The United Nations Internal Administration of Justice: Reporting Of Misconduct and Retaliation: Whistle Blower Protection, The Office of Internal Oversight Services (OIOS) and The Ethics Office

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Introduction

The reporting of misconduct, a duty of all staff, also know colloquially as “whistle blowing”, is administered by the Office of Internal Oversight Services (OIOS). It is believed the United Nations referred explicitly to the term “whistle blowing” only in the OIOS 2001 Investigations Manual. The United Nations subsequently eliminated the use of the term “whistle blowing” in its 2009 and subsequent Investigations Manuals. The Organization is not known to have used the term since in any policy statements.

The receipt of reports of retaliation, is the role of the Ethics Office. Policy does not refer explicitly to whistle blower protection but rather to “protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations” as set forth in ST/SGB/2005/21, ST/SGB/2017/2 and ST/SGB/2017/2. The Ethics Office on its website claims “…the Ethics Office protects staff from being punished for reporting misconduct or for cooperating with an official audit or investigation.” This is commonly known as "whistleblower protection”.

This article will examine how the Ethics Office, contrary to its ostensible mission of ensuring “enhanced” protection of staff members against retaliation, actually requires that retaliation take place before it can be reported so that “protection” can be offered. This has recently been modified so that to provide prevention, the “ OIOS will inform the Ethics Office of reports received of wrongdoing that OIOS identifies as posing a retaliation risk to a staff member.” (ST/SGB/2017/2, 5.1)

It shall also be seen how, by a process of mission creep, the Ethics Office called for a non-mandated “initial assessment” to take place before one can merit the mandated “preliminary review”; evidence must be “independent and corroborated” and there is to be a belated shift in the burden of proof. In so doing, the Ethics Office is consistently formulating ever more stringent requirements that have ensured an ever lower level of protection for the staff member, an increase in protection for the manager or administrator and a diminished prospect for accountability.

It will also examine how the Ethics Office has elevated institutional deception to a new level by pretending to protect staff members while not claiming in its annual reports to having protected even one staff member from retaliation over the past 11 years.

This chapter will also consider the linkages between the Secretary-General and the Tribunals regarding the matter of the independence of the Ethics Office. The Secretary-General, by claiming the Ethics Office is independent, although its foundation documents do not establish it as such, removes the recommendations and decisions of the Ethics Office from modification by the Secretary-General and, therefore, from judicial review. This view has been embraced by the UN Appeals Tribunal. These claims help ensure the lack of accountability.

A. MISCONDUCT AND ITS REPORTING: THE GA AND ITS RESOLUTIONS

1. Staff Members' Duty to Report Misconduct

The General Assembly, as the ultimate authority, established the Staff Regulations and Rules, the basic rights and obligations of staff. Staff Rule 1.2 provided: "(c) Staff members have the duty to report any breach of the Organization's "regulations and rules to the officials whose responsibility it is to take appropriate action and to cooperate with duly authorized audits and investigations. Staff members shall not be retaliated against for complying with these duties."

The Secretary-General implements General Assembly resolutions in part by means of his Secretary-General's Bulletins (SGBs). To give voice to the GA's decisions, the Secretary-General, in his ST/SGB/2005/21 established: "It is the duty of the staff member to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action." (ST/SGB/2005/21, 1.1.) (ST/SGB/2017/2,1.1)

This is a straightforward statement of the statutory obligation on the part of staff members to report misconduct. It is more than an expectation. It signals the unacceptability of misconduct and the expectation that misconduct shall be reported. Then, having said this, as shall be seen, the policy makes no provision for mandatory investigation of these reports, offering no realistic means for realizing this statement.

But what is "appropriate action"? One might imagine it would involve the correcting of what is wrong. But that is not what is said. The boundaries of appropriate action are not revealed. No obligations are specified. No oversight is indicated. No agents responsible for oversight are mentioned. There is no time frame.

2. Duty to Report: Management's Corresponding Duty

If the reporting of misconduct is the duty of staff, what are the corresponding rights of staff and the duties of management? Are there any? What rights are involved?

Black's Law dictionary points out: **"**In its use in Jurisprudence, this word [duty] is the correlative of right. Thus,wherever there exists a right in any person, there also rests a corresponding duty upon some other person or upon all persons generally." That might be interpreted as: "With each duty, there is an equal and corresponding right."

But is this the case? Does the UN give expression to this concept of duty? While the staff member has the duty to report misconduct, the only corresponding obligation on the part of management is to receive the complaint. There is no corresponding right of the staff member to have his/her report investigated. Nor is there a duty on the part of management, especially the Office of Internal Oversight Services (OIOS) or the Office of Human Resources Management (OHRM) to investigate or consider it.

Thus, a staff member, taking his or her responsibility seriously may well find him or herself in a situation placing his or her personal and professional life in danger.

It might be asked why, if a stated objective is one of enhancing protection, the reportings of misconduct and retaliation are not to be done to the same office. One might expect the OIOS, which receives reports of misconduct, to investigate and analyze those reports, and to also address issues of retaliation. That is not the case. But there is no indication that the Ethics Office will be informed by the OIOS of its investigations and analyses of the reports of misconduct. The putative misconduct and the putative retaliation have EACH been treated as if they had a hermetically sealed character and had nothing to do with each other. Only with the issuance of ST/SGB/2017/2 was the OIOS role revised: "5.1 OIOS will

inform the Ethics Office of reports received of wrongdoing that OIOS identifies as posing a retaliation risk to a staff member." "5.2 When informed by OIOS of an individual who is at risk of retaliation, the Ethics Office will consult with that individual on appropriate retaliation prevention action."

The more closely these questions are addressed, the easier it is to track provenance and outcomes. The greater the distance, as is currently the practice, the more difficult the tracking. That may be precisely the intent.

With the reporting of misconduct required as a duty of staff, the reporting would seem to be an expectation, one that contributes to the Organization's effective and efficient functioning in an open, transparent and fair manner.

While establishing the reporting of misconduct as a "duty", it does not establish the "duty" as a right. Indeed, the duty to report misconduct is not a right of any staff member. If it were, and it should be, staff members who report misconduct would never be put through an adversarial process such as often takes place.

Nor does the policy establish corresponding duties on the part of management to investigate the reported misconduct. The OIOS, on receipt of a report of misconduct, enjoys discretion as to whether to investigate or not.

Nor does the policy establish an incentive structure to reward those who "whistle blow". This makes clear the UN does not see whistle blowing as a positive. To the contrary, experience has revealed it is to be discouraged wherever possible.

The UN has established a policy structure for addressing two goals incompatible with accountability: a) establishing the reporting of misconduct to the OIOS and the OHRM as a duty and b) the reporting of retaliation to the Ethics Office. This ensures the mission gets lost in the weeds so it cannot be realized. There are a number of strategies by which these are realized:

a) The UN asserting staff members have a duty to report misconduct but do not have a right to do so.
b) Establishing the OIOS and the OHRM as the recipients of the reports of misconduct and the Ethics Office as the recipient of reports of retaliation divides the two functions creating confusion and incoherence.
c) The General Assembly in its resolution A/RES/62/247, 12 granted the Ethics Office authority to investigate and the Secretary-General with ST/SGB/2005/21 and ST/SGB/2017/2 did not support or convey that authority.
d) Establishing the Ethics Office as incapable of investigating but engaging in "fact-finding".
e) There is no provision for any action by the OIOS with respect to the report of misconduct to the OIOS for informing the analysis by the Ethics Office. To that extent, they do not support and reinforce each other or intersect to the extent possible;
f) Establishing the Ethics Office as incapable of taking administrative decisions;
g) Establishing the Ethics Office so that what decisions it does take cannot be appealed;
h) Eliminating any prospect of positive recognition or reward for the reporter of misconduct;
i) Minimizing prospects of the Ethics Office prevention of retaliation except at the recommendation of OIOS;
j) Introduction of an unauthorized or un-mandated "initial assessment" by the Ethics Office as a means of filtering out about 70% of the reports of retaliation.
k) Those who are filtered out at the "initial assessment" stage do not receive the preliminary review mandated in policy.
l) Letting the OIOS use "discretion" in refusing to investigate even those cases referred by the Ethics Office trivializes the process and creates a lack of confidence.
m) OIOS' annual reports omitting any reference to reports for misconduct filed by whistle blowers.

n) Ethics Office annual reports making no mention of their chief success indicator: the numbers of whistle blowers protected from retaliation;
o) The Ethics Office, ensuring all documentation is ”independent and corroborated” whatever that means, is another burden of proof on the reporting staff member.
p) The Ethics Office denying the staff member reporting retaliation the administration’s burden of proof prior to the “initial assessment”, the “preliminary review” and the “prima facie” phases.

3. Whistle Blower

The term “whistle blower” is used colloquially within the UN referring to one who reports misconduct, independent of whether or not there has been retaliation.

It is believed the only use of the term “whistleblower” by the United Nations took place when the OIOS defined a ‘whistleblower’ as “…a staff member who refuses to engage in and/or reports illegal or wrongful activities of his/her employer or fellow staff member, subsequently and as a result, the staff member’s chain of command or his/her fellow staff members retaliate against that staff member.” (OIOS Investigations Manual, 2001) This definition strongly suggests one who reports misconduct is not a whistle blower unless and until s/he experiences retaliation. This creates an expectation of retaliation as opposed to its prevention.

The Appeals Tribunal qualified that a bit when it found “…that the Appellant has not been able to establish that he was a genuine whistle-blower.” (2011-UNAT-124)

Think of that! The staff member has to establish not only that he was a whistle blower; but that he was a GENUINE whistle blower! And this comes from the Appeals Tribunal?

All this, in the absence of criteria, introduces gradations as to as to what constitutes a genuine whistle blower. An insincere whistle blower? An authentic whistle blower? An inauthentic whistle blower? An incompetent whistleblower?

4. Reports of Misconduct to the Office of Internal Oversight Services (OIOS):

4.1 The General Assembly decided:

“(c) Functions

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:

“5. (iv) Investigation

The Office shall investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken; (A/RES/48/218-B, 5)

“6. Requests the Secretary-General to ensure that the Office of Internal Oversight Services has procedures in place that provide for direct confidential access of staff members to the Office and for protection against repercussions, for the purposes of suggesting improvements for programme delivery and reporting perceived cases of misconduct;” (A/RES/48/218-B, 6)

The intent of the GA as expressed in its decision is that such reports "shall" be investigated. How was that given voice by the SG?

The intent is also that the OIOS shall dress reports of misconduct as well as retaliation or repercussions.

4.2 The Secretary-General's Interpretation

"The Office **shall investigate reports of violations of United Nations regulations, rules, and pertinent administrative issuances** and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken." (ST/SGB/273, para. 16)(Emphasis added.)

This, consistent with the GA Resolution 48/218-B, makes it quite clear that the OIOS is obliged to investigate issues, especially reports of misconduct, that are brought before it. Or does it?

Only two paragraphs later, the Secretary-General, in his interpretation of the GA's decision introduced a significant weakening: "The Office **may 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." (ST/SGB/273, para. 18)(Emphasis added.)

This paragraph shifts the issue from the ringing affirmation of a mandatory investigation: "shall investigate", to "may investigate", a far more equivocal and discretionary one.

The "protection" of the staff member reporting misconduct receives many times more attention in procedures and processes than does the investigation of the original report of misconduct.

Should there be retaliation, the reporter is placed on the defensive and attention shifts away from the investigative role of the OIOS and its investigation of the initial report to the non-investigative role of the Ethics Office. One function of the Ethics Office seems to be to serve as a buffer against the high expectations that a staff member should have of the OIOS' investigation.

It may be said that the OIOS, through its 2001, 2009 and 2015 editions of its Investigations Manuals has cast accountability into question. This is especially true of: "The investigation function is a critical part of the overall accountability framework, and to maintain the integrity of any accountability framework, standards for investigations must be created, published and monitored for compliance." (OIOS, 2015 Investigations Manual, 2.1.2.) The matter of an "accountability framework" is one not defined in policy.

The reporting of misconduct is a duty of staff members. Having called for the filing of reports of misconduct with the OIOS, policies do mention general principles but do not require reports to be assessed, considered, appraised, investigated, or otherwise resolved.

The OIOS, regarding the the burden of proof, may do as its discretion dictates, a setting conducive to the avoidance of investigations, transparency and accountability.

5. Reporting Misconduct Through Established Internal Mechanisms

Staff have a duty to report misconduct. What do the OIOS or the OHRM do with the reports? A review of the Activities Reports of the OIOS indicates no mention of reports of misconduct, the Ethics Office or any cases filed in the context of ST/SGB/273 or ST/SGB/2005/21. There seems to be no information on what happens with those complaints. To the extent that is the case, there is neither transparency nor

accountability.

Could this reflect the assignment of **only slight** importance to the reports of misconduct? If so, could their worth and value possibly be depreciated to a greater extent? Could accountability be depreciated to a greater degree? What else could be done to ensure the lack of linkage between the reports of misconduct and the reports of retaliation?

Could it be the case that staff members, having been told to file their reports with the OIOS, the OHRM or their own departments, now find there appears to be no subsequent record of this very substantial body of reports? Have these reports vanished? What level of analysis has been brought to bear? By whom? What does the lack of reporting say of the sense of trust, transparency? What do they say about the state of the Organization's management? About the administration of justice? Or the success of the Secretary-General to control the essential components of the system?

Is there no attempt to verify or refute those reports? To vindicate the staff members having made those reports?

The separation of the initial report of misconduct and the subsequent report of retaliation would seem to make little sense from the standpoint of rational procedures, transparency and work flow.

B. RETALIATION

6. The Ethics Office

6.1. Purposes:

"The Secretary-General, for the purpose of securing the highest standards of integrity of staff members in accordance with Article 101, paragraph 3, of the Charter of the United Nations, taking into consideration paragraph 161 of the 2005 World Summit Outcome 1 and pursuant to General Assembly resolution 60/248, hereby promulgates the following:"

"The objective of the Ethics Office is 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." (ST/SGB/2005/22, para. 1.2)

These make it clear that integrity and a culture of ethics, transparency and accountability are among the highest aims of these policies. How have these been pursued?

6.2 Ethics Office Responsibilities (ST/SGB/2005/21 and ST/SGB/2005/22 and ST/SGB/2017/2)

The main responsibilities of the Ethics Office were established as follows:

"(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;" (Also ST/SGB/2005/21, 5.2)

"(e) Such other functions as the Secretary-General considers appropriate for the Office. (ST/SGB/2005/22, Article 3.1)

However, with the abolition of ST/SGB/2005/21 by the issuance of ST/SGB/2017/2 these responsibilities also seem to have been abolished as they do not appear to have been duplicated elsewhere.

It is responsibility of the Ethics Office for (b) the protection of staff against retaliation for reporting misconduct with which we are most concerned in this chapter.

The entire procedure with the many qualifications given to the process of reporting retaliation to the Ethics Office, all seem to be designed to allow the administration the introduction of as many qualifiers as possible, each one designed to enable the avoidance of the discharge of the burden of proof by the administration and the avoidance of accountability.

Policy indicates the duty of the administration to protect the individual's identity but does not indicate any duty to investigate, analyze or assess the reports of misconduct. Could it be that the putative misconduct of managers is of a lesser order of importance?

It would appear contradictory, even inexplicable, that the whistle blower should have to make his/her report to the OIOS, only to have the OIOS then claim that it cannot apply its mandate to take "interim steps" to protect the whistle blower. This ethical and legal lapse would require the staff member to have to await retaliation before being able to establish a case for protection against retaliation to the Ethics Office.

That all of this could take place with no reference whatsoever to the reports of misconduct that allegedly gave rise to the allegations of retaliation is breathtaking. Is it the case that there could be little or no relationship whatsoever?

