducts a preliminary review to determine if the issue falls within protected activities and whether a prima facie case of retaliation for that activity exists. According to the Government Accountability Project (GAP), which advocates for whistle-blowers, only 3 percent of applications for protection against retaliation from 2006 and 2014 were granted.<sup>8</sup> In the rare cases where the Ethics Office concludes that the complaints are valid, it then can recommend that the matter be investigated by the OIOS.

Like that of the Ethics Office, the OIOS record on investigations disappoints. According to the OIOS, of 584 matters received in 2016, only 221 were classified for a full investigation.<sup>9</sup> How many of these resulted in disciplinary action or referral to national legal authorities was not specified. Reports, however, indicate that the OIOS has not pursued investigations effectively or diligently.<sup>10</sup> Former U.S. Permanent Representative to the U.N. Samantha Power specifically criticized investigations of allegations of sexual exploitation and abuse, stating: “[O]f 69 allegations [of sexual exploitation and abuse by peacekeepers] made in 2015, only 17 had been fully investigated by the end of January 2016, and only one person had been punished—suspended for only nine days.”<sup>11</sup>

3. Brett D. Schaefer, “The Demise of the U.N. Procurement Task Force Threatens Oversight at the U.N.,” Heritage Foundation *WebMemo* No. 2272, February 5, 2009, <http://www.heritage.org/report/the-demise-the-un-procurement-task-force-threatens-oversight-the-un>.
4. John Heilprin, “UN Whistleblower Case Shows Accountability Limits,” Associated Press, January 10, 2014, <http://www.bigstory.ap.org/article/un-whistleblower-case-shows-accountability-limits> (accessed March 2, 2017).
5. Brett D. Schaefer, “Haiti Cholera Lawsuit Against the U.N.: Recommendations for U.S. Policy,” Heritage Foundation *Backgrounder* No. 2859, November 12, 2013, [http://thf\\_media.s3.amazonaws.com/2013/pdf/BG2859.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/BG2859.pdf).
6. U.N. Secretariat, “Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations,” ST/SGB/2005/21, December 19, 2005, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/651/55/PDF/N0565155.pdf?OpenElement> (accessed March 2, 2017).
7. U.N. General Assembly, “Activities of the Ethics Office,” A/61/274, August 18, 2006, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/61/274](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/61/274) (accessed March 2, 2017).
8. Government Accountability Project, “Value Walk: Questions on Whistleblowing to UN in Wake of Systemic Abuses,” September 30, 2016, <https://www.whistleblower.org/multimedia/value-walk-questions-whistleblowing-un-wake-systemic-abuses> (accessed March 2, 2017).
9. U.N. Office of Internal Oversight Services, Investigations Division, “Monthly Performance Indicators,” January 31, 2017, <https://oios.un.org/resources/2017/02/KDaYyRPR.pdf> (accessed March 8, 2017).
10. Heilprin, “UN Whistleblower Case Shows Accountability Limits.”
11. U.N. Security Council, “Repatriation of Commanders, Units Among Steps to Tackle Sexual Exploitation, Abuse by Peacekeepers, Secretary-General Tells Security Council,” March 10, 2016, <http://www.un.org/press/en/2016/sc12274.doc.htm> (accessed March 13, 2017).

In addition, both the Ethics Office and the OIOS are internal to the U.N. with officers appointed by and overseen by the U.N. Secretary-General. The authority of the Ethics Office was originally supposed to extend system-wide, but a whistle-blower dispute involving the United Nations Development Program (UNDP) led that organization to repudiate the authority of the Ethics Office, and then-U.N. Secretary-General Ban Ki-moon issued a revised policy in 2007 allowing separately administered U.N. organs or programs to establish their own ethics offices.<sup>12</sup> The U.N. Ethics Office currently covers duty stations in New York, Geneva, Vienna, and Nairobi, as well as U.N. regional commissions, peacekeeping operations, special political missions, and U.N. organs and programs without their own ethics offices.