Had the OIOS investigated the reports of misconduct, what would have happened had the OIOS found no misconduct but the Ethics Office had found a case merited a preliminary review? Or if the OIOS found misconduct and the Ethics Office found the case did not warrant a preliminary review?

7. Reporting Retaliation

7.1 To Whom Is Retaliation Reported?

"Individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation may submit a request for protection against retaliation to the Ethics Office in person, by regular mail, by e-mail or through the Ethics Office helpline. They should forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible." (ST/SGB/2017, 6.1)

It appears the Ethics Office becomes engaged "cold", i.e., with no knowledge of the original reporting of misconduct and action, if any, by the OIOS and the OHRM.

7.2 What Is Done With The Report?

"Upon receipt of a complaint of retaliation or threat of retaliation, the Ethics Office will conduct a preliminary review of the complaint to determine whether (a) the complainant engaged in a protected

activity; and (b) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation." (ST/SGB/2017, 7.1)

"The Ethics Office shall maintain the confidentiality of all communications received from complainants who request protection against retaliation, and from all relevant third parties." (ST/SGB/2017, 7.2)

These suggest a number of possibilities: 1) the Applicant having been requested to make the case for an investigation by the OIOS of the initial report of misconduct, may also be called upon to make a different case, this one for retaliation and to an entirely different body, the Ethics Office; 2) the Applicant has the burden of proof to make a sufficient case to the Ethics Office for his/her complaint of retaliation in order to survive an un-mandated "initial assessment" and so as to enable a mandated "preliminary review" and to establish a *prima facie* case; 3) but the Ethics Office does not actually carry out an investigation, only an "initial assessment" and then a "preliminary review"; 4) since the Ethics Office cannot investigate,what is the prospect that the Applicant's presentation might not receive the attention it deserves? 5) there appears to be no provision for the OIOS' resolution of the Applicant's initial complaint of misconduct prior to the applicant having to file a complaint of retaliation; 5) might the OIOS investigation already be underway? 6) if the initial complaint is not resolved by the OIOS prior to the secondary complaint of retaliation to the Ethics Office, does this suggest both bodies might each be simultaneously addressing a different complaint from the same applicant? 7) why is the prospect of misconduct and retaliation stemming from the same source not raised or considered jointly? 8) why might there be two enquiries being undertaken by two different bodies simultaneously, related to the same complaint and complainant? 9) could this possibly be less efficient and effective? 10) if so, how? 11) what ethical, managerial and legal purposes could be addressed and satisfied by such procedures seemingly un-related, un-coordinated, and un-integrated procedures?

8. Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations, (ST/SGB/2005/21, ST/SGB/2017/2)

As noted, in Sections 1-4 of both ST/SGB/2005/21 and ST/SGB/2017/2 no mention was made of the Ethics Office.

Section One provided: "1.1 It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation." (ST/SGB/2017/2, 1.1)

The focus is on the duty of the reporter. There is no attention to the corresponding duty of the administration. The right to protection sounds good but what does it mean?

It will be revealed, following the reporter's filing a report, usually with the OIOS, an action often understood to mean the effective death of that reporter's professional development, there is no commitment to investigate that report. This has often ensured the lack of resolution, thereby leaving the reporter "hanging out to dry". Failure or refusal to investigate is, perhaps, the most effective, least aggressive form of retaliation.

8.1 Meaning

"Retaliation against individuals who have reported misconduct …violate[s] the fundamental obligation of all staff members to uphold the highest standards of efficiency, competence and integrity and to discharge their functions and regulate their conduct with the best interests of the Organization in view." (ST/SGB/2017/2, 1.3) This paragraph says nothing of the misconduct initially reported.

8.2 Definitions of Retaliation

The 2005 SGB policy noted retaliation is any "…direct or indirect detrimental action recommended, threatened or taken against an individual who officially reported misconduct or otherwise cooperated with duly authorized audits or investigations.19 If established, retaliation constitutes misconduct which is subject to possible sanction." (ST/SGB/2005/21,1.4)(OIOS Investigations Manual, 2015, 1.3.4)

Twelve years later this was modified to read: "Retaliation means any direct or indirect detrimental action **that adversely affects the employment or working conditions of an individual, where such action has been** recommended, threatened **or taken for the purpose of punishing, intimidating or injuring an** individual because that individual engaged in an activity protected by the present policy, as set out in section 2 below ("protected activity")." (ST/SGB/2017/2, 1.4)(Emphasis added.)

These changes, while elaborating on the nature of the conditions giving rise to retaliation, also deleted a key sentence from the earlier policy: "When established, retaliation is by itself misconduct." (ST/SGB/2005/21, 1.4) This eliminates the prospect of the reporter viewing the establishment of retaliation as a target or goal. The greatest contribution of this elimination would be to the avoidance of accountability.

While the administration has given the staff the duty to report misconduct but not the right to report misconduct, it has provided staff with procedures for the filing of reports alleging misconduct and retaliation. But it has not provided for the investigation and resolution of either. This remains a matter of "discretion". It claims to have provided for the effective protection of the whistle blower but has not claimed to have protected any. This would appear to be a sure fire formula for paralysis and for avoiding accountability.

Still absent is a recounting of historical and statistical experience as to the advantages and disadvantages of the separation of responsibility for reporting and retaliation functions. Perhaps the failure to have claimed even one staff member as having been protected may be seen as evidence of the questionable separation of responsibilities.

While one would think addressing the reporting of misconduct and addressing any retaliation to which such reporting might have given rise, should be highly complimentary functions, they are not treated as such. Hence the OIOS seems to have had no responsibility to the Ethics Office regarding reports of misconduct unless it chose to investigate a report and until recently. Now OIOS is to inform the Ethics Office, in the context of preventing retaliation. We are not told how that might be assessed or gauged. Does such notice have to await initiation of retaliation?

There are, however, no reciprocal, responsibilities indicated on the parts of the Ethics Office and to the OIOS. Among such indications would be the numbers of reports of misconduct, their disposition and retaliation, numbers of those eliminated during the "initial assessment" and the numbers of those reporting and the proportion of those that had given rise to retaliation.

A whole new range of matters with respect to which discretion or indiscretion may be exercised is now introduced, each of which offers prospects for the avoidance of accountability.

This is confirmed by the facts that:

a) Prevention, the most logical of protective measures, was never mentioned for the first decade of the Ethics Office existence. Indeed, the Ethics Office still has no provision for initiating the prevention of retaliation. It may address the prevention of retaliation only at the behest of the OIOS. This separation of functions, of course, ensures a far less simple, speedy, less effective process and at a far greater expensive for the Organization, while stating that protection is "enhanced". The lack of policy transforms the "enhanced" protection into a fiction. True, retaliation

cannot always be prevented, but prevention is central to intervention and it would be an important first step for the Ethics Office.

b) The Secretary-General could simply nullify any adverse administrative action or decision believed by the reporter to be in retaliation for his/her report of misconduct, until such time as the Organization had established that the action or decision would have been taken in any event prior to the reporting of misconduct. In one case, retaliation came nine years following the report of misconduct. The Organization can have a long memory. There is good reason to believe because of the time span, this would never be recognized by the Ethics Office or the Tribunals as constituting retaliation. It is, however, no less real.

c) On the other hand, prevention, while providing an opportunity for the revocation of any adverse administrative decisions or actions taken against a whistle blower, does not offer the Organization the range of "outs" or escapes that can be realized through interpretations, implementations and, most importantly, the "burden of proof".

d) the staff member had to have **already** been the victim of retaliation before there could even be access to the Ethics Office for the possible protection against **further** retaliation.

So we should not be surprised when the Ethics Office in its annual reports does not claim to have protected any staff member from retaliation.

What kind of protection is offered by the Ethics Office? Precious little. Organization policy requires that the staff member must actually experience retaliation and then for the Ethics Office to determine if there is a prima facie case that "…the protected activity [the reporting] was a contributing factor in causing the alleged retaliation or threat of retaliation" before he or she could expect relief.

The element of "causing" must be realized for what it is: pernicious, irrelevant and impossible to prove. As the Dispute Tribunal found: "it is in the nature of things that it be covert." (UNDT/2013/085, Para. 87) Could there be more significant deterrents? Could there possibly have been a more perverse formulation of its mission?

These functions are posited as related only to those engaging in retaliation, not those who may have engaged in the initial misconduct,

While the joining of the responsibilities for reporting misconduct and retaliation, as decided by the GA, would be intuitively logical and sensible, the SG did not agree. It would seem that the splitting of these responsibilities could offer the SG many more opportunities and conditions for contesting: the authority of two bodies rather than one, the procedures of two bodies as opposed to one.

It should be noted that his policy, ST/SGB/2017/2 on Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations, appears to be bifurcated. It appears as though sections 1-4 and sections 5-9 were written by two different authors each with his or her distinct perspective. Interesting, but when glued together, as they seem to have been, they make for poor policy.

The duty to report misconduct is to be directed to the OHRM or the OIOS, not the Ethics Office. The Ethics Office has no responsibilities *vis à vis* the reporting of allegations of misconduct or their investigation nor does it claim any authority for the investigation of allegations of retaliation. In fact, the Ethics Office while having authority for investigations deriving from the GA, that authority has never been conveyed to the Ethics Office by the SG. This bifurcation or splitting of responsibilities makes clear the lack of systems analysis, the lack of coherence, the lack of rational consistency, that have been brought to bear in the preparation of this policy.

9. Prevention of Retaliation

Despite the obvious importance of prevention to the objective of protection, it was twelve years after the founding of the Ethics Office that the matter of prevention of retaliation was mentioned for the first time: "OIOS will inform the Ethics Office of reports received of wrongdoing that OIOS identifies as posing a retaliation risk to a staff member. OIOS will provide this information to the Ethics Office only upon the consent of the individual making the allegation." (ST/SGB/2017/2, 5.1)

The matter of prevention is mentioned only with respect to prevention of retaliation for reporting of misconduct, not prevention of the initial misconduct itself. Many have argued that findings of responsibility for misconduct would be the best deterrent and that deterrence would be the best means of preventing retaliation.

"When informed by OIOS of an individual who is at risk of retaliation, the Ethics Office will consult with that individual on appropriate retaliation prevention action. With the individual's consent, such action may include engagement by the Ethics Office with the individual's senior manager or managers to ensure monitoring of the individual's workplace situation, with a view to preventing any retaliatory action against the individual as a consequence of engaging in a protected activity." (ST/SGB/2017/2, 5.2)

Thus the prevention of misconduct is addressed in terms of a reporter who may request to be relocated following misconduct. There is no such provision for relocation of the manager/perpetrator who may be free to engage in further misconduct. As is well-known, when a manager is relocated it is often in the context of a promotion. Where prevention is under discussion, this would be shameless.

Still, there is no discussion of the initial reporting of misconduct. This continues the shift of attention away from the putative misconduct and towards the putative retaliation as though they have nothing to do with each other. This, again, suggests maximum protection of the manager having engaged in misconduct.

Having said that, what criteria might the OIOS summon to help guide it in making an identification of a retaliation risk? There seems to be no guidance on such an issue. This seems to call for judgements as to who has been reported for misconduct, the nature of the misconduct, how likely s/he is to be vindictive and retaliate, how susceptible the reporter is to retaliation, etc.

Nor is there any further mention of prevention of retaliation. Nor is there mention of the nullification of any administrative decisions or actions having a negative impact on the staff member following the reporting of misconduct. Nor is there any mention of the authority, if any, the Ethics Office enjoys to address these matters. Nor is there any mention of a lack of resolution of reports of misconduct and retaliation as elements of retaliation in themselves.

It may be seen there is no role for the Ethics Office in initiating prevention as an element of protection. The only preventive role for the Ethics Office is at the behest of the OIOS. Where the OIOS may be neither able or willing, the Ethics Office enjoys no authority on its own to seek to prevent retaliation.

There is nothing as to those who may expect that retaliation may be taken against them. Rather there is provision for those who believe retaliation has already been taken against them.

Otherwise,"individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation may submit a request for protection against retaliation to the Ethics Office…." (ST/SGB/2017/2, 6.1)

Is it lunacy that there had been no mention of prevention for more than a decade or to establish that prevention against retaliation can be considered by the Ethics Office only after notification by the OIOS?

Under these circumstances, retaliation may be seen to be invited where, even if established, the retaliation might have no consequences for the manager. If no staff member has been seen to have been protected, it would follow that no manager should have suffered any consequences.

Nothing is said about the prospect of placing a freeze on the putative retaliatory administrative decision or action pending the administration proving [to whom?] that it would have taken the same decision in the absence of the report of misconduct.

Since "protection" depended upon the staff member having to first experience the retaliation, that could obviously be viewed as an invitation for retaliation rather than protection.

10. Reporting of Misconduct as Causing Retaliation

While retaliation might be viewed as any adverse action taken against a complainant following the filing of the charges of misconduct, it must also involve a reporting of perceived cases of possible violations of rules or regulations, mismanagement, misconduct, waste of resources or abuse of authority, aka, the protected activity.

The Ethics Office: "[u]pon receipt of a complaint of retaliation or threat of retaliation, … will conduct a preliminary review of the complaint to determine whether (a) the complainant engaged in a protected activity; and (b) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation. (ST/SGB/2017/2, 7.1)

"… the burden of proof shall rest with the Administration to demonstrate by clear and convincing evidence that it would have taken the same action absent the protected activity referred to in section 2.1 above or that the alleged retaliatory action was not taken for the purpose of punishing, intimidating or injuring the individual who engaged in the protected activity." (ST/SGB/2017/2, 2.2) The position of this statement at the outset makes clear the burden of proof applies to the entire process of reviewing the report of retaliation.

"Once a prima facie case has been determined to exist, the policy shifts the burden of proof onto the Organization, requiring the Administration to show that it would have taken the same alleged retaliatory action absent the fact that the individual reported misconduct or cooperated with a duly authorized audit or investigation." (A/65/343, 33)

In addition to the effect or impact on the staff member or reporter, this last clause, introduces elements of purpose or intent. This additional condition could make a finding of retaliation even more remote.

As will be seen shortly, contrary to the statement that the burden of proof shall remain with the administration, the burden of proof lies with the complainant, not the administration. This paragraph also makes it clear that before the Ethics Office could find there had been retaliation, it was the staff member who had not only to establish that there had been retaliation but that his or her report was a contributing factor in CAUSING the retaliation.

It will be seen that the "initial assessment" process resulted in the filtering out of 380 or 71% of the 533 reporting misconduct over an 11 year period and who never even made it to the preliminary assessment.

In addition, the establishment of causation is far more complex a legal undertaking than establishing an associative relationship. It frequently involves determination as to intent. Thus, it was the staff member who had not only to establish that there had been retaliation but that his or her report was a contributing factor in CAUSING the retaliation

The Dispute Tribunal got it right when it took exception to the willingness of the Ethics Office to accept the administration's version of events. Speaking of the difficulty a staff member faces in having to establish that the reported behaviour caused the retaliation: "…**the fact is that there will seldom be direct, explicit evidence of retaliation. It is the nature of such actions that it is covert." (UNDT/ 2013/085, Para. 87)**

As will be seen below, a delay in the shift of the burden of proof will take place so that instead of its application at the outset, it is not to be applied before the "initial assessment" nor before the "preliminary review" nor before the finding of a prima facie case. Only afterwards. This deprives the reporter of key advantages.

Thus, the Organization i) demands the reporting of misconduct, then ii) fails to ensure there is an exhaustive investigation as to the nature of the charges of misconduct; iii) and fails to extend a hand to protect the staff member for the proper fulfillment of his or her responsibilities. The Organization, in effect, lowers the barriers to retaliation and raises the barriers to protection of the staff member.

Is this "enhanced protection"? Or aggravated jeopardy? Could there be better ways to devalue the staff member and to avoid accountability?

11. The Ethics Office Process

11.1 Reporting Retaliation to the Ethics Office

"Individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation may submit a request for protection against retaliation to the Ethics Office in person, by regular mail, by e-mail or through the Ethics Office helpline. They should forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible." (ST/SGB/2017/2, 6.1) The word "may" replaces the word "should" in the 2005 policy.

The Ethics Office, upon receipt of a complaint of retaliation or threat of retaliation, "…will conduct a preliminary review of the complaint to determine whether (a) the complainant engaged in a protected activity; and (b) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation." (ST/SGB/2017, 7.1)

This last function, which usually places the burden of proof on the staff member, would seem to have no place in a system that offers staff members the "right to be protected against retaliation".

"The Ethics Office shall maintain the confidentiality of all communications received from complainants who request protection against retaliation, and from all relevant third parties." (ST/SGB/2017, 7.2)

It remains unclear if the Ethics Office "may", "will" or "shall" undertake the "preliminary review" provided to only one-third of all who filed their complaints of retaliation. The answer seems to be that the Ethics Office will do as discretion or indiscretion dictates.

This is a pallid declaration of any right or duty to offer protection. It offers little if any hope to the reporter.

11.2 Ethics Office: "Early or Initial Assessment"

As noted above, the policy authorizes a preliminary review as a first step; in practice, however, the first step was the "early or initial assessment".

A report on the Activities of the Ethics Office signals a process referred to here as "mission creep". The Ethics Office seems to have decided that the implementation of its mission called for more vigorously stringent criteria than those provided in policy ST/SGB/2005/21. As will be seen, the Ethics Office, in its own annual reports signaled the establishment of successively higher barriers to staff members seeking protection from retaliation, and higher barriers to managerial accountability, hallmarks of a lack of independence.

Mission creep is a term used here to describe the gradual assumption of un-delegated authority to effect significant changes in its policies and practices, usually to introduce barriers to the staff. An important first step in its mission distortion was the introduction of "early or initial assessment" prior to a preliminary review of reports of retaliation.

Its second report on Ethics Office Activities (A/62/285)(2007) expanded on the mandate of the Ethics Office in a manner not authorized by its foundation documents. It referred to the Ethics Office's "gate-keeping" functions as involving, "…an initial assessment of a case is made in order to determine whether it falls within the scope of the mandate and warrants a preliminary review". (A/62/285, para. 53)

This report made clear that the Ethics Office had contrived an "initial assessment" as a new phase to be undertaken with no basis in policy, without authority; with unknown criteria; by unknown persons even before the "preliminary review" is ever undertaken. Only if the unspecified criteria related to the "initial assessment" were met, then would a "preliminary review" be warranted. (para. 53) What were these criteria? We are not told.

According to the policy, it appears access to the "preliminary review" should have been automatic. While the introduction of this new step boggles the mind, astonishingly, in the light of its responsibilities as "guardian" of the Organizations ethics, none of this seemed to bother the Ethics Office or the Secretary-General or even the General Assembly

The most recent policy statement in 2017 on Protection of Staff from Retaliation on the role of the Ethics Office, ST/SGB/2017/2, ignores the "initial assessment" altogether and makes no reference to it:

This was a most significant development. Be certain that this phase is a powerful one. It was repeated for each and every one of the 11 years, 2006-2016. As has been seen, of the 533 staff members who had reported a case of retaliation, only 153 or 29% made it to the preliminary review stage, the stage called for in the policy. This was a filtering out of 380 staff members by this "initial assessment". No reasons or criteria have been offered for this removal of more than 71% of those who reported retaliation for having reported misconduct and who thereby appear to have been denied their rights under the terms of ST/SGB/2005/21.

Could any of this possibly be asserted to be in the interests of staff? Could it be said that the "early assessment" or "initial assessment" was introduced because of the pressing load of cases? Whether in the short run or the long run, it would appear the average number of complaints was about one per week. Could this possibly have been too great a case load for the staff to permit the cases to go on to a preliminary review? If so, this does not appear to have been offered as a reason. What then, might the reasons have been?

This is not to say there should be no filtering process. It is to say that if there had to be a filtering process, the Ethics Office should have recommended to the Secretary-General and to the General Assembly that such a phase be instituted in its policy and it should have recommended strict criteria for the functioning of such a step. It seems the Ethics Office did neither.

It is clear that "gate-keeping" involves important decisions. Each one could deprive the staff member of i) a "preliminary review of the complaint to determine if the complainant engaged in a protected activity" ii) a finding that there was "**a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation…"** and iii) a finding that the promised shift in the burden of proof should take place. Each of these make clear that the burden of proof is on the staff member and could place untenable pressures on the staff member.

The "initial assessment", resulted in the short-circuiting of policy in that it eliminated the prospect of a preliminary review for substantial numbers of staff. This rerouting of any inquiry elsewhere, would seem to enable of an avoidance of accountability. This was of importance because it is well -known that prior to any reporting of misconduct one must be more than careful since such a report, in effect, can mean the personal and professional demise of the staff member. It also usually means that with such a report of retaliation to the Ethics Office, that information will almost always find its way back to one's supervisors or those likely to have been responsible for any retaliation.

The practice of the Ethics Office, by establishing an additional barrier, contradicted the policy statements to the detriment of these staff members. But that is only the first of a number of ways by which the Ethics Office embroidered on the policy to the detriment of the staff while posturing to be the guardian of ethics for the organization.

11.3 Ethics Office: "Preliminary Review"

The Ethics Office mandate, as seen above, is to undertake a "preliminary review", not even a full review, and certainly no investigation.

The so-called protection depends upon the reporter making a *prima facie* case that s/he had already experienced retaliation. The burden of proof, contrary to the policy, does not rest with the administration but rests with the reporter. These conditions placed on and by the Ethics Office are shameful. But the worst is yet to come.

The first purpose of the preliminary review is to determine if (i) the complainant engaged in a protected activity (generally, a formal report of misconduct). Only about 153 out of 533 complaints made it to the preliminary review stage. The established policy states the Ethics Office may undertake a preliminary review. There is no provision in policy for the Ethics Office to undertake an "initial assessment" or investigations. This raises the question as to the legality of such a task.

This reveals major structural shortcomings in the intent, design and functioning of the Ethics Office with respect to protecting staff against retaliation. As there is no information regarding the initial assessment function, so there seems to be none related to the "preliminary review". Unknown are criteria, issues, persons; procedures; policies; and processes.

The second purpose is to determine if: "there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation." (ST/SGB/2017/2, 7.1)

Of a more positive nature, the most recent policy states: "The Ethics Office shall seek to complete its preliminary review within 30 days of receiving all information requested concerning a complaint of retaliation submitted." (ST/SGB/2017/2, 7.4) This replaces "will seek" with "shall seek" and 45 days with 30 days.

12.0 ETHICS OFFICE REPORTS NUMBERS OF COMPLAINTS OF RETALIATION

Year	Nos. of Cases	Prelim. Review	Prima Facie	Determ of Retaliation	Sources
2006	45	-	1	0.	A/61/274, 45
2007	52	12-	2	0	A/62/285, 54
2008	45	16	1	0	A/63/301, 48-9
2009	64	22	1	1	A/64/316, 60
2010	36	14	2	0	A/65/343, 35
2011	55	13	1	0	A/66/319, 26
2012	46	14	2	2.	A/67/306, 43
2013	49	15	3	1	A/68/348, 41
2014	51	16	3	1	A/69/332, 39
2015	40	14	0	0	A/70/307, 37
2016	50	17	6	-	A/71/334, 40
	533	153	22	5	

It would appear from the above reports of the Activities of the Ethics Office, that in its first eleven years, there were 533 requests for protection. Of these, 380 cases, or about 71%, failed to even make it past the “Initial assessment”. Thus, only 153 even merited a preliminary review, the principal mandate of the Ethics Office with respect to claims of retaliation. Beyond those 153, there was a further reduction of 131 filings to yield only 22 cases where a prima facie case found to exist. And of those, there was a determination of retaliation for only 5. There seem to be no figures as to the proportion of those prima facie cases where retaliation had been determined to have taken place. Finally, there were no reports of any staff member having been protected against retaliation. Does this indicate the Ethics Office was quite incompetent? Or does it suggest it was doing exactly what was expected of it? Or somewhere in between?

Despite the huge numbers of cases not making it to the preliminary review, we are given no explanations as to what happened, the reasons, the criteria, the purposes, the resolutions, the outcomes, if any. It seems doubtful that all these cases could not have been without some merit. It is obvious to all staff members that the mere fact of their reporting perceived or actual misconduct would imperil the reporter’s professional and personal career. Reporting, therefore, could be seen to under-represent actual observations of misconduct.

The elimination of most of those cases having been filed took place during the “initial assessment” phase. This as noted, is an unauthorized step taking place between the filing and the preliminary assessment. We are not provided with the authority for such a step; we know nothing of the criteria applied; who does this; or what happens to those staff members whose cases are dispensed with.

There is of course, no linkage between the retaliation cases filed with the Ethics Office and the numbers of misconduct cases filed with the OIOS and what has happened to these.

As will be seen, the Ethics Office is not expected to decisively address complaints of retaliation. Its real value may lie in its appearing to deal with this issue.

The Ethics Office’s lack of authority to investigate or decide issues related to retaliation raises serious questions as to its usefulness. It is suggested here that its usefulness may be more apparent than real.

13.0 Mission Creep: Evidentiary Issues

Two more issues emerged from the process of mission creep both related to evidentiary matters

13.1 "Independent and Corroborated"

Not content with the addition of the "initial assessment", the Ethics Office introduced a second example of mission distortion, this related to the quality of evidence required of the complainant. In its third annual report, for 1 August 2007 – 31 July 2008, the Ethics Office interposed a second gate-keeping function: one that made the preliminary review much more exacting: **"The preliminary review process involves a review of documentation submitted by the complainant and fact-finding in order to determine if there is independent and corroborated information in support of the complaint of retaliation."** (A/63/301, para. 49)(A/64/316, Para. 60)(A/65/343, Para. 33) (Emphasis added.)

This was the first time anything had been heard of "…independent and corroborated information in support of the complaint…." In the United Nations, the very word "independent" conjures up many more questions than answers. Independent of the complainant? Independent of the administration? Corroborated by whom? Corroborated by the administration? This appeared to be an artificial construct from start to finish with no basis in policy.

There is no mention of such a level of documentation in the policy statement. It is also the case that this requirement would establish a far more rigorous, even adversarial, process than merely confirming the prima facie level. These more demanding requirements could enable the exclusion of even more staff members who had reported retaliation.

It should be seen that under these circumstances the burden of proof would fall squarely on the staff member. The high level of documentation called for casts into deep doubt the shift in the burden of proof called for in the next section.

The purpose of such stringent requirements could only be to place any relief farther and farther out of reach of the reporting staff member. Is this what the Secretary-General refers to as "enhanced" protection?

Almost all staff members are aware of the dangers of reporting misconduct: Whether valid or not, the staff member is likely to be aware that by reporting misconduct he or she is signing off his or her future professional development with the UN. Thus before staff report misconduct, they are likely to consider possible consequences from every conceivable angle. This significantly reduces the prospect that any claims of misconduct would be superficial or ill-considered. Despite that, we are not informed as to the reasons for more that 71% of all applications not even making it to the first step.

13.2 Burden of Proof

A third and more powerful example of mission distortion, one with far greater impact as a barrier to the review process, was the Ethics Office unauthorized delay in the application of the shift of the burden of proof to the administration.

"The Secretary-General, for the purpose of ensuring that the Organization functions in an open, transparent and fair manner, with the objective of enhancing protection for individuals who report misconduct…" issued the new policy on protection against retaliation for reporting misconduct.

The language and the spirit of ST/SGB/2017/2 as they related to the allegations of retaliation: **"**The present bulletin is without prejudice to the legitimate application of regulations, rules, and administrative procedures, including those governing evaluation of performance, non-extension or termination of appointment. However, the **burden of proof shall rest with the Administration** to

demonstrate by clear and convincing evidence that it would have taken the same action absent the protected activity referred to in section 2.1 above or that the alleged retaliatory action was not taken for the purpose of punishing, intimidating or injuring the individual who engaged in the protected activity. (ST/SGB/2017/2, 2.2) (Emphasis Added.)

This last sentence is breathtaking in its scope and legal significance. It is, quite possibly, unique in the history of the United Nations. For once, an administrative issuance tells us the burden of proof does not lie exclusively with the appellant. Or did these words really mean what they said?

"The policy (ST/SGB/2005/21) envisages protective measures for staff members under threat of or experiencing retaliation for duly reporting misconduct in their working environment to the responsible offices or officials. It represents a shift of the burden of proof to the Organization, requiring it to show in each case that the alleged retaliatory action is unrelated to the report of misconduct." (A/61/274, 42)

This makes it quite clear that the shift in the burden of proof takes place "… requiring it to show in each case that the alleged retaliatory action is unrelated to the report of misconduct."

Grammatically, coming as it does at the outset of the SGBs, it should be seen as applying to all phases following the filing of a report of retaliation, including the "initial assessment", if that is a legitimate undertaking, the "preliminary review" and the finding of a prima facie case. This would also suggest the burden of proof rests with the administration.

This leaves a few questions not yet addressed: Who or what implements this policy? Who decides the burden of proof has shifted? To whom does the administration have to prove it would have taken the same steps? Are we surprised that no office or department is authorized to implement the shift in the burden of proof?

More fundamentally, is it likely that such an exacting level of proof would take place in the absence of recourse to an administrative decision? Yet, if there were such adverse administrative decisions and they were, quite properly, factored into the Ethics Office's decisions, that would be all for nought given that "Recommendations of the Ethics Office and the alternate Chair of the Ethics Panel under the present bulletin do not constitute administrative decisions and are not subject to challenge under chapter XI of the Staff Rules." (ST/SGB/2017/2, 10.3)

On the other hand, implementation of the burden of proof might give rise to a conflict of interest, if implemented by the Ethics Office, inasmuch as the head of the Ethics Office is appointed by the SG and is accountable to the Secretary-General, s/he reports "directly" to the SG, the policies are established by his SGBs; the officers are appointed or fixed by the SG; staff are promoted by the SG; and salaries are paid by the SG.

The statement of policy in ST/SGB/2005/21 was faithfully echoed by the Ethics Office in its first annual report when it wrote: "The policy envisages protective measures for staff members under threat of or experiencing retaliation for duly reporting misconduct in their working environment to the responsible offices or officials. **It represents a shift of the burden of proof to the Organization, requiring it to show in each case that the alleged retaliatory action is unrelated to the report of misconduct."** (A/61/264, Para. 42) **(Emphasis added.)**

Thus the policy envisages protective measures. It represent a shift in the burden of proof to the Organization requiring it to show in each case that the alleged retaliatory action is unrelated to the report of misconduct.

This statement was promising in that it not only coincided with the policy statement, it required the administration to prove that the reported retaliation was, in fact, not retaliation at all, but that the adverse administrative decisions taken were to have been taken properly in any eventuality. The administration

would have to prove that it had taken all the requisite measures and steps. The staff member, at the same time, would have the opportunity to rebut or refute the administration's arguments and evidence.

Such evidence should focus on all documentation, steps and measures taken prior to the misconduct reported to the OIOS, not only explanations or justifications offered following the reporting.

Of course, these arguments would all take place not in any judicial or even quasi-judicial context but in the administrative context of the Ethics Office. Could this, by itself, inspire confidence?

This would be the first and last time the Ethics Office faithfully interpreted this policy. While the Ethics Office spoke of a shift in the burden of proof, it never mentions having actually implemented it.

The Ethics Office then used subsequent Annual Reports to deceptively modify the interpretation of the policy statement away from that in the first annual report and to establish shifts in its ostensible mandate. The Ethics Office, it appears, embarked with relentless determination to establish new and more formidable barriers to the protection of staff against retaliation every year or two.