The experiences of whistle-blowers across the U.N. system have sent a clear signal that protection will be difficult to attain and retaliation will likely occur. The GAP has compiled numerous instances illustrating “the consistent failure of the United Nations and its funds, programs and agencies to protect whistleblowers from retaliation.”<sup>13</sup> Some examples include:

- **Peacekeeping.** James Wasserstrom, who headed the U.N. Office for the Coordination of Oversight of Publicly Owned Enterprises in Kosovo, was subjected to harassment and retaliation after reporting a multimillion-dollar corruption and bribery scheme involving U.N. officials in 2007.<sup>14</sup> He was forced to leave the U.N. and had to endure years of process and legal expenses before being

vindicated. Aicha Elbasri, former spokesperson for the African Union–United Nations Mission in Darfur, provided leaked documentation showing that the mission was deliberately underreporting and concealing attacks by Sudanese forces on civilians and U.N. peacekeepers.<sup>15</sup> Elbasri left her position out of concern that U.N. whistle-blower protections would not be sufficient to prevent retaliation and could prevent exposure of the evidence that she had gathered.<sup>16</sup>

- **U.N. Development Program.** Artjon Shkurtaj raised concerns internally about inappropriate activities and practices of the UNDP in North Korea. In response, the UNDP refused to renew his contract.<sup>17</sup> He lodged a retaliation complaint with the Ethics Office, which recommended an investigation in 2007. The UNDP repudiated the authority of the Ethics Office and instead insisted on setting up its own ethics office. Secretary-General Ban Ki-moon went along with this action, issuing a new bulletin (ST/SGB/2007/11) that permitted separately administered organs and programs like the UNDP to establish their own ethics offices. This directly undermined the authority of the Ethics Office and sent a signal to other parts of the U.N. system that they could likewise repudiate its decisions.

In another example, Dr. Ismail Ahmed accused UNDP officials of fraud and corruption in Somalia. His contract expired in November 2007 and was not renewed. This timing was used as an excuse to deny his appeal to the UNDP Ethics

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12. U.N. Secretariat, “Ethics Office—Establishment and Terms of Reference,” ST/SGB/2005/22, December 30, 2005, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/668/34/PDF/N0566834.pdf> (accessed March 8, 2017), and U.N. Secretariat, “United Nations System-wide Application of Ethics: Separately Administered Organs and Programmes,” ST/SGB/2007/11, November 30, 2007, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=ST/SGB/2007/11](http://www.un.org/en/ga/search/view_doc.asp?symbol=ST/SGB/2007/11) (accessed March 8, 2017).

13. Shelley Walden, “GAP Releases Report on UN Whistleblower Cases,” Government Accountability Project, August 22, 2014, <http://whistleblower.org/blog/094322-gap-releases-report-un-whistleblower-cases> (accessed March 2, 2017).

14. Michelle Nichols, “Tribunal Orders United Nations to Pay \$65,000 to Whistleblower,” Reuters, March 20, 2013, <http://www.reuters.com/article/us-un-kosovo-whistleblower-idUSBRE92J1EY20130320> (accessed March 2, 2017).

15. Colum Lynch, “They Just Stood Watching,” *Foreign Policy*, April 7, 2014, <http://foreignpolicy.com/2014/04/07/they-just-stood-watching-2/> (accessed March 2, 2017).

16. Aicha Elbasri, “Peacekeepers: Allegations of Abuse and Absence of Accountability at the United Nations,” testimony before the Committee on Foreign Affairs, U.S. House of Representatives, April 13, 2016, <http://docs.house.gov/meetings/FA/FA16/20160413/104766/HHRG-114-FA16-Wstate-ElbasriA-20160413.pdf> (accessed March 2, 2017).

17. Report, *United Nations Development Program: A Case Study of North Korea*, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, January 24, 2008, <https://www.hsgac.senate.gov/subcommittees/investigations/hearings/united-nations-development-program-a-case-study-of-north-korea> (accessed March 2, 2017).