Meanwhile at each and every step of these processes, the staff members were being denied the protections afforded by such a shift. So, the Ethics Office was now significantly disadvantaging the staff members while pretending to defend their interests.

In its second annual report, not content with the policy requirements set forth in ST/SGB/2005/21, the Ethics Office insisted on the shift in burden only ***after*** the prima facie test had been applied. The second annual report for 1 August 2006 – 31 July 2007, (A/62/285) flatly contradicted its first report by stating: **"Once a prima facie case has been determined to exist, the policy shifts the burden of proof to the Organization, requiring the Administration to show that it would have taken the same action absent the protected activity."** (para. 52) (Emphasis added.) The third annual report, for 1 August 2007 – 31 July 2008, (A/63/301), in an almost identical statement (para. 47), lent support to its unauthorized modification of its interpretation of the policy statement and the first annual report.

This would make clear that the shift in the burden of proof would come about only **after** arguments had already been made in preparation for the "initial assessment" and for the "preliminary review" and for a finding of a prima facie case. In other words after only 22 of the 533 reporters remained who had been found to have prima facie cases.

But this was no ordinary prima facie case. This was to be "…**a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation." (ST/SGB/2005/21, 5.1(c)) (ST/SGB/2017/2, 7.1)**

This demanded of the reporter to establish a *prima facie* case that not only had there been retaliation and that it had been associated with the initial report of misconduct, but that it had actually been caused by the report of misconduct. Could there be a higher bar? Of course, shifts in time (one client was retaliated against 9 years after the reporting of misconduct) of by another officer could eliminate any prospect of establishing a causative relationship.

13.3 Authority for Shifting the Burden of Proof

It will be remembered that in the policy statement ST/SGB/2017/2, (para. 2.2) there is no explicit mention of the Ethics Office in connection with this issue (Sections 1-4) and the Ethics Office is given no role and no authority with respect to the shift in the burden of proof. Nor was the shift ever mentioned in connection with the responsibilities and mandates of the Ethics Office. That particular policy issue is silent with respect to the Ethics Office; it is given no role in either affirming or denying its implementation. In fact, authority for shifting the burden of proof is not assigned to any United Nations office.

Regardless, the ways by which the Ethics Office has transformed its mission with respect to the level and quality of proof required of the whistle blower seem to reveal a determination that the whistle blower shall appear to be protected and the managers shall appear to be accountable while, in reality, protection and accountability are almost eliminated.

A third example of mission creep may be seen in the delay in the assumption by the administration of the burden of proof until AFTER a preliminary review has been granted.

Politically, the report of the Secretary-General put forth a different interpretation: that the shift takes place only following the prima facie determination. This leaves it to the staff member to make his or her prima facie case: “Once a prima facie case has been determined to exist, the policy shifts the burden of proof onto the Organization, requiring the Administration to show that it would have taken the same alleged retaliatory action absent the fact that the individual reported misconduct or cooperated with a duly authorized audit or investigation.” (A/65/343, 33)

This example of mission creep might help explain the paucity of *prima facie* cases: only 22 over the eleven years from 2006 - 2016. But once a prima facie case has been determined to exist, evidentiary issues become important only for those 22 found to have a prima facie case for going on to the next level: a determination that there had been retaliation.

What criteria have been developed to implement this clause, to enable the Ethics Office to determine what might have *caused* a retaliation? Do they look for exclamations such as: “Oh, I was just so provoked, I had to do it.” Is there a lesser standard? Who assesses the intent? Who reaches this and the other determinations? Elsewhere in the U.N. a determination is, for all intents and purposes, a decision.

It is suggested here that a principal reason for calling for a prima facie case of causing retaliation prior to the shift in the burden of proof was to avoid the prospect of the administration having to assume the burden of proving that there had been no retaliation. A second principal reason was to enable the avoidance of accountability.

Instead, the burden of proving retaliation has been placed on the shoulders of the reporting staff member who would necessarily, in most cases, have to establish the motivation of the retaliator and to find the “smoking gun” to connect the motivation to the adverse actions.

14.0 The Prima Facie Case

Reports on Ethics Office Activities have yielded few if any disclosures as to those factors which played a significant role in yielding a finding of a prima facie case or those that militated against a finding of a prima facie case. We are not told of who or what body within the Ethics Office reached such decisions, the criteria used, findings in cases where the decision was quite close and how those differences were resolved.

Although there is some information as to the outcomes of OIOS investigations following the referrals of the prima facie cases by the Ethics Office, there have been no disclosures as to those factors that emerged from the OIOS deliberations and how those might have differed from those of the Ethics Office. Of particular importance might be the differences between those factors that led the Ethics Office to a finding of a prima facie case and why and how different weights may have been given to those factors by the OIOS in the light of its investigative role.

When the Ethics Office does not find a prima facie case, the victim can appeal any adverse administrative decision. But the decisions of the ethics Office do not constitute administrative decisions. (ST/SGB/2017/2, 10.3) How often does retaliation take the form of an administrative decision?

Following a referral of a prima facie case by the Ethics Office to the OIOS, the OIOS may refuse to consider the case. The SG and tribunals have decided the OIOS is not required to consider the case. (A/65/343, 34)

Following a referral of a prima facie case by the Ethics Office to the OIOS, if the OIOS does not find retaliation to have been established, the victim may appeal any adverse administrative decision but not the findings of a prima facie case or the OIOS finding of no retaliation.

When the Ethics Office refers a prima facie case to the OIOS and the OIOS finds retaliation to have been established, if the Ethics Office sustains the OIOS findings, the case may be referred for administrative resolution. (A/68/348, 46) (A/69/332, 43)

What happens when the Ethics Office refers a prima facie case to the OIOS, the OIOS finds retaliation to have been established and on return of the case to the Ethics Office, the Ethics Office does not sustain the OIOS findings? Appeal?

In any of the above situations, the complainant is free to take his/her case to the Management Evaluation Unit prior to taking it to the UNDT to appeal the misconduct or retaliation but not the action or inaction of the Ethics Office.

Following the OIOS investigations and upon receipt of its investigation report and since the Ethics Office cannot undertake an investigation, it is not clear why the Ethics Office is authorized to make the determination of support or rejection regarding the OIOS investigation and whether the "… the Ethics Office will conduct an independent review of the findings and supporting documents to determine whether the report and the supporting documents showed, by clear and convincing evidence, that the Administration would have taken the alleged retaliatory action absent the complainant's protected activity or that the alleged retaliatory action was not made for the purpose of punishing, intimidating or injuring the complainant. "(ST/SGB/2017/2: 8.4)

This makes clear the authority of the Ethics Office to override the OIOS investigation report. While the OIOS has a determinative role with respect to reports of misconduct, it is the Ethics Office that has the determinative role with respect to OIOS findings related to the Ethics Office recommendations it receives concerning retaliation.

It appears as though there were no questions of a policy nature that arose regarding determinations of a prima facie case by the Ethics Office during the "preliminary review". Or at least there appear to have been none reported to the GA. (A/63/301)

It must be assumed that such issues as the administration's likelihood of undertaking the same actions in any case, would have already been addressed by the administration. This would most likely have been a key element of its defense.

That being the case, it would strongly suggest that the Ethics Office, in the absence of its own investigations, probably could not override the investigations and recommendations of the OIOS.

For the Ethics Office to override the OIOS decision would suggest the D-1 went up against the USG…a challenge fraught with a prospect for unhappiness.

Now the Ethics Office was saying it was interpreting its mission and mandate as requiring a finding of a *prima facie* case **prior to** the shift in the **burden of proof**, despite the fact that the SGB made no connection whatsoever between the role of the Ethics Office in making a prima facie case (para. 5.1) and the shifting of the burden of proof (para. 2.2). These are two distinct and separate issues. If this

had become the practice by the Ethics Office, it could only result in a significant weakening of the protections for staff members.

This interpretation, diametrically opposed to the established policy, denied the staff member reporting retaliation critical, legal and investigative support when it was most needed: prior to the "initial assessment", prior to the "preliminary review" and prior to a finding of a *prima facie* case. This delay finds no support in any policy, certainly not ST/SGB/2017/2.

Rather than protecting the staff member who reported retaliation, this change could only have been designed to inflict an intolerable burden on that staff member. "In each case" would mean the 533 who had reported retaliation as opposed to only the 22 or 4% of the cases where a prima facie case had been found over the past 11 years. Was this "enhanced protection"? Or was it aggravated jeopardy?

For those having the burden of proof, in calling for proof of causation, it invites, indeed, begs for speculation as to the motives of the supervisor/manager. This might call for a smoking gun: a memo or some indisputable fact. This calls for proof as to one's motives: "…the fact is that there will seldom be direct, explicit evidence of retaliation. It is the nature of such actions that it is covert." (UNDT/2013/085, Para. 87) There could be no higher standard of burden of evidence for the staff member to have to prove as is evidenced by the fact that so few do so and so few are protected..

This systematic distortion of Ethics Office policy, of course, did little more than create a pyramid of conditional factors and clauses each of which could be and was used to discredit, disqualify, antagonize, and to punish the diligent staff member and strip the staff member of many rights. It also created a situation and structure anathema to the duty to report. This is the opposite of the administration proving it would have done the same "absent the protected activity."

This interpretation was a deliberate misinterpretation of mission. This writer maintains this action, in particular, has tainted the work of the Ethics Office. Although, it may never be known how many staff members have been victimized by this action, the Organization owes the responsibility to those who had their reports disqualified or discredited to find them and to apologize and, in other ways, to compensate them. It emerged with the express purpose of disadvantaging the staff member and avoiding accountability. The end result was the protection of the manager and the victimizer, rather than the victim.

"If the Ethics Office finds that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days." (ST/SGB/2005/21, 5.5)(ST/SGB/2017/2, 8.1) It is not clear how many times this has occurred in the past 11 years. But it is clear that the number of referrals was far fewer than would have been the case, had the issue of the shift of burden been properly applied.

One advantage for the administration in this course of action is the delay in the administration's having to meet its burden of proof. To the extent a case does not become a prima facie case, the administration does not have to reveal much if anything.

Nor is there any provision by which the Administration is required to provide the Ethics Office and the complainant with any and all information in satisfaction of paragraph 2.2 on the shifting of the burden of proof. It should be clear that such a shift would obviously require the presentation of whatever documentation and evidence might be required to address that provided by the complainant. While this was undoubtedly anticipated, there was no provision to address it.

15.0 Administrative Decisions

The initial findings of the Ethics Office re:a) its "initial assessment" and b) its "preliminary review" and c) its findings as to a "prima facie" case and d) its referrals of those case to the OIOS, and e) the investigations of those cases by the OIOS and f) the subsequent "independent review" by the Ethics Office of the OIOS investigations, in the absence of any authority to investigate, and g) the Ethics Office's "final retaliation determination" all do not constitute administrative decisions and are not subject to challenge under Chapter XI, 10.3 of the Staff Rules. (ST/SGB/2017/2, 10.3)

This is, frankly speaking, ludicrous. Would it be possible to insulate the work of any unit from accountability to a greater extent? Could the SG, in seeking to shield the work of the Ethics Office from accountability, reflect less confidence in the quality of its work as well as the work of the Tribunals? Might the SG seek to apply this formula to all other units of the Secretariat?

Among the measures recommended and taken have been: the staff member should receive an upgraded performance evaluation, that prior changes made to the staff member's supervisory chain as an interim protection measure should be maintained and that disciplinary action be taken 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 (A/68/348, 46) (A/69/332, 43), the subject of the complaint should be referred for disciplinary action. (A/69/332, 43) the complainant should be reimbursed for expenses incurred as a result of the retaliatory action and that the subject should be referred for disciplinary action. (A/69/332, 44) This raises questions as to the appropriateness of measures to address retaliation. Do they achieve a return to the status quo ante? Should they? (A/68/348, 46)

Does the OIOS decide? The Ethics Office may find a case to be prima facie; request the OIOS to investigate any cases it finds to be prima facie (5.5); the OIOS may investigate and share the outcome of its investigations and makes recommendations (5.5); the Ethics Office may receive the investigation report (5.7) and the OIOS recommendations (6.1), undertake an independent review and arrive at the same or totally different recommendations (8.4).

To this point there has been no mention of the original report of misconduct and how it might relate to any actual misconduct. It appears the issues of the reporting of misconduct and the reporting of retaliation have been separated so as to deflect attention and that neither might inform the other.

The separation of the "review" and "investigation" functions, it would seem, is central to the weakening of the system.

This early notification of the outcome of the investigation was dropped. It appears the "complainant", an unfortunate and prejudicial term, now will be notified only much later following the "independent review".

The Ethics Office is disadvantaged in three important ways: 1) its consideration of retaliation is structurally split from the reporting of the misconduct which may have given rise to the retaliation in question; 2) the Ethics Office enjoys no authority to undertake investigations. This seriously impairs its capacity to undertake fact-finding and 3) contrary to its foundation documents, the Ethics Office has been found by the Secretary-General and the Appeals Tribunal to be "independent" meaning its decisions are not seen as administrative decisions and therefore may not be modified by the Secretary-General and therefore not considered by the Dispute Tribunal.

As will be seen, this goes to the heart of the dismissal of the Andronov decision.

16.0 Incentive Structure

Far from creating an incentive structure for recognizing or rewarding the reporting staff member for exercising his/her duty to report, the organization has created an adversarial process. Rather than

incentive structures and rewards, it appears to have, instead, established itself as hostile, antagonistic, indeed threatening to such reporting at every possible step.

Among the components of an incentive structure that should be created: the elimination of the "initial assessment" or its regularizing through a known statement of tits purposes, objectives and procedures; eliminating the requirement for "independent and corroborated" evidence and the shift in the burden of proof to the administration prior to the "initial assessment"; the mandatory undertaking of investigations of reports of misconduct and retaliation by a singe office: the OIOS; application of the UNAT decision in the Andropov (UNAT, 1157) case in place of the far narrower and more exclusive definition of an administrative decision; the nullification of adverse administrative decisions taken against the staff member reporting misconduct until such time as the administration has established that it would have taken the same measures **prior** to the reporting of the misconduct.

17.0 Investigations, Authority:

17.1. OIOS, General Assembly

The General Assembly was quite clear: "The Office [OIOS] **shall investigate** reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken;" (A/RES/48/218-B, 5(c)(iv))

The GA also requested "…the Secretary-General to ensure that the Office of Internal Oversight Services has procedures in place that provide for direct confidential access of staff members to the Office and for protection against repercussions, for the purposes of suggesting improvements for programme delivery and reporting perceived cases of misconduct…." (A/RES/48/218-B, 6)

The General Assembly, therefore, had explicitly linked both the reporting of misconduct and the protection against repercussions or retaliation as functions of the OIOS. This, of course, would make great good sense as there should be investigations of both and the investigative process and the reports could inform each other.

17.2 OIOS, The Secretary-General

But the General Assembly and the Secretary-General were not of one mind. There was a significant distance between these express decisions of the General Assembly and their interpretation in the policies of the Secretary-General's Bulletins.

The Secretary-General decided that matters dealing with reports of misconduct should be discretionary and repercussions or retaliation against reporting of misconduct should be handled by the Ethics Office with no authority to investigate. These would be two effective attempts to avoid accountability.