Advisor based on the fact that he was no longer employed.<sup>18</sup>

- **Office of Internal Oversight Services.** The OIOS Investigations Division has been troubled for some time and has fallen short in pursuing cases inherited from the abolished Procurement Task Force and in opening investigations based on new allegations. However, the OIOS has also been embroiled in whistle-blower retaliation. In 2010, the Deputy Director of the OIOS Investigation Division impeded an investigation and retaliated against two OIOS whistle-blowers.<sup>19</sup> In 2014, another OIOS investigator complained of retaliation by the same OIOS officials who were implicated in the previous case, but the Ethics Office recused itself from making a decision on that allegation and referred the matter to the U.N. Chief of Staff, who took no action. Both examples, plus the situation involving Anders Kompass described below, raise serious concerns because they detail how the very institutions on which whistle-blowers are supposed to rely for protection can themselves be involved in retaliation.
- **U.N. High Commissioner for Human Rights (UNHCHR).** Perhaps the most egregious examples of whistle-blower retaliation in recent years have occurred at the U.N. Office of the High Commissioner for Human Rights. In 2015, the OHCHR possessed a report alleging sexual abuse by peacekeepers—some from France—in the Central African Republic. A senior OHCHR official, Anders Kompass, informed the French government. In retaliation for this action, High

Commissioner Zeid Ra'ad al Hussein demanded Kompass's resignation. An external enquiry subsequently found that the chief of staff had inappropriately orchestrated the unwarranted investigation into Kompass.<sup>20</sup> The Under Secretary-General of OIOS and the Director of the Ethics Office were complicit in carrying out that investigation. Kompass was eventually vindicated by an independent panel but resigned from his position.<sup>21</sup> Another OHCHR official, Miranda Brown, who blew the whistle to the U.S. government and Congress on the CAR child sexual abuse allegations and abuse of authority by the U.N. leadership—both of which were confirmed by the independent panel—did not have her contract renewed and was terminated while on sick leave.<sup>22</sup> After the U.N. Ethics Office denied her protection, Brown appealed to the High Commissioner and then to the Secretary General to reinstate her, but thus far, Brown's attempts at reinstatement have been refused.

Most recently, yet another OHCHR official, Emma Reilly, reported through official channels that a high-level OHCHR official, Eric Tistounet, had repeatedly provided names of Chinese human rights activists seeking to attend sessions of the U.N. Human Rights Council. She believed that this communication placed these activists in danger and at least one such individual was reportedly arrested by the Chinese government at the Beijing airport on her way to attend a session of the Council and died in detention. When Reilly's reports elicited no response from the High Commissioner, she informed the Irish government.

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18. Government Accountability Project, "UNDP Whistleblower Details Comprehensive Wrongdoing in Somalia Projects," May 14, 2008, <https://www.whistleblower.org/press/undp-whistleblower-details-comprehensive-wrongdoing-somalia-projects> (accessed March 2, 2017).

19. U.N. Dispute Tribunal, *Nguyen-kropp Postica v. Secretary-General of the United Nations* (Judgement No. UNDT/2013/176), December 20, 2013, <http://www.un.org/en/oaj/files/undt/judgments/undt-2013-176.pdf> (accessed March 2, 2017).

20. U.N. General Assembly, "Taking Action on Sexual Exploitation and Abuse by Peacekeepers," Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic, December 17, 2015, <http://www.un.org/News/dh/infocus/cenafricrepub/Independent-Review-Report.pdf> (accessed March 2, 2017).

21. Sandra Laville, "Child Sex Abuse Whistleblower Resigns from UN," *The Guardian*, June 7, 2016, <https://www.theguardian.com/world/2016/jun/07/child-sex-abuse-whistleblower-resigns-from-un> (accessed March 2, 2017).

22. Miranda Brown, "Do No Harm: Ending Sexual Abuse in United Nations Peacekeeping," testimony before the Committee on Foreign Relations, U.S. Senate, April 13, 2016, [http://www.foreign.senate.gov/imo/media/doc/041316\\_Brown\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/041316_Brown_Testimony.pdf) (accessed March 2, 2017).

23. Bea Edwards, "A Third Whistleblower Unsuccessfully Seeks Protection from Retaliation at UN/OHCHR," Government Accountability Project, February 1, 2017, <https://www.whistleblower.org/blog/014301-third-whistleblower-unsuccessfully-seeks-protection-retaliation-unohchr> (accessed March 2, 2017).