"What is the role of OIOS investigations in the United Nations? It is fundamental that internal investigations must have as their core mandate the purpose to determine whether any improprieties or wrongdoing has occurred in the Organization. The most significant benefit of **a good internal investigation is that it enables management to determine whether there are any problems with corrupt staff, organizational structure, or administrative policies and procedures.** An internal investigation provides UN management with an essential tool of over- sight to identify any necessary changes to ensure on-going business operations and to disclose potential misconduct, which may affect staff moral and bad publicity among the Member States." (Tamara A. Shockley, The Investigation Procedures of the United Nations Office of Internal Oversight Services and The Rights of the United

Nations Staff Member: An Analysis of The United Nations Judicial Tribunals' Judgments on Disciplinary Cases In The United Nations)

Investigations are defined as "a legally based and analytical process designed to gather information in order to determine whether wrongdoing has occurred and, if so, the persons or entities responsible. (OIOS, 2009 Investigations Manual, 1.1)

While the General Assembly resolution provides for both the reporting and investigation of misconduct, the Secretary-General Bulletins demonstrate a remarkable lack of clarity in this area. There are few if any provisions for the investigation of the reports of misconduct. As will be seen, such allegations or reports often become orphans within the system.

In the absence of any investigation of the reports of misconduct, it would be difficult if not impossible to establish, verify or refute the basis for the reporting of misconduct. If there is no established or identified basis for reporting, it would be difficult if not impossible to prove, as the staff member is asked to do, that it was the misconduct that gave rise to the reporting and that it was the reporting that caused the retaliation. In the absence of an investigation and a firm decision regarding the charge of misconduct, the result may be "quiet" and very effective retaliation.

We argue that the avoidance of accountability is enhanced by the prospect that the investigation of issues seems to be treated by the OIOS and other offices as a discretionary matter instead of being mandatory.

The SG's Bulletin gives the OIOS two conflicting mandates: para. 16 that "The Office **shall investigate reports** of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken." (ST/SGB/273, 16)

Two paragraphs later in 18 there is every indication of the OIOS being free to ignore its earlier mandate to investigate reports made to it. "The Office **may 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." (ST/SGB/273, 18)

Staff and managers, depending on a plain language reading of articles 16 and 18, cannot come away with a clear understanding of the intent or the processes.

The SG's insistence on discretionary authority deflects the intent of the GA and muddies the water. Most importantly, it directly challenges the authority of the GA and it further establishes conflicting and confusing procedures for staff and managers.

The issue of whether or how these investigations are actually considered is not really addressed. That matter appears to have become one more discretionary matter.

While original reports of misconduct must be filed with the OIOS and only the OIOS can take steps to initiate prevention of retaliatory measures, the OIOS, inexplicably, has no role with respect to the filing of complaints of retaliation which are to be filed with the Ethics Office. Regardless, only the OIOS enjoys authority to investigate any claims.

Phrased otherwise, the Ethics Office is the locus for new complaints of retaliation but has no authority for prevention of retaliation. What could be more dysfunctional than that?

Does this mean reports of retaliation go without investigation? Well, yes and no. The Ethics Office might review them, or maybe not. It will not investigate them. But, if, as a result of the complaint and the review,

there is a prima facie finding that there is a credible case of retaliation, the case is referred to the OIOS for investigation.

Where a report is found by OIOS to be not receivable as a result of its investigation, there appears to be no means by which the Ethics Office is so notified.

There seems to be remarkably little information as to the numbers of reports of misconduct that are filed and the disposition of each.

All of the above, serves to diminish, if not to eliminate, any prospect for deterrence. Deterrence requires a wide-spread awareness of the manifestations of retaliation, efforts to address them and actions taken against the retaliators. The absence of these only disables deterrence.

17.3 The Joint Inspection Unit (JIU) Report On Strengthening The Investigations Function (JIU/REP/2000/9)

Among the numerous factors identified by the (JIU) as of importance for the investigative function were:

1. "An effective investigations function is required to deter wrongdoing, to assure proper accountability and to maintain the confidence of Member States and other stakeholders in the integrity of the organizations they are supporting."(paras. 9-10).

The execution, application and implementation of investigations and their results, the assurance of consequences and staff seeing that the tone at the top stems from a vigorous sense of integrity are all critical to deterrence. These are all areas to which far too little attention is given in the UN Secretariat. The UN mandates for investigations of reports of misconduct or whistleblowing have undergone a long-term process of erosion, especially involving the translation of the GA decisions into Secretariat policy. This has involved the shift from the definitive "shall" to the far more equivocal and conditional "may". The extensive use of conditional clauses makes it clear to the staff that when the SG wishes to avoid addressing certain cases or staff or directors, there will be little resort to investigations. All of this conveys a lack of even-handedness in addressing managers as well as staff and a lack of resolve so as to render ineffective any prospect of deterrence. The Ethics Office, while having exclusive responsibility for retaliation, has no investigative role. It has been seen elsewhere that discipline was applied between 1 January 2004 and June 2015 to a total of 513 staff and 2 managers came before the Joint Disciplinary Committee. (See: Sims, Redesign Panel Themes and Implementation, ACUNS, January 2016. p.13.)

2. "There is a fragmentation of responsibility for the investigations function within the organizations of the United Nations system." (paras. 17-21).

Why did the GA did not fragment the authority for reporting and investigation of misconduct and retaliation, but the SG did. The division of labour between the OIOS and the Ethics Office related to the reporting of misconduct and retaliation, can be counter-productive and serve to erode effectiveness and efficiency. Faulty communications between the different agencies with responsibilities, the situation where no agency can take decisions and each one simply "advises", where the investigations of one agency do not inform or contribute to the functioning of the other agencies are all outcomes of fragmentation. This writer suggests this fragmentation is not an accidental outcome but is a design element. Fragmentation of authority and responsibility does not serve the interests of justice or accountability.

3. "Operational independence" (paras. 32-33).

This can be counterproductive unless mandated by the GA and in a context offering accountability and the absence of opportunities for dilution of independence.

4. “Strong support from the organization’ s executive head (paras. 34-35).

This relates directly to the “tone at the top” as identified by the “Organizational Integrity Survey”. Sadly, the tone at the top may be seen to include ambivalence, incoherence and a leaning more towards collusion between the SG and the Tribunals so as to produce an outcome not supported in legislation.

5. “The need for preventive measures to reduce vulnerability to wrongdoing by use of proactive investigations and lessons learned from completed investigations” (paras. 71-75).

Prevention, as relates to retaliation, has come about ten years late to the game. There is no explicit role for the Ethics Office for the initiation of preventive measures. It is only at the proposal of the OIOS that the Ethics Office might be recommended to address preventive measures.

17.4 Investigations: Ethics Office

17.4.1 Does the Ethics Office Actually Investigate?

The General Assembly, reaffirmed “… that trained heads of offices, programme managers and boards of inquiry, as well as the Department of Safety and Security and the Ethics Office, may carry out administrative inquiries and investigations, except in cases of serious misconduct and/or criminal behaviour, in accordance with resolution 59/287;” (A/RES/62/247, 12)

This resolution makes clear the GA’s intent that the Ethics Office has the authority to carry out numerous investigations.

This is supported in the 2015 edition of the OIOS Investigations Manual. “The general investigation function may be discharged through a variety of different offices and departments in the United Nations system (see Chapter 2), including: Investigations Division/Office of Internal Oversight Services.. [and the] Ethics Office” (OIOS Investigations Manual, 2015, 1.2)

These are important as they are consistent with the GA decision A/RES/62/247, 12. At the same time they are inconsistent with the functions of the Ethics Office as set forth by the Secretary-General in ST/SGB/2017/2.

Although the General Assembly granted the Ethics Office the authority to investigate; the SG, in successive policies: ST/SGB/2005/21, ST/SGB/2005/22 and ST/SGB/2017/2 did not. In fact, the Ethics Office repeatedly notes that it cannot undertake investigations. The Ethics Office itself is given no authority by the SG for investigation or decision-making.

“If the Ethics Office considers that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days.” (ST/SGB/2017/2, 8.1)

This makes clear the Ethics Office, rather than undertaking its own investigation, is required to out-source it to the OIOS. But out-source it to what end? it also suggests the OIOS might be the lead entity in addressing both complaints or neither.

Why should the Ethics Office receive reports of retaliation but not have the authority to investigate them? Is it to create an additional pole of activity with the prospect of diverting attention away from the original reporting of misconduct?

What are the essential differences between investigating, fact-finding, reviewing? Why should the Ethics Office do anything if its finished product is not based on sound empirical evidence, reliable information, an ability to distinguish between fact and fiction and a shift in the burden of proof to the management?

This does not say that the OIOS shall actually investigate the complaint of misconduct. As we have already seen, SGB/273 in article 16 says it "shall" and in article 18 says it "may". Nor does it say the OIOS shall investigate the complaint referred to it by the Ethics Office. Again, the wording appears intended to foster a high level of conditionality, confusion and, most importantly, uncertainty, enabling maximum discretion. This cannot foster deterrence.

At no point has the Ethics Office been entrusted by the SG with the authority to conduct an investigation despite its high-level responsibilities. Even the most recent of the SGBs does not grant such authority.

17.4.2 Retaliation: The OIOS Investigation Report

The OIOS Investigations Manual sets forth many of the criteria used in undertaking its investigations. These will not be reviewed here.

"Whatever the conclusion of an investigation, a written report should be prepared to record the process, result and recommendations, if any (see Chapter 6). The reporting step is critical to communicating information to relevant managers and creating the auditable record for future review and assessment, particularly during any internal justice process or when the investigator's exercise of discretionary authority is challenged. (2015, OIOS Investigations Manual, 2.1)

"Upon receipt of the [OIOS] investigation report, the Ethics Office will conduct an independent review of the findings and supporting documents to determine whether the report and the supporting documents show, by clear and convincing evidence, that the Administration would have taken the alleged retaliatory action absent the complainant's protected activity or that the alleged retaliatory action was not made for the purpose of punishing, intimidating or injuring the complainant. If, in the view of the Ethics Office, this standard of proof is not met, the Ethics Office will consider that retaliation has occurred. If the standard of proof is met, the Ethics Office will consider that retaliation has not occurred." (ST/SGB/2017/2, 8.4)

This makes clear the Ethics Office will conduct "an independent review" of the OIOS investigation to determine if "the Administration would have taken the alleged retaliatory action absent the complainant's protected activity". Does anyone believe the Ethics Office, with its D-1, would enjoy adequate authority to conduct such a high-tension review of the work of the USG in the absence of any authority to investigate? While speaking of a "standard of proof", no indication is offered as to what that might include.

While this suggests the OIOS shall investigate and issue its report, that might not necessarily be the case. For example, in a recent report (A/64/316, 66), "…the [Ethics] Office completed its preliminary review of a complaint received in the 2007-2008 cycle and, after making a determination of a prima facie case of retaliation, referred it to OIOS for investigation. The Office of Internal Oversight Services declined to proceed with an investigation, based upon the operational independence provided to it by the General Assembly in its resolution." (RES/48/218 B)

The Ethics Office was of the view that in order to implement fully the policy of protection against retaliation, as set out in the 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."** (A/64/316, Para. 66) (Emphasis added.) Even where the OIOS does investigate allegations of misconduct, what appears to be a complete lack of provision for a collaborative or communicative handling of the reports and complaints

does not appear to be in keeping with any policy. This disjointed arrangement certainly cannot serve the interests of effectiveness and efficiency. It seems to have been thoughtfully contrived to serve the interests of the administration, while not serving the interests of either the Organization or the staff member. There is no provision for an organic linkage between the OIOS and the Ethics Office. Rather, they are fragmented and compartmentalized, with little relationship one to the other.

This raises serious questions as to the reliability of OIOS as a partner as well as to those ends for which "independence" might be exercised. Where the Ethics Office has found for the Applicant that there had been a prima facie case of retaliation, what ends could override that? Could it be much less than a concern on behalf of management?

Does this suggest the Ethics Office, on the basis of an investigation carried out by the OIOS, will only make recommendations to the head of department or office or to the USGM. In other words, it does little or nothing itself to actually protect the staff member?

18. Mission Statement Related to Retaliation

It should be noted, the Ethics Office, with respect to retaliation, has no mission statement. In general, it may be said that its objective is 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. (ST/SGB/2005/22, 1.2)

Regardless, this is not a mission statement. It gives every appearance, on the basis of its policy statements, of having no sound purpose and no strategies for shaping and directing the activities it does have. The Ethics Office seems to be to be little more than a mailbox. It is totally reliant on other entities to take decisions based on their own investigations.

At this point, we find the SG's legal resources in the form of the General Legal Division of the Office of Legal Affairs has constructed yet another monument to conditional clauses so as to maximize "discretion" and "non-decisions" into virtually every aspect of enquiry into misconduct.

This makes clear that the views and legislative decisions of the GA are effectively disregarded by the SG. The SG has set his executive policies as inconsistent with, and at times in opposition to, the legislative decisions of the GA. This weakens the work of the GA; nullifies some of its important decisions and makes it appear unaware of what is happening and, therefore, ineffective, and impotent.

Meanwhile, the staff member / reporter is sent bouncing back and forth between entities in hopes of a resolution. Likely seen as functional by management, this fosters confusion, uncertainty, multiple poles for filing; analyses; referrals; who concluded what? who decided what? The elevated levels of discretion make it almost impossible to determine responsibility and to fix accountability. This writer maintains that is precisely the objective.

19. Establishment of Misconduct and Retaliation

19.1 Establishment of Misconduct

What applicable criteria and procedures exist for a finding of misconduct? Is a finding of misconduct the same as the "establishment" of misconduct? Are they different? Who would do it? Consequences?

If the reported misconduct were to be found to be worthy of investigation, when and by whom would that decision be made? If the reported misconduct were found to be unworthy of investigation, when and by whom would that decision be made? Criteria used? Who would be notified of such decisions? When? Would management have the burden of proof to establish the misconduct of the management? Could this possibly be perceived as a conflict of interest? Would the reporting staff member have the intolerable burden of proof to establish the management's misconduct? Could this possibly be perceived as oppression? Or victimizing the victim?

How many instances have been "established"?

While it might be expected that serious misconduct would clearly be a priority, there are no known reports of serious misconduct found to have resulted in disciplinary actions.

"Under Staff Rule 10.1, staff can be held financially accountable for losses suffered by the Organization only when misconduct has been established. The high bar for imposing personal financial accountability arises from the Organization's clear distinction between instances where a financial loss suffered by the Organization results from an inadvertent error, oversight or simple negligence, and instances where a financial loss results from gross negligence. In the former instances, any deficiencies are addressed through performance management mechanisms, such as the ones listed above. The latter instances involve negligence of a very high degree involving an extreme and willful or reckless failure to act as a reasonable person in applying or in failing to apply the regulations and rules of the Organization. **To date, no such cases have been identified**." (A/70/187, 150)(Emphasis added.)

If no cases have been identified, might it be expected that there have been no consequences? How does this contribute to accountability and deterrence? Could it be expected to detract from accountability and deterrence?.

19.2 Establishment of Retaliation

19.2.1 OIOS Discovery of Retaliation

Where retaliation is reported to or discovered by OIOS, it will be referred to the Ethics Office for an initial assessment and, If successful, a preliminary review and a prima facie finding that there is a credible case of retaliation or threat of retaliation. "…the initial assessment as to whether an OIOS investigation is warranted is made by the Ethics Office." (OIOS Investigations Manual 2015, p. 6)

After receipt of the OIOS investigation report, the Ethics Office will inform the complainant in writing of the outcome of the investigation.20 (ST/SGB/2005/21)

19.2.2 Ethics Office and the Establishment of Retaliation

It was seen that OIOS policy, however, called for "interim steps" to protect the whistle blower. The content and outcome of these is not known.

We are deprived of an understanding of which body establishes retaliation, on the basis of what evidence and what criteria.

"When established, retaliation is by itself misconduct." (ST/SGB/2005/21, 1.4)

"**If retaliation against an individual is established**, the Ethics Office may, after taking into account any recommendations made by OIOS or other concerned office(s) and after consultation with the individual

who has suffered retaliation, recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action. 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." (ST/SGB/2005/21, 6.1) (Emphasis added.)

It will be recalled that with the issuance of ST/SGB/2017/2, its predecessor, ST/SGB/2005/21 was abolished. The newer statement makes no similar reference to the "establishment of retaliation". With the abolition of the previous policy so also were abolished provisions for the establishment of retaliation.

The abolition of any reference to "retaliation, if established, is misconduct," seems to suggest that retaliation, as an administrative decision, is not in peril. While an inconvenience, it is no longer identified as misconduct. Should that be the case, does this mean there is no longer the prospect of protecting anyone from retaliation and there are certainly no corrective measures to be considered?

Two measures ensured the maximum distance between the actions of the Ethics Office and accountability. The first, the Ethics Office, as noted, was granted no authority by the SG to undertake an investigation which would have to be farmed out to the OIOS.

The second may be seen in: "Recommendations of the Ethics Office and the alternate Chair of the Ethics Panel under the present bulletin do not constitute administrative decisions and are not subject to challenge under chapter XI of the Staff Rules. " (ST/SGB/2017/2,10.3)

Are there additional steps that could be taken to depreciate the work of the Ethics Office?

"If the Ethics Office considers that there has been retaliation against an individual, it may, after taking into account any recommendations made by OIOS or other concerned office(s) and after consultation with the complainant, recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action and protecting the complainant from any further retaliation." (ST/SGB/2017/2, 8.5)

"Should the Ethics Office not be satisfied with the response from the head of department or office concerned, it can make a recommendation to the Secretary-General." (ST/SGB/2017/2, 8.6)

This would immediately pit the D-1, head of the Ethics Office against a USG, head of office or department. Is there anyone who believes the D-1 would win this contest?

" The Secretary-General will provide a written decision on the recommendations of the Ethics Office to the complainant, the Ethics Office and the department or office concerned within 30 days." (ST/SGB/2017/2, 8.6)

In this context, should there be an appeal, the high level of discretion shapes the outcome the SG wants: he can cite the GA or his own policies. It is heads I win, tails you lose.

What criteria and procedures exist for a finding by the Ethics Office of a *prima facie* case of retaliation? This is unclear. Once such a case has been found, however, it is referred to the OIOS for investigation. What criteria and procedures exist for a finding by the OIOS of retaliation? For the "establishment" of retaliation? Are they different? How many instances have been "established"?

What have been the net effects or consequences? How has this contributed to accountability?

The delinking of the reports of misconduct (to the OIOS) and retaliation (to the Ethics Office) is a vital issue, one which the administration seems only too eager to perpetuate in the interest of fragmenting authority and responsibility and reducing if not eliminating the focus on managers' misconduct.

The Dispute Tribunal found: "By failing to properly assess whether there was a link between the reporting of misconduct and the alleged retaliation the Ethics Office denied or radically limited the protections that the Secretary-General clearly intended to afford to United Nations staff members." (UNDT/2013/085, Para. 88)

How would an OIOS decision of no misconduct affect claims of retaliation? Could there be a finding of no misconduct, but a finding of retaliation?

In fact, in at least one case, there had been a finding of a *prima facie* case of retaliation which had then been referred by the Ethics Office to the OIOS for investigation. The OIOS refused to do so.

This, in effect, would seem to nullify the policy on retaliation.

There also appears to be few, if any, records of any such retaliation having been established.

There is no detailed explanation as to what happens if there is no investigation of retaliation. On the other hand, if facts are established, then what happens? How is accountability achieved since it is not self-executing? When? Where?

What would happen to the reporting staff member who had filed a validated report? In the absence of any retaliation?

Or would the burden of proof shift to the administration to prove that despite the validated allegation of misconduct, there had been no retaliation?

These questions remain largely unanswered but show clearly the need for a far more intimate addressing of both reports of misconduct and retaliation.

And all of this takes place in the context of the system for the administration of justice?

One might expect that since the initial reports of misconduct are made to the OIOS, it would be the same office that would investigate allegations of retaliation. But that is not the case. To the contrary, the design seems to be to introduce as much time and distance as possible between the handling of allegations of misconduct and retaliation. As will be seen, to judge from reports, there is no handling at all of allegations of misconduct. In one case known to this writer, retaliation was still vigorously underway 9 years after the reporting of misconduct.

This might seem astounding. But it is not so when it is realized the extent to which the SG and the Tribunals have sought to design out accountability.

The inability of the Ethics Office to undertake investigations and its failure to have protected even one staff member from retaliation, act to inhibit or prevent further efforts at retaliation through the process of deterrence.

This system for addressing retaliation publishes SGBs and establishes an Ethics Office, all to suggest the appearance of action. The basic purpose, however, this writer would maintain, is to deflect attention from the most important aspect: the investigation and resolution of the initial complaints of misconduct. It is these that are the heart of staff concern, staff discontent and whistle-blowing.

20. Correcting Consequences for the Victim

"Pending completion of the investigation, the Ethics Office may recommend that the Secretary-General **take appropriate measures to safeguard the interests of the complainant, including, but not limited to, temporary suspension of the implementation of the action reported as retaliatory and, with the consent of the complainant, temporary reassignment of the complainant within or outside his or her office or placement of the complainant on special leave with full pay**." (ST/SGB/2017/2, 8.3)

"If the Ethics Office considers that there has been retaliation against an individual, it may, after taking into account any recommendations made by OIOS or other concerned office(s) and after consultation with the complainant, **recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action and protecting the complainant from any further retaliation. Such measures may include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, or, if requested by the individual, transfer to another office or function for which the individual is qualified, independently of the person who engaged in retaliation**. The head of department or office concerned shall provide a written decision to the complainant and the Ethics Office on the recommendations of the Ethics Office within 30 days." (ST/SGB/2017/2, 8.5)

The emphasis on **correcting negative consequences** to the victim is important where things can be returned to the *status quo ante.* This, however, is rarely possible. Retaliation often has so many results: above all a sense of confidence and trust are usually dashed; the relationship between the reporter and the retaliator is often destroyed; the actions of the retaliator become widely known among staff and that person is widely held in contempt, further destroying his or her effectiveness as a manager; the process may take years off the personal and professional growth of the victim. There must be forms of compensation for this.

The policy strongly suggests the staff member, against whom retaliation has been contemplated or practiced, might request a change of office or function so as to avoid retaliation. But why should a potential or actual victim seek to move and once again become a victim? On the other hand, this also suggests the manager who has retaliated wins by achieving the resulting transfer of the staff member s/he has retaliated against.

21. Consequences for the Retaliator

While speaking of the transfer of the victim, there is no mention of the transfer of the retaliator. The policy does not suggest that the manager who has retaliated should be transferred to another post. It should be made clear that when resort to transfer of a manager becomes necessary it will be to a lower-level post, not to a higher level post with a promotion or to enable an early promotion, as is so often the case. This does not address why one who has engaged in retaliation, a particularly repulsive form of behavior, should ever be transferred so as to visit the prospect of such behavior on some other part of the Secretariat.

If the standard of proof is met, i.e., it is established that the administration would have taken or had planned to take the alleged retaliatory actions in any case, the Ethics Office will consider that retaliation has not occurred. In all cases, the Ethics Office will inform the complainant in writing of its determination and make its recommendations to the head of department or office concerned and to the Under-Secretary-General for Management. Those recommendations may include that the matter be referred to the Assistant Secretary-General for Human Resources Management for possible disciplinary procedures or other action that may be warranted as a result of the determination." (ST/SGB/2017/2, 8.4)

No consequences are mentioned for those whose misconduct has been established. Nor are any figures given as to outcomes for such cases. How many have been received? How many have been investigated? In what instances has reported misconduct been found to have been not misconduct? Outcomes? In what instances has it been confirmed as having been misconduct?

What are the processes and the procedures for "establishing" retaliation? Having been removed from the new policies, this, it seems, is no longer of interest to the Secretary-General. Who is involved? Who has the burden of proof? What conflicts of interest might be involved? How many reports of misconduct have there been? Of these, how many procedures for "establishing" misconduct? In how many has misconduct been established?

Given the number of qualifiers, it might be remarkable if anything were to be achieved. As has been noted elsewhere, maybe nothing was achieved as there appear to be no reports of staff protected from retaliation nor of managers chastised. While the title of the policy is: "Protection Against Retaliation…" we find the more honest subtitle to be: "Protection Against Further Retaliation".

This makes clear that the United Nations has not been able or willing to give thought to the Ethics Office's role in the prevention of retaliation. Rather, the United Nations actually requires that retaliation take place before its so-called "protection" can kick in. It is for the victim to establish that s/he had been retaliated against. Remember, the Ethics Office cannot investigate!!

The bifurcation of policy and responsibilities means the addressing of the reported misconduct and the reported retaliation by the OIOS and the Ethics Office , respectively, are addressed separately and do not necessarily inform each other.

The argument about protection is designed to shift attention from the reported misconduct to whether there had been retaliation. The administration has neither the obligation nor the burden of proof to undertake an investigation of a reported misconduct.

This places the burden of proof on the whistleblower. While there is a duty to report, there is no right to report. Where there is no resolution of the original report of misconduct, there may be no need for retaliation as the staff member may be left to twist slowly in the wind.

22. Independence of the Ethics Office

If saying something once is good, repeating it must make it better. Consider the repetitive assertions that the Ethics Office is independent.

For example, one sentence has been repeated over a period of three years: "The Ethics Office was established as an independent office within the Secretariat upon the approval of the General Assembly at the 2005 World Summit (see General Assembly resolution 60/1, para. 161 (d))" This same sentence could be found in numerous reports of the Secretary-General: A/61/274, A/66/319, A/68/348 and A/71/334.

Actually, this was a bit of hyperbole. The cited resolution did no such thing. Rather than the creation of an independent Ethics Office, the cited resolution read: "In this regard, we request the Secretary-General to submit details on an ethics office with independent status, which he intends to create, to the General Assembly at its sixtieth session;" (A/RES/60/1, (161(d))

The resolution only requested the Secretary-General to submit details on an ethics office with independent status. The details with respect to independence were never forthcoming. As a result, there appears to be no foundation document to substantiate the claim that the Secretary-General had established the independent Ethics Office.

There is no claim in ST/SGB/2005/21, ST/SGB/2005/22 or ST/SGB/2017/2 that the Ethics Office is to function independently. The Ethics Office reports directly to the Secretary-General. (ST/SGB/2005/22, 1.1), all Ethics Office staff are appointed by the S-G; accountable to the S-G; recruited by the S-G; paid by the S-G, promoted by the S-G and are removed by the S-G. This cannot convey an aura of independence.

"Independence and impartiality are of vital importance in the functioning of the Ethics Office, and must be actively preserved and strengthened as the final structure of the Office is put in place and its work evolves." (A/61/274, 55)

However, it makes no mention of the establishment of the Ethics Office nor its "independence".

And this is the Ethics Office? At no point did the Ethics Office in its annual report, or any other time, actually quote a specific sentence or paragraph from a specific resolution in support of its claim to be independent. As is well-known, a request by the GA to the SG can hardly be viewed as an accomplished fact.

Repetition, however, never seems to go out of style, even within the same report:

"The Ethics Office serves as an **independent,** confidential and impartial entity dedicated to providing timely and high-quality advice to staff concerning the ethical obligations of international civil servants. This advisory function ensures that staff members understand their obligations as embodied in the Charter and in relevant regulations, rules and policies. In helping staff to make decisions consistent with the values and rules of the Organization, the Office helps to mitigate operational and reputational risk." (A/69/332, 11)

"The Ethics Office continued to provide **independent ethics advice** to the Procurement Division of the Department of Management on issues relating to the integrity, anti-corruption and corporate compliance programmes of vendors seeking to do business with the United Nations." (A/69/332, 15)

"The Ethics Office continued to provide **independent advice** to the Department of Management and the Department of Field Support with regard to the compliance monitorship for two critical service vendors that support peacekeeping." (A/69/332, 17)

Again, in the foundation documents of the Ethics Office, there is no mention of its having been made independent or of its having protected staff against retaliation.

Thus the repeated references seem misleading and fallacious at best.

If there is such a fast and loose description of the mandate of the Ethics Office, what can be expected as to its actual functioning?

"As required by its terms of reference, the Office continued to maintain its independence by having the head accountable to the Secretary-General and, as needed, access to information relevant to its work.[4]" (A/71/334, 5)

Obviously, being "accountable to the Secretary-General" cannot be seen as a formula for the maintenance of independence. To the contrary, it is a recipe for dependence.

The SG and the UNAT (2014-UNAT- 457) have both decided that the Ethics Office makes no decisions and, they are not subject to modification by the SG. Therefore they cannot be receivable by the UNDT. This places the work of the Ethics Office beyond judicial consideration, review and accountability.

Note that prior to the filing of a request for protection from retaliation, one must have already experienced retaliation. 380 or 71% or of all 533 filings over an eleven year period were found to be not even worthy of preliminary review; of the 153 to be considered for preliminary review, only 22 have been found to constitute a prima facie case to then be referred to the OIOS Of those 22, only 5 were found to have been victims of retaliation.

Yet, in all the reports prepared by the Ethics Office, nowhere does it claim to having protected evan a single staff member. With a zero, or close to it, success rate, what is the value of the Ethics Office for protecting staff? It seems that is a very substantial amount of money to be spent by a unit that is not able to indicate having protected even a single staff member from retaliation. With such a low success rate, perhaps its success should be seen in its value for management.

The OIOS, on the other hand, appears to enjoy "operational independence" in accordance with a General Assembly resolution. The same, however, cannot be said of the Ethics Office since there is no claim of independence and no legislative provision for it. This suggests that the activities of the Ethics Office may be or may become subject to a variety of pressures from all levels of managers.

The lack of a provision in legislated policy for the independent functioning of the Ethics Office, much less a General Assembly resolution on the subject as with the OIOS, did not stop the Secretary-General from asserting that it was indeed an independent office.

The SG's arguments have been embraced by the UNAT, with the exception of Judge Faherty. the failure or refusal of the UNDT to cite the legislative foundations for these arguments would, in effect, suggest the Tribunal is legislating on behalf of the GA. (2014-UNAT- 457)

That the independence is far from settled in the thinking of the GA may be seen in A/RES/263: "45. Also recalls paragraph 147 of the report of the Advisory Committee, and requests the Secretary-General to develop in his next report a proposal concerning the independence of the Ethics Office for the consideration of the General Assembly at its seventy-second session." (A/RES/263, 23 December 2016)

This certainly suggests the GA does not consider the matter of Ethics Office independence to be a settled issue.

In the absence of foundation documents to substantiate the claim that either the GA or the SG established the independent Ethics Office, the repeated reference is misleading and fallacious.

Even where the SG asserts the recommendations of the Ethics Office are not administrative decisions and are therefore not subject to challenge or appeal under Chapter 11 of the Staff Rules, he does not make this claim on the basis of the independence of the Ethics Office as he did in his arguments before the UNAT.

23. Fictional Jurisprudence: i) Wasserstrom: Independence of the Ethics Office; ii) Koda: "Independence of the Ethics Office"; iii) Andronov: The real UNAT Decision;

The Secretary-General has pursued at least three instances of promoting fictional jurisprudence in his assertion that the work of the Ethics Office, being independent, does not involve decisions amenable to the SG's authority. One involves the "independence" of the Ethics Office as reflected in Wasserstrom; the second involves the "independence" of the Ethics Office as reflected in Koda. The third involves the nature of the administrative decision as decided by the United Nations Administrative Tribunal.

23.1. Fictional Jurisprudence, Part One: Wasserstrom: The "independence" of the Ethics Office

A key element of this argument is the Wasserstrom case, (2014-UNAT-457, para. 14), the Secretary-General "…reiterates that the Ethics Office is independent from the Secretary-General and it is not capable of making an administrative decision within the meaning of Article 2 of the UNDT Statute; it has

the authority to make only recommendations to the Organization that are not binding." 2014-UNAT-457, para. 14.