She has since been subjected to harassment, but her appeal for protection to the Ethics Office was rejected.<sup>23</sup> Particularly troubling is that this pattern of retaliation is happening at the U.N. office charged with championing human rights, including rule of law and due process. Repeated hostility and retaliation against OHCHR whistle-blowers has led the GAP to call for an investigation of the High Commissioner.<sup>24</sup>

The retribution faced by these individuals and the failure of the U.N. whistle-blower policy to protect them has no doubt dissuaded many others from similarly reporting wrongdoing. This does a disservice to the U.N., the vulnerable individuals relying on the U.N. for protection and support, and the taxpayers in member nations who cannot be confident that their contributions are being used as intended.

### Applying U.S. Whistle-blower Standards

Legislation enacted in 2015 required the U.S. to withhold 15 percent of contributions to individual U.N. organizations, departments, and agencies unless the Secretary of State reported to the Committees on Appropriations that the organization, department, or agency is “effectively implementing and enforcing policies and procedures which reflect best practices...for the protection of whistleblowers from retaliation”—including access to independent external arbitration.<sup>25</sup> Similar language was included or continued in subsequent appropriations bills for fiscal years 2016 and 2017.<sup>26</sup>

Despite evidence of substandard observance and retaliation in disparate parts of the U.N. system, former Secretary of State John Kerry reported that every U.N. organization met the whistle-blower

standards except the World Intellectual Property Organization (WIPO). He asserted this despite the fact that U.N. organizations do not allow whistle-blowers access to independent external arbitration as specified in the reporting language. In fact, when whistle-blower Miranda Brown formally requested “expedient access to independent adjudicative bodies, in particular, external arbitration,” the Office of the Chef de Cabinet of the U.N. Secretary-General made clear that this was not an option under the system of administration of justice within the U.N.:

[Y]our sole legal recourse is to a multi-step process that includes a two-tier set of independent adjudicative bodies, i.e. the United Nations Dispute Tribunal and the United Nations Appeals Tribunal. This system binds the Secretary-General and United Nations staff members alike. Since the system, as established by the General Assembly, does not provide for recourse to arbitration for the resolution of the claims of United Nations staff members, no legal basis exists for submitting your client’s claims to external arbitration.

Thus, if the Secretary-General were to accept your proposal for external arbitration, he would be acting *ultra vires* and in contravention of the legal framework established by the General Assembly.<sup>27</sup>

Withholding funding to WIPO was warranted—a 2016 congressional hearing detailed grave abuse of authority and retaliation against whistle-blowers by WIPO leadership.<sup>28</sup> But the failure to withhold in other cases where problems have been documented

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24. Bea Edwards, “Trouble at UN OHCHR: Investigate the High Commissioner,” Government Accountability Project, February 9, 2017, <https://www.whistleblower.org/blog/091009-trouble-un-ohchr-investigate-high-commissioner> (accessed March 2, 2017).

25. Consolidated and Further Continuing Appropriations Act of 2015, Public Law 113-235, § 7048.

26. The legislation also specified five areas where best practices should be applied: (i) protection against retaliation for internal and lawful public disclosures; (ii) legal burdens of proof; (iii) statutes of limitation for reporting retaliation; (iv) access to independent adjudicative bodies, including external arbitration; and (v) results that eliminate the effects of proven retaliation. See Consolidated Appropriations Act of 2016, Public Law 114-113, § 7048. Language was carried over in the Further Continuing and Security Assistance Appropriations Act of 2017, Public Law 114-254.

27. Letter from Patrick Carey, Office of the Chef de Cabinet of the United Nations Secretary-General, to Miranda Brown, April 30, 2015. Available upon request.

28. Hearing, *Accountability at the World Intellectual Property Organization: Illicit Technology Transfers, Whistleblowing, and Reform*, Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations, Subcommittee on the Middle East and North Africa, and Subcommittee on Asia and the Pacific, Committee on Foreign Affairs, U.S. House of Representatives, February 24, 2016, <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg98830/html/CHRG-114hhrg98830.htm> (accessed March 2, 2017). Transcript available at <http://docs.house.gov/meetings/FA/FA16/20160224/104528/HHRG-114-FA16-Transcript-20160224.pdf> (accessed March 13, 2017).

undermined the intent of enacted law and likely sent the message to the U.N. that the U.S. did not take whistle-blower protections seriously.