"3. Mr. Wasserstrom appealed. There was a preliminary issue as to whether the decision of 21 April 2008 taken by the Director of the Ethics Office was an "administrative decision" within the meaning of Article 2(1)(a) of the UNDT Statute. In Order No. 19 (NY/2010) dated 3 February 2010, the Dispute Tribunal determined that the decision by the Director of the Ethics Office that retaliation did not occur was an administrative decision and accordingly, Mr. Wasserstrom's application was receivable. The Secretary-General appealed UNDT Order No. 19 (NY/2010). In Judgment No. 2010-UNAT-060 dated 1 July 2010, the Appeals Tribunal dismissed the Secretary-General's interlocutory appeal as not receivable. The Appeals Tribunal was of the view that the question of whether the Director's decision constituted an appealable administrative decision went directly to the merits of the case, which could not be decided before the Dispute Tribunal rendered a judgment on the merits" (2014-UNAT-457,3)

"4. In Judgment on Liability, the Dispute Tribunal upheld Mr. Wasserstrom's complaint of retaliation. The UNDT concluded that the Ethics Office had failed to carry out an independent and proper review of the OIOS investigation report by not making further inquiries into the factual inconsistencies in the investigation report and its annexes, and that its uncritical acceptance of the OIOS conclusion of no retaliation was an error in law." (2014-UNAT-457, 4)

"The Secretary-General clarifies that his appeal is directed at the Dispute Tribunal's conclusion that the Ethics Office's determination of no retaliation constituted an administrative decision that fell within its jurisdiction, …" (2014-UNAT 457, 6)

In neither paragraph setting forth the Secretary-General's position had he made any reference to any citations as to the legislative mandate for the Ethics Office. Had there been any reference to the independence of the Ethics Office in its foundation documents, he could easily have cited it. but there was none.

"The Secretary-General submits that the UNDT erred in finding that Mr. Wasserstrom's application challenging the Ethics Office's determination of no retaliation was receivable. He is of the opinion that the Ethics Office's 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. In this connection, the Secretary-General refers to this Tribunal's jurisprudence on independent entities such as OIOS in Koda3 in support of his position that the acts and omissions of the Ethics Office do not constitute administrative decisions falling within the competence of the Dispute Tribunal, although actions taken by the Administration based on the Ethics Office's recommendations would be appealable administrative decisions. He also refers to the jurisprudence of the former Administrative Tribunal in Perez-Soto concerning the Ombudsman's Office.4" (2014-UNAT-457, 7)

As is often done by the Secretary-General, in the context of the Management Evaluation Unit or in appeals, there is a reference to a resolution, case or a tribunal decision. In the absence,however, of any specific citation or quotation from that resolution or case in support of his position, the SG argues that it says things it does not say. He infers the meaning he seeks instead. Such inferences offer very little in the way of substantiation of his claims.

Mr. Wasserstrom, in his answer, maintained "…that, contrary to the assertions made by the Secretary-General, the function of the Ethics Office is elementally different from that of the Ombudsman. There is no authority or precedent that insulates decisions of the Ethics Office from judicial review." (2014-UNAT-457, 11)

In the absence of any foundation document to that effect, the Secretary-General refers to the Koda case (2011-UNAT-130) as jurisprudence providing justification for his claim that the Ethics Office is independent. But Koda does no such thing. It makes no mention of the Ethics Office and only discusses

the "operational independence" of the OIOS. Having heard the Secretary-General's argument that the Ethics Office is independent, the Appeals Tribunal, with one dissenting opinion, agreed, thereby, in effect, establishing a legislative intent that had not been legislated.

23.1.1 Considerations:

"32. The decision of the Appeals Tribunal (Judge Faherty dissenting) is as follows: as a preliminary issue, Section 2 of the Secretary-General's Bulletin ST/SGB/2005/22 entitled "Ethics Office – establishment and terms of reference" states that the head of the Ethics Office is appointed by the Secretary-General and will be accountable to the Secretary-General in the performance of his or her functions. And it is the Secretary-General who is a party to this appeal on behalf of the Ethics Office."

This statement cannot convey much in the way of a sense of independence. Usage of the term "independent", regarding the Ethics Office, cannot in any way be analogous to its usage with respect to the OIOS.

"33. The Secretary-General appeals the Dispute Tribunal's conclusion that the Ethics Office's determination of no retaliation constitutes an administrative decision that comes within its statutory jurisdiction. He contends that it is not an administrative decision subject to judicial review."

"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". Hence, the Secretary-General's appeal on receivability is upheld." (2014-UNAT-457, 41) (Emphasis added.)

This summary statement by the UNAT gives no clear presentation of the reasons for the UNAT decision in this case. The reasons have to go beyond the SG's arguments and find their bases in the intent as expressed in original legislation.

It is the case that almost every unit of the United Nations can make only recommendations to the Secretary-General. Therefore, such recommendations are, in effect, the administrative decisions of these units. This places the UN in the predicament or anomalous situation that either there are no administrative decisions that can be appealed or each and every administrative decision can be appealed.

"From the extensive procedural facts and the posture of the Secretary-General, his refusal to comply with the production or discovery orders issued by the UNDT was deliberate and longstanding and delayed the proceedings; thus, it was frivolous and vexatious. The UNDT therefore exercised its discretion correctly in awarding costs against the Secretary-General for abuse of the judicial process. In the circumstances, the Appeals Tribunal unanimously affirms the award of costs in the amount of USD 15,000 against the Secretary-General." (2014-UNAT-457, 42)

23.1.2 Judgment:

It would not seem likely that the SG in making this argument would not cite or quote the policy basis for it. The policy basis for the claim of independence for the OIOS is clearly set forth, not the least of all in General Assembly resolution 48/218 B. It is the case that the foundation documents for the Ethics Office (ST/SGB/2005/21, ST/SGB/2005/22 and ST/SGB/2017/2) make no such representation of independence, nor does any seem to be intended.

The lack of a basis in legislation or law for the SG's claim did not prevent the UNAT from accepting the argument. Did this taint the work of the UNAT in Wasserstrom, 2014-UNAT-457? This raises serious

questions as to the Tribunal's independence and the basis for its decision and its eagerness to adopt the SG's position.

The following contradictions and reversals in the decisions by the UNDT could well be accounted for by a process of collusion between the Respondent and the Tribunal as has been seen elsewhere.

23.2 Faherty: (Dissenting opinion)

"As the Appeals Tribunal has held in Andati-Amwayi, "[w]hat constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision".7 (2014-UNAT-457, Dissent, 4)

"The primary basis for the Secretary-General's appeal in the present case is that the fundamental nature of the entity in question, that is, the Ethics Office, and its relationship with the Secretary-General is such that it removes the actions of the Ethics Office from the scope of judicial review." (2014-UNAT-457, Dissent, 5)

Her argument had several dimensions:

"Once promulgated in 2005, ST/SGB/2005/21 was imported into the terms of appointment and conditions of service of the United Nations staff members." (2014-UNAT-457, Dissent, 16)

"A plain reading of the Bulletin demonstrates that individuals, including staff members, covered by the Bulletin have a duty to report in good faith any breach of the Organization's Regulations and Rules. This duty is mirrored by the statutory protection and remedies set out in the Bulletin to aid and support staff members who believe retaliatory action has been taken against them for their having reported misconduct or cooperated with a duly authorized audit or investigation." (2014-UNAT-457, Dissent, 17)

"Mr. Wasserstrom invoked the process set out in ST/SGB/2005/21 on 3 June 2007 when he lodged a complaint with the Ethics Office of retaliatory action by UNMIK." "The Ethics Office concluded that by submitting a report of misconduct to OIOS and cooperating with the duly authorized audit, Mr. Wasserstrom engaged in a "protected activity'' within the meaning of section 2 of the Bulletin." (2014-UNAT-457, Dissent, 18)

"I turn now to the Secretary-General's primary legal arguments on receivability. The question to be determined in the context of the legal argument is whether the Ethics Office's finding of no retaliation constituted an "administrative decision" capable of being brought within the scope of judicial review. The requirement that the determination affected Mr. Wasserstrom's terms of employment and conditions of service has been satisfied. The issue is whether it is a decision taken by the Administration." (2014-UNAT-457, Dissent, 28)

29. To address this question, one must look to the nature of the Ethics Office itself and its place within the framework of the Organization.

She does not take head-on the SG's contention that the Ethics Office is "independent".

"The Secretary-General argues that the Ethics Office is limited to making recommendations to him and the Organization. Therefore, he contends that the Ethics Office's finding of no retaliation was not a decision and submits that the legal basis for this argument lies in the decision of the Appeals Tribunal in Koda.9 He argues that in Koda, the Appeals Tribunal distinguished between acts and omissions of independent entities and administrative decisions taken by the Secretary-General based on those acts and omissions. He submits that any appealable decision Mr. Wasserstrom could have is on the basis of

an action taken by the Secretary-General "based on" the Ethics Office's recommendations. He likens the Ethics Office to that of the Ombudsman and relies on the decision of the former Administrative Tribunal in Perez-Soto which held that the Ombudsman only has authority to make recommendations and that therefore, the "conclusion that the Ombudsman cannot take a decision, whether explicit or implicit, leads unavoidably to the fact that no appeal of her actions, advice, views, proposals, recommendations, or lack thereof is possible".10 (2014-UNAT-457, Dissent, 31)

But it is the case that Koda makes nether explicit nor implicit reference to the Ethics Office and the argument put forth by the SG that it is independent.

"I find no merit in this argument. A comparative analysis of ST/SGB/2002/12 entitled "Office of the Ombudsman – appointment and terms of reference of the Ombudsman" and ST/SGB/2005/22 does not bear out the Secretary-General's argument. Accordingly, I uphold the Dispute Tribunal's finding that "[t]he Ethics Office cannot in any meaningful sense be regarded as analogous to the Ombudsman".11 The decision in Perez-Soto, which at most would have been persuasive, is of no assistance on the issue. (2014-UNAT-457, Dissent, 32)

This raises the question as to whether the SG is postulating yet another piece of fictional jurisprudence.

"The Secretary-General maintains that as an "independent'' entity, the Ethics Office cannot be amenable to him. He draws attention to General Assembly resolution 60/1 which "request[ed] the Secretary-General to submit details on an ethics office with independent status''. He cites the General Assembly mandate as binding on his office and states that he took action to establish the Ethics Office in a manner that would be consistent with its independent status, including stating in his report to the General Assembly that the Ethics Office would be "located outside the Executive Office of the Secretary-General in order to guarantee its independence".12 (2014-UNAT-457, Dissent, 33)

It is true that the GA had initially requested the SG to submit details on an independent Ethics Office, but he never did so. There is no mention whatsoever in the foundation documents of the Ethics Office that it is to be independent.

But the GA had never endorsed the SG's actions with respect to the establishment of an "independent" ethics office. in fact, The GA affirmed it had not yet determined the Ethics Office's "independence". This may be seen in its resolution: "45. Also recalls paragraph 147 of the report of the Advisory Committee, and requests the Secretary-General to develop in his next report a proposal concerning the independence of the Ethics Office for the consideration of the General Assembly at its seventy-second session." (A/RES/263, 23 December 2016) This certainly indicates the GA did not consider the matter of Ethics Office independence to be a settled issue.

The SG therefore had no legal basis for his argument that the Ethics Office was "independent" and therefore not amenable to him.

The SG'S concept of independence, however, is beyond fragile, especially since in accordance with ST/SGB/2005/21, ST/SGB//2005/22 and ST/SGB//2017/2 every aspect of the functioning of the Ethics Office, possibly unlike the functioning of the OIOS, takes places in the orbit of the Secretary-General.

"In that case [Koda], the Appeals Tribunal found: OIOS operates under the "authority" of the Secretary-General, but has "operational independence". As to the issues of budget and oversight functions in general, the General Assembly resolution calls for the Secretary-General's involvement. Further, the Secretary-General is charged with ensuring that "procedures are also in place" to protect fairness and due-process rights of staff members. **It seems that the drafters of this legislation sought to both establish the "operational independence" of OIOS and keep it in an administrative framework.** We hold that, insofar as the contents and procedures of an individual report are concerned, the Secretary-General has no power to influence or interfere with OIOS. Thus the UNDT also has no jurisdiction to do

so, as it can only review the Secretary-General's administrative decisions. But this is a minor distinction. Since OIOS is part of the Secretariat, it is of course subject to the Internal Justice System.14 (Emphasis Added.) (2014-UNAT-457, Dissent, 37)

There was no such legislative intent with respect to the Ethics Office as with the OIOS.

"Accordingly, the Appeals Tribunal held that "[t]o the extent that any OIOS decisions are used to affect an employee's terms or contract of employment, OIOS' report may be impugned".15 (2014-UNAT-457, Dissent, 38)(Koda, 2011-UNAT-130, 42)

"The principle underlying our ruling in Koda is that notwithstanding an entity's operational independence, once it is part of the Secretariat, any decision capable of affecting an employee's terms of employment and conditions of service "may be impugned". As the Ethics Office's finding of no retaliation affected Mr. Wasserstrom's terms of employment and condition of service, I see no basis to insulate the Ethics Office from the test which the Appeals Tribunal applied in Koda." 16 (2014-UNAT-457, Dissent, 39)

"Arriving at the aforesaid conclusion, I also place particular reliance, while accepting and acknowledging the "operational" independence of the Ethics Office, on sections 1 and 2 of ST/SGB/2005/22 and, in particular, section 5.7 of ST/SGB/2005/21 which provides:
"Once the Ethics Office has received the investigation report, it will inform in writing the complainant of the outcome of the investigation and make its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management. Those recommendations may include disciplinary actions to be taken against the retaliator." (2014-UNAT-457, Dissent, 40)

This, despite the fact that the "operational independence" of the Ethics Office has nowhere been established legislatively.

"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. (2014-UNAT-457, Dissent, 41)

" In all of those circumstances, I find that Mr. Wasserstrom's application to the UNDT is receivable and I uphold the Dispute Tribunal's determination in this regard, as reflected in UNDT Order No. 19 (NY/2010). As the decision of the Appeals Tribunal (by a majority) has deemed Mr. Wasserstrom's application not receivable, any consideration by me of the Secretary-General's appeals against UNDT Judgment No. UNDT/2012/092 and UNDT Judgment No. UNDT/2013/053 has been rendered moot,17 as is Mr. Wasserstrom's appeal against UNDT Judgment No. UNDT/2013/053." (2014-UNAT-457, Dissent, 42)

That the tribunal could find the views of the Ethics Office to be the views of an independent body is, in effect, to have the tribunal undertake a legislative function where there is still no legislative mandate by the GA establishing the Ethics Office as an independent entity. The GA may have expressed the wish that it be independent but then that never happened.

23.3. Fictional Jurisprudence: Part Two, Koda.:

As was seen above, "The Secretary-General submits that the UNDT erred in finding that Mr. Wasserstrom's application challenging the Ethics Office's determination of no retaliation was receivable. He is of the opinion that the Ethics Office's 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. In this connection, the Secretary-General refers to this Tribunal's jurisprudence on independent entities such as OIOS in Koda3 in support of his position that the acts and omissions of the Ethics Office do not

constitute administrative decisions falling within the competence of the Dispute Tribunal, although actions taken by the Administration based on the Ethics Office's recommendations would be appealable administrative decisions." (2014-UNAT-457, Dissent, 7)

The reference to Koda is a distraction in that it is posited as jurisprudence which does not exist. It is true that Koda does make reference to the OIOS which has putative "operational independence". The OIOS' independence is, however, also established in its foundation documents (A/RES/48/218-b) nor does Koda establish any rules or even guidelines for the treatment of "independent" offices.