### Does the New U.N. Whistle-blower Policy Measure Up?

Secretary-General António Guterres, perhaps concerned that the Trump Administration might apply the whistle-blower law more stringently than the Obama Administration, issued a new bulletin amending the previous U.N. whistle-blower protection policy.<sup>29</sup> According to the U.N., the Secretary-General

has made it a priority for the UN to have a whistle-blower protection policy that meets the highest possible standards, and the updated plan aims to ensure the Organization functions in a more open, transparent and fair manner. UN Staff and management both agreed on the policy, contained in a bulletin that was just issued, which meets best practices.<sup>30</sup>

However, an analysis by former OIOS investigator Peter Gallo concluded that the new policy would not have made substantive differences in the treatment of past whistle-blower cases. Specifically, the policy retains ambiguity and discretion in key areas that would allow the U.N. to continue its selective application of whistle-blower protections.<sup>31</sup> For instance, Section 2 of the new policy says that in order to receive protection, a complainant must provide evidence sufficient to support “a reasonable belief” that misconduct has occurred. That judgment is at the discretion of the Ethics Office and is not subject to review.<sup>32</sup>

Gallo also concludes that in some ways the new policy is an erosion of previous protections. For instance, the Ethics Office was previously required to complete its preliminary review within 45 days from receiving the complaint of retaliation, but now must complete

the review within 30 days of receiving *all* information requested. Gallo notes that this “allows the Ethics Office to delay the process and take as much time as they wish,” thereby allowing retaliation to continue.<sup>33</sup>

In terms of the congressional best practices, the most glaring deficiency is that whistle-blowers do not have “access to independent adjudicative bodies, including external arbitration.” In fact, the policy in this particular area remains the same after ST/SGB/2017/2 as it was when Miranda Brown was informed that the current system does not provide for external arbitration.

In brief, the system is entirely internal. The Ethics Office is a U.N. body and does not actually have the authority to protect whistle-blowers; it can merely recommend to the Secretary-General that he do so. This raises obvious conflict-of-interest concerns. The option for a review by the Ethics Panel in ST/SGB/2017/2 would be inherently compromised as explained by Gallo:

Section 9 provides for the “review” of the Ethics Office decision by the Alternate Chair of the U.N. Ethics Panel, but the argument that that is somehow “independent” is fallacious. The Alternate Chair of the U.N. Ethics Panel will always be a professional colleague of the Ethics Director and any professional relationship they have should create a conflict of interest that prevents them reviewing the decision of someone they know and work with.<sup>34</sup> The underlying problem is that existing U.N. justice options are inherently compromised because they are a part of the U.N. system. Moreover, if the Secretary-General or head of the U.N. organization simply refuses to enforce the judgment, no recourse short of removing that individual from office exists, which raises significant international political complications reducing the likelihood of such a removal occurring.<sup>35</sup>

29. U.N. Secretariat, “Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations.”

30. U.N. News Centre, “Secretary-General Guterres Approves Updated UN Whistleblower Protection Policy,” January 23, 2017, <http://www.un.org/apps/news/story.asp?NewsID=56026#.WK9ZJFUrcs> (accessed March 2, 2017).

31. Peter Gallo, “Designed to Fail: UN Whistleblower Protection Policy,” February 5, 2017, <http://petergallo.com/wp-content/uploads/2017/02/Designed-to-Fail-PAG-on-ST-SGB-2017-2.pdf> (accessed March 2, 2017).

32. U.N. Secretariat, “Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations.”

33. Gallo, “Designed to Fail: UN Whistleblower Protection Policy; An Analysis of ST/SGB/2017/2,” p. 7.

34. *Ibid.*, p. 16.

35. High-level appointments are difficult for governments to secure and are often jealously guarded symbols of national pride. Governments will often resist removal even if warranted.