The Ethics Office has no independence if we are to judge from its foundation documents. The GA may have intended to but never established the Ethics Office as an independent unit. The Tribunals may find it has independence. But in so finding, the Tribunals are entering into a legislative function, one that does not belong to it.

Koda makes no reference to the Ethics Office nor to its putative independence.

The Secretary-General appears to wish to extract far more from the Koda decision than had been intended by the Tribunal. A Tribunal finding that an entity is or is not "independent" must be based on legislative intent. The wish of the Secretary-General is not sufficient. Absent the legislative intent, the Tribunal has no authority to write that intent. It is not the function of the Tribunal to legislate.

This author contends this fails on two grounds: i) the SG argues the most limited, circumscribed, constricted, spare, and narrowly drawn interpretation of a wonderfully generous, Administrative Tribunal decision (Andronov, UNAT 1157) and ii) the SG argues the Ethics Office is independent and therefore not subject to the SG's authority, an argument not made anywhere in its founding documents.

23.4. Fictional Jurisprudence: Part Three, Andronov:

The SG has contended the definition of an administrative decision in UN Administrative Tribunal 1157, Andronov, as set forth in the para. 34 is determinative. The former Administrative Tribunal's definition of an administrative decision that is subject to judicial review has now been adopted by the Appeals Tribunal: " 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 or 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.5"

As will be seen, the UN Administrative Tribunal viewed this definition of an administrative decision as an **entirely inadequate basis** for ensuring legal and judicial protection for staff. But the Secretary-General uses this definition of an administrative decision in an exclusive manner so as to significantly diminish the number of appeals, especially those where the administrative decision can be interpreted as not fulfilling all of the parameters as set forth.

The Administrative Tribunal's decision was of great importance and has been totally dismissed by the administration:

"The Tribunal believes that the legal and judicial system of the United Nations must be interpreted as a comprehensive system, without lacunae and failures, so that the final objective, which is the protection of staff members against alleged non-observance of their contracts of employment, is guaranteed. The Tribunal furthermore finds that the Administration has to act fairly vis-à-vis its employees, their procedural rights and legal protection, and to do everything in its power to make

sure that every employee gets full legal and judicial protection." (UN Administrative Tribunal, No. 1157)

"Consequently, the Tribunal determines that, in cases where the Administration believes that there is no specific administrative decision to be challenged in proceedings before the JAB, the rules should be interpreted by the Administration so as to ensure that legal and judicial protection are provided." (UN Administrative Tribunal, No. 1157)

These quotes from Andronov differ significantly from the paragraph quoted by the UN Appeals Tribunal. It is not known that the UN Appeals Tribunal rejected these quotes by the Administrative Tribunal but it most certainly has not embraced them.

It is believed neither the Dispute Tribunal nor the Appeals Tribunal nor the Secretary-General has ever cited the Administrative Tribunal's decision as a foundation for a determination as to whether or if an administrative decision was valid.

The Secretary-General has engaged in a highly selective, discriminatory and limiting reading of Andronov. This aspect of Andronov, while correctly quoted, focused on the significantly narrower, exclusive and very limiting aspect of the decision. In so doing the SG revealed his displeasure with the essence of the definition used in the Andronov decision. In reality, the Administrative Tribunal's decision was precisely the opposite.

Has this decision of the Administrative Tribunal been repudiated by the management? Have the UNDT or the UNAT rejected the decision of the former Administrative Tribunal? This is not known to have happened.

Here the Secretary-General takes a position diametrically opposed to the UNAT decision in Andronov. To their discredit, the UNDT and the UNAT have accepted the SG's partial quote as truth. In doing so, numerous Appellants have been shortchanged and denied justice.

24. Decision or No Decision

Does this signal that the Ethics Office can reach a **decision** concerning a *prima facie* case but no other type of **decision**? Or, maybe, not even that decision? To how many hapless staff members might these findings have been applied? Any such uncertainty has been dispelled by the Secretary-General though in the absence of documentary evidence. He cited no foundational document to substantiate his claim that the Ethics Office is independent and therefore not capable of making a decision that he or the tribunals could review. The tribunals fell into place in agreement, also in the absence of reference to foundation documents raising questions as to the apparent closeness between the SG and the tribunals, even the prospect of collusion.

The lack of clarity about decisions is revealed in the SG's report on the Activities of the Ethics Office. "Since 2010, the Ethics Office has taken several measures to advance protection against retaliation, including (a) successfully using an alternative investigating mechanism when OIOS could not conduct an investigation owing to a conflict of interest; (b) protecting the confidentiality of individuals who seek protection; (c) developing and implementing protection against retaliation standard operating procedures; (d) implementing a rigorous practice of reviewing completed investigation reports, including the evidence and witness statements; **(e) exercising its independent judgement when making the ultimate decision as to whether workplace retaliation occurred;** and (f) embarking upon an ambitious outreach and educational campaign for staff, to encourage staff to speak up and report workplace concerns. (A/68/348, 49)

Here the Ethics Office touts its "independence" as key to its "…making the **ultimate decision** as to whether workplace retaliation occurred." Thus sees itself as making **"the ultimate decision"**.

Yet the elements of independence and decision-making are skirted in ST/SGB/2017/2, 10.3 where the SG asserts: "Recommendations of the Ethics Office and the alternate Chair of the Ethics Panel under the present bulletin do not constitute administrative decisions and are not subject to challenge under chapter XI of the Staff Rules." (ST/SGB/2017/2, 10.3)

Can there be a *prima facie* finding that retaliation took place in the absence of proof being provided that the reporting of misconduct contributed ***to causing*** the retaliation? Or would this be another example of the bar being set even higher in the absence of any mandate to do so?

This writer maintains that the phrase about **causing retaliation** has no place, and given the Office's attenuated and contrived duties with respect to retaliation, perhaps the Office too has no place. Is it simply designed to make it appear that something worthwhile is taking place when, in reality, it is not?

This is the first time the SG has codified his position and, in effect, that of the UNAT that these are not administrative decisions.

This is bizarre in that should the Ethics Office decide a request cannot even reach the "preliminary review", this is not an administrative decision subject to any further appeal. No reasons are given for this statement. There is no basis in the foundation documents. There is a position only in the context of the SG's position. This appears to be little more than an attempt to curtail the rights of the reporters and to ensure accountability is beyond reach.

25. The Ethics Office as Guardian

Perhaps the most misleading and deceptive aspect is that while the Ethics Office was was touting itself "…as a guardian of the standards of conduct for United Nations staff…..", (A/61/274, PARA. 5) and that that its work offers "enhanced protection" to staff members. it was engaged in consistently formulating ever more stringent requirements that have ensured an ever lower level of protection for the staff member.

It has done this by i) failing, until recently, to call for preventive measures as key elements addressing protection; ii) the establishment of its unauthorized "initial assessment" for the removal of two-thirds of those filing claims of retaliation; iii) its unauthorized calling for "independent and corroborated" evidence; iv) the delay in implementation of the shift in the burden of proof; v) the Ethics Office actually requires that retaliation take place before it can be reported and that only if proven by the staff member, can "protection" be offered and vi) the "independence " of the Ethics Office, not established legislatively in its foundation documents, but so claimed by the SG and agreed to by the UNAT. This last element places the actions and decisions of the Ethics Office beyond modification by and the authority of the SG and the Tribunals and, therefore, not subject to accountability. The Office has placed itself in a position where it is posturing as the protector of ethics, on the one hand, while engaged in the systematic distortion, misrepresentation and misapplication of organization policy on the other. This is a disservice not only to the staff member but more importantly, to the Organization itself.

That the Ethics Office should then proclaim who have reported misconduct is a travesty.

Finally, the most recent policy, the first one addressing the prevention of retaliation (ST/SGB/2017/2), extends the bifurcation of responsibility between the OIOS and the Ethics Office. The original report of misconduct goes to the OIOS, claims of retaliation go to the Ethics Office. But now it is for the OIOS to

gauge whether there is a prospect for prevention and that is a decision for the OIOS which is then to be communicated to the Ethics Office. Could this possibly be more convoluted?

26. Discretion and the Avoidance of Accountability

If the original reports of misconduct must be filed with the OIOS and only the OIOS can i) investigate and ii) take steps to prevent retaliatory measures, why must any aspect of the retaliation process take place with the Ethics Office especially since in the context of ST/SGB/2017/2, 10.3) the Ethics Office ostensibly cannot investigate or even take a decision?

"If the Ethics Office considers that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days." (ST/SGB/2017/2, 8.1)

"If the Ethics Office determines that there is no prima facie case of retaliation or threat of retaliation, it shall so notify the complainant in writing." (ST/SGB/2017/2, 7.5) It appears this determination does not constitute a decision and therefore may not be appealed.

"Where, in the opinion of the Ethics Office, there may be a conflict of interest if OIOS conducts an investigation as referred to in section 8.1 above, the Ethics Office may recommend to the Secretary-General that the complaint be referred to an alternative investigating mechanism." (ST/SGB/2017/2, 8.2)

This should make clear that, contrary to the mandate from the GA, the Ethics Office is not to undertake an investigation under any circumstances.

The prospects for a conflict of interest where the management has the burden of proof to establish that there was no retaliation and, if there was, that it would have taken the same measures regardless, are quite powerful.

Can it be expected the Ethics Office would be able to conduct an "independent review of the findings and supporting documents" to determine whether the report and the supporting documents "show, by clear and convincing evidence, that the Administration would have taken the alleged retaliatory action…." in any case when the Office does not even enjoy the authority to investigate? Is the Office now going to second guess the investigation by the OIOS? As noted, there appear to be no standards by which such a determination is to be made.

So the "independent review" is to be constrained to the report and the supporting documents? What if the Ethics Office comes to learn of other documents? Are all other such documents to be precluded? Is this yet another illusion of independence?

Given the vast sensitivity to status and rank, as some have pointed out, does anyone really believe that a USG will assign a high value to the recommendations of a Director of the Ethics Office especially one in an antagonistic position? As if in confirmation of this reality, there seems to be no report of any such recommendation having been made.

The entire process becomes even more convoluted, if that is possible, by offering an illusion of progress. If the Ethics Office finds there to be no prima facie case of retaliation or threat of retaliation, the complainant may request a further review, this time by the alternate chair of the Ethics Panel. If the first review produced no concrete action, the second review may do exactly the same. Regardless, all are non-decisions and are non-appealable. The staff member is denied fundamental Chapter 11 appeal rights.

"The aim of OIOS investigations is to establish facts and make recommendations in light of its findings. The Secretary-General or delegated programme manager, in the circumstances of the case, has the responsibility to consider what action, if any, is to be taken after receipt of the report. It is important to note that OIOS is not a law enforcement agency, and does not have subpoena or other coercive statutory powers;….").(OIOS, 2009 Investigations Manual 1.2.1)

In which case, can it really investigate??

"As with the decision at intake on whether an investigation is to be initiated, the decision of how and when to close the investigation is discretionary and must take into account the interests of the Organization and the requirements of the system of accountability.").(OIOS, 2009 Investigations Manual 2.1)

In the absence of any retaliation, it would appear the Ethics Office would have no jurisdiction and would have no role with respect to a report of misconduct. If so, it would seem that the Ethics Office would have only a minor role with respect to the prevention of retaliation and only at the behest of the OIOS. The Ethics Office seems to have no independent capacity with respect to the prevention of retaliation, a subject not yet addressed by the UN.

Until retaliation has taken place, it cannot be reported. This ensures that the reporter must experience retaliation before s/he can be protected and then it is too late.

It is the case that should the Ethics Office find a request does not even merit a "preliminary review", and where it merits a "preliminary review", it might not rise to a prima facie case and those determinations which are not decisions cannot be reviewed.

The OIOS, in its annual reports of its activities, appears to make no reference to the number of reports of misconduct filed in the context of ST/SGB/2005/21 or ST/SGB/2017/2 and the related reports of retaliation filed with the Ethics Office. Nor does it appear to call attention to those cases referred to it by the Ethics Office in the event of a *prima facie* case of retaliation.

The experience of this counsel suggests it is not likely the OIOS will agree to investigate and even less likely that the OIOS will undertake any "interim measures" to prevent retaliation against the staff member. Where that is the case, the staff member will not likely be the beneficiary of any measures by the OIOS to prevent retaliation. Of the 533 requests for protection against retaliation, it seems there was only 1 instance in which the Ethics Office facilitated interim protection measures!!

27. Summary

In summary, the Ethics Office is fatally flawed by virtue of its putative independence in the absence of any legislative intent to that end; it reports to the SG and enjoys little independence from the SG; it has no statement of mission; staff have the duty but no right to report misconduct; management has no corresponding duty to the staff member; the staff member must actually experience retaliation prior to requesting protection; to provide protection, the Ethics Office must determine if there is a prima facie case that **"…the protected activity [the reporting] was a contributing factor in causing the alleged retaliation or threat of retaliation";** the elements of a "contributing factor in causing the alleged retaliation" are pernicious and have no place in the context of the duty to report misconduct; this creates an adversarial process; there should be a system of recognition and reward for the fulfillment of this duty; policy and practice shall prevent retaliation; the Ethics Office's work cannot be reviewed by the tribunals; it cannot take administrative decisions; it cannot undertake investigations; the Ethics Office's work is not amenable to the SG; it is given to "mission creep" where it has introduced major steps, not established as policy: the "initial assessment" which has culled two-thirds of those staff who have reported misconduct

and it has introduced the requirement that reporters of misconduct must provide "independent and corroborated" evidence; and a belated shift in the burden of proof; the shift in the burden of proof to the management should be established for all steps related to the reporting and resolution of misconduct, retaliation and its prevention, the "initial assessment" and the "preliminary review" and not just following the finding of a prima facie case; it also requires the reporter to report misconduct to one office (OIOS) and retaliation to another (the Ethics Office); this bifurcation or splitting of responsibilities makes clear the lack of systems analysis, the lack of coherence, the lack of rational consistency, that has been brought to bear in the preparation of this policy; the OIOS is not required to investigate the reports of misconduct; there is no provision for the OIOS investigation report on the misconduct to be provided to the Ethics Office before undertaking its work with respect to retaliation; analyses of misconduct by the OIOS should inform analyses of retaliation by the Ethics Office; there is no provision that measures with negative impacts be rescinded until determined they were not taken in retaliation for the reporting of misconduct; **f**ailure or refusal to investigate is, perhaps, the most effective, least aggressive form of retaliation; the Ethics Office cannot prevent the reporter from being damaged; there is no longer a provision for the "establishment of misconduct or retaliation"; "when established, retaliation is by itself misconduct." has been eliminated; retaliation is no longer established as misconduct; misconduct and retaliation are tossed between the GA and the SG; following ten years of operation, the matter of prevention, as an element of protection, has only recently been introduced; only the OIOS can call the attention of the Ethics Office to the need for prevention in certain cases; its D-1 cannot hold his or her own against the USGs; investigations of allegations of misconduct and retaliation and steps related to the prevention of retaliation are not done by the same office, preferably the OIOS; the Ethics Office has consistently formulated ever more stringent requirements that have ensured an ever lower level of protection for the staff member, an increase in protection for the manager or administrator and a diminished prospect for accountability; the Ethics Office has not claimed in its annual reports to having protected even one staff member from retaliation over the past 11 years; the Ethics Office does not seem to have reported on a) the number of times it has effected a shift in the burden of proof, b) the numbers of staff protected from retaliation, c) the numbers of cases of misconduct found, d) the numbers of cases of retaliation found and e) the outcomes of those cases; the Ethics Office, from all of its analyses of allegations of retaliation, seems to have identified few practices or issues, whether by staff or managers, to which attention should be called to address the very significant numbers of real or perceived breaches of policy. Nowhere is a determination revealed that misconduct and retaliation are not to be tolerated.