Since 2009, cases could be appealed to the U.N. Dispute Tribunal (UNDT). But the jurisdiction of the UNDT is limited to procedural compliance: It cannot review the substance of the complaints or review decisions made by the Ethics Office. Even so, the U.N. has failed at times to fully cooperate or disclose documents and communications that would bolster appeals by whistle-blowers.<sup>36</sup> Even if a whistle-blower succeeds in getting the UNDT to find that procedures were not followed properly, the U.N. can appeal that judgment to the U.N. Appeals Tribunal (UNAT), whereupon the UNDT judgment is suspended.

Unfortunately, this path has rarely been successful for whistle-blowers. The U.N. General Assembly appoints the judges to both the UNDT and the UNAT and, historically, the tribunals have demonstrated a strong bias in favor of the organization.<sup>37</sup>

In the rare instances when an alternative mechanism is established because of a clear case of conflict of interest, the U.N. does not create a truly independent body.

For instance, to investigate the disclosure of sexual exploitation and abuse in the Central African Republic, the U.N. set up an “External Independent Review.” But the terms of reference were determined by the U.N., the scope of the review was established by the U.N., and the three panelists were appointed by the Secretary-General.<sup>38</sup> Outside experts unsurprisingly identified conflicts of interests with two of the panelists and did not consider it independent.<sup>39</sup>

## Enforce Whistle-blower Standards

Secretary-General Guterres should be commended for recognizing that U.N. whistle-blower protections were inadequate and issuing a new policy in January. However, the new policy falls short of the best practices standard established by Congress. To address this, the Trump Administration should:

- **Assess whistle-blower protection policies at international organizations.** Each international organization should be required to prove that its policy not only is on the books, but also is being actively enforced, and to identify and explain how many cases of retaliation have been pursued. If their policies fall short of the standards outlined by Congress, as the recently issued U.N. policy does, the Secretary of State should report this conclusion to Congress and withhold 15 percent of U.S. contributions as required by law.
- **Inform organizations whose policies fall short what needs to change to avoid withholding in future years.** In the case of the U.N., U.S. representatives should push for greater independence and clarity of roles in the system. Specifically, the U.S. should:
  - **Avoid** having the Ethics Office handle retaliation cases, which are matters of staff misconduct, but instead restrict itself to developing standards, advising and training on ethical matters, and making staff aware of options for

36. Gallo, “Designed to Fail: UN Whistleblower Protection Policy.”

37. Perhaps the most glaring example is the case of James Wasserstrom, the whistle-blower who was harassed and retaliated against after reporting a corruption scheme involving hundreds of millions of dollars orchestrated by U.N. officials and Kosovo government officials. The Ethics Office found that Wasserstrom’s whistle-blower claims were valid and recommended an investigation. After receiving an investigation report from the OIOS, the Ethics Office concluded that Wasserstrom was not retaliated against. Wasserstrom won an appeal before the UNDT and was awarded damages, but the U.N. appealed that decision to the UNAT, which reversed that decision and greatly narrowed the scope of applicable decisions that could be reviewed by the UNDT. The ultimate consequence was to undermine whistle-blower protections in the U.N. system. U.N. Dispute Tribunal, “Wasserstrom v. Secretary-General of the United Nations,” Judgment No. UNDT/2013/053, March 15, 2013, <http://www.un.org/en/oaj/files/undt/judgments/undt-2013-053.pdf> (accessed March 8, 2017); U.N. Appeals Tribunal, “Wasserstrom (Respondent/Appellant) v. Secretary-General of the United Nations (Appellant/Respondent),” Judgment No. 2014-UNAT-457, June 27, 2014, <http://www.un.org/en/oaj/files/unat/judgments/2014-UNAT-457.pdf> (accessed March 8, 2017); and Government Accountability Project, “UN Tribunal Weakens Whistleblowers’ Rights, Disregards U.S. Appropriations Law,” September 3, 2014, <https://www.whistleblower.org/press/un-tribunal-weakens-whistleblowers-rights-disregards-us-appropriations-law> (accessed March 8, 2017).

38. News release, “Secretary-General Appoints Independent Review Panel on UN Response to Allegations of Sexual Abuse by Foreign Military Forces in Central African Republic,” U.N. Secretariat, June 22, 2015, <http://www.un.org/press/en/2015/sgsm16864.doc.htm> (accessed March 2, 2017).

39. Bea Edwards, “The UN’s Independent External Panel on Sexual Abuse by Peacekeepers in Africa Not Independent, Not External,” Government Accountability Project, July 30, 2015, <https://www.whistleblower.org/blog/103830-un%E2%80%99s-independent-external-panel-sexual-abuse-peacekeepers-africa-not-independent-not> (accessed March 2, 2017).



registering various types of complaints. Likewise, peacekeeping Conduct and Discipline Units should focus on training, standards, and guidance. Both units should be instructed to confidentially convey relevant complaints to an independent inspector general as detailed below, but they should not be the only avenue for lodging such complaints.

- **Establish** standing claims commissions automatically where U.N. peacekeeping operations are deployed. To provide an independent avenue for lodging claims and allegations of abuse in areas where U.N. peacekeeping operations are deployed, the U.N. Security Council should instruct the Secretary-General to amend the status of forces agreements (SOFAs) between the U.N. and the host governments to automatically establish standing claims commissions. Small claims resulting from damages caused by U.N. officials and peacekeepers, such as those for traffic accidents, should be resolved by the commission. Allegations of more serious crimes, such as sexual exploitation and abuse, should be referred immediately to an independent inspector general as detailed below.
- **Replace** the OIOS with a truly independent U.N. inspector general unit. Retaliation issues and investigations into mismanagement, criminality, or other serious issues need to be the responsibility of an independent investigator unit. The OIOS cannot adequately fulfill these responsibilities because it reports to and is overseen by the very structure it is supposed to investigate. The General Assembly should abolish the OIOS and replace it with an independent inspector general office reporting directly to the General Assembly and empowered, staffed, and resourced as necessary to investigate any U.N. fund, program, mission, or organization funded in whole or part through the regular or peacekeeping budgets. If the inspector general concludes that prima facie evidence of criminal conduct exists, he should be required to recommend formally and publicly that the Secretary-General or other relevant authority waive immunity and immediately refer the case to national authorities for investigation.

The inspector general should be appointed to a fixed five-year term and not be subject to removal except for gross misconduct. In addition, should the U.N. adopt a “Freedom of Information Act” policy, the U.N. inspector general’s office should be responsible for overseeing compliance with these requests. The Independent Audit Advisory Committee (IAAC), not the Secretary-General, should be responsible for vetting and compiling a slate of inspector general candidates for consideration and appointment by the General Assembly.

- **Replace** the UNDT and UNAT with a truly independent appeals body that has the authority to review claims; grant protection from retaliation; hear appeals of decisions by the OIOS or, ideally, an independent U.N. inspector general; and award damages and restitution. The General Assembly should ensure that this body is independent and distinct from the U.N. Secretariat, perhaps modeled after institutions and mechanisms established for resolving international commercial disputes, and have the authority to impose punitive action for noncompliance with its judgments. A list of independent experts should be maintained by the IAAC to provide “judges” for hearings as required. For fairness, an option for selecting the hearing panel could be for the claimant to select one judge, the U.N. another, and the two selected judges to jointly select the third.
- **Improve the ability of whistle-blowers to return to U.N. employment.** Whistle-blowers understand the ramifications and likely consequences of reporting wrongdoing, having seen how past whistle-blowers have been harassed and ostracized, but nevertheless feel compelled to do so either from a sense of fairness or a dedication to the mission and purposes of the organization. These are the types of employees that member states should like to see in the U.N. system as they are the ones most likely to use donor funding as intended.

Congress can assist these efforts by taking the following actions:

- **Identify more clearly best practices in whistle-blower protection.** The existing language provides some detail but could benefit from more clearly identifying examples of best practices and requiring the Secretary of State to certify that these best practices have been met.
- **Adopt more detailed whistle-blower protection language, including the 15 percent withholding language, in an authorization bill.** This would make the requirement permanent until amended or eliminated, rather than an appropriations requirement requiring annual renewal.

## Conclusion

If the U.S. truly believes in the necessity of protecting whistle-blowers in international organizations, then it should signal this seriousness by following through with withholding and being as detailed as possible when communicating improvements to international organizations.

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