

“A Comparative Analysis of the U.N. and UNDP Whistleblower Protection Policies”
Prepared by the Government Accountability Project (GAP)

GAP SUMMARY OF UNDP COMMENTS

February 21, 2008

UNDP’s defense of its whistleblower protection policy is based on an inaccurate interpretation of SGB/2005/21, which GAP helped to draft originally. The Under Secretary General for Management intended the application of a single ethical standard to the UN Organization, as demonstrated below. UNDP explains the Program’s weaker whistleblower protection policy by citing UNICEF and UNFPA’s policies, but that begs the question. Those policies also dilute and violate SGB/2005/21, the authoritative standard.

Moreover, UNDP fractured ethical standards much farther than these Funds by establishing a separate internal Ethics Office and refusing to recognize the jurisdiction of the UN Ethics Office when it ordered an investigation of the allegations of a UNDP whistleblower. This initiated a chaotic sequence of events that has left whistleblowers without meaningful and effective recourse as UNDP and the other Funds and Programs establish *ad hoc* processes for addressing retaliation.¹

In a number of instances, UNDP explains the differences between its policy and the Secretariat’s by citing the UNICEF and UNFPA policies, which also tend to be weaker, often in similar ways. But this argument does not really address the problem of a deficient policy for whistleblowers. Further, there is a fundamental distinction between the way in which UNICEF has handled this issue and the reactive approach of UNDP (We have not spoken to UNFPA).

Early in 2007, one year after the publication of SGB/2005/21, UNICEF quietly developed its own whistleblower protection policy. Public comment was not solicited. Nor was a press release issued. The new policy was never externally posted.² Nonetheless, the matter rested there. UNDP did not adopt its own policy at that time. Over one year later, when the UN Ethics Office found that a UNDP whistleblower had a *prima facie* case of retaliation, UNDP hastily adopted its own policy, replicating the weaker UNICEF policy rather than the stronger Secretariat policy. Then UNDP went further and established its own Ethics Office, naming a 30-year veteran of the Program to lead it rather than recruiting a neutral outsider, as the Secretariat had done.

It is conceivable that, in the wake of SGB/2005/21, an additional administrative step was necessary to reinforce the UN Ethics Office’s capacity to oversee the Funds and Programs.

¹ That said, we recognize that UNDP has changed the policy we analyzed since we wrote our initial comments. All changes are noted and analyzed below.

² When GAP sought to obtain the policy, we were obliged to submit a request in writing describing our organization and our objective in seeking the document. In short, the UNICEF policy was closely held. When GAP did obtain the policy, we saw that it was, in fact, weaker than SGB/2005/21 in critical ways.

That is no excuse for the UNDP Administrator to evade the responsible Ethics Office's jurisdiction, especially just after an embarrassing finding that one of his senior operations officers in a crucial post had suffered retaliation for disclosing misconduct. All new policies and standards go through growing pains to establish a functional implementation plan. But the UNDP Administrator not only has splintered application of a single ethical standard; to date he has eliminated credibility for the U.N.'s institutional commitment to protect whistleblowers.

It is urgent that the UN Ethics Committee take steps to harmonize all Funds' and Programs' whistleblower policies to meet the standards established by ST/SGB/2005/21. We recognize that the November 2007 Legal Framework of UNDP addressed some of the problems we raised based on the September '07 document, but we also suggest that UNDP immediately amend its November '07 Legal Framework to address the remaining deficits. GAP offers its pro bono services to UNDP to help harmonize remaining inconsistencies, as analyzed below.

UNDP Comments *February 12, 2008³*

UNDP welcomes the attention paid by the Government Accountability Project (GAP) to critical issues of transparency and accountability. We are of course prepared to engage in an ongoing discussion of these issues in the interest of both employee welfare and organizational effectiveness. However, the GAP analysis referenced above proceeds from several mistaken assumptions about both the U.N. Ethics System established by the Secretary General in late 2005 and the UNDP Legal Framework on Standards of Conduct issued in September 2007. It also seems to dismiss the Secretary-General's attempt in his Bulletin of November 30, 2007 to engage the Funds and Programmes in a harmonization of the ethics system across these agencies as a step backwards, rather than the constructive initiative it represents. Finally, the memo contains several important inaccuracies about the applicable provisions, which this response seeks to correct.

Jurisdiction of the U.N. Ethics Office. The GAP's first mistaken assumption is that the ethics policy articulated in the Secretary-General's Bulletins of 2005 applied automatically to the Funds and Programmes--without regard to the separate governance arrangements of these organizations. Although that may also have been the expectation of U.N. Undersecretary Christopher Burnham and others at the time, as GAP asserts elsewhere,⁴ those Bulletins were not in fact developed in consultation with the Funds and Programmes and therefore could not simply be imposed upon them because of their distinct legal and governance structures. Given the obvious disagreement on this point with the GAP, it may be helpful to review how the policies came into being.

- In 2005 then-Secretary General Kofi Annan began exploring the creation of a UN Ethics Office. In the World Summit Outcome Document of September 2005,

³ Prepared by the Washington Liaison Office of UNDP.

⁴ See the December 4, 2007 release "New UN Ethics Guidelines Greatly Misleading" on the GAP website which makes this argument. http://www.whistleblower.org/content/press_detail.cfm?press_id=1253

world leaders urged the Secretary-General to develop a system-wide code of ethics and requested that he submit to the General Assembly details of the planned Ethics Office.

- In separate October 2005 and November 2005 reports to the General Assembly, Secretary-General Annan provided these details. In particular, in the October report he made clear that the relationship between the UN Ethics Office and the funds and programs was yet to be worked out. He wrote, “Consultations with the United Nations funds and programmes are under way to determine cooperative arrangements that might be concluded between them and the Secretariat.”
- In December 2005 Secretary-General Annan established the UN Ethics Office by promulgating a “Secretary-General’s bulletin” on the subject (SGB/2005/21). He also issued a separate Bulletin dealing with the protection of employees who report misconduct (SGB/2005/22). The rules governing these Bulletins state that “Secretary-General’s bulletins shall not, unless otherwise stated therein, be applicable to separately administered organs and programmes of the United Nations.” The 2005 Bulletin that established the Ethics Office did not address the relationship with the Funds and Programs. So it was understood at the time that this was an issue to be resolved in the future.
- In this context, the General Assembly issued a resolution in June 2006 that welcomed the establishment of the Ethics Office and also urged the Secretary-General to “finalize a system-wide code of ethics for all United Nations personnel, including personnel of the funds and programmes, at an early date.”
- U.S. Ambassador to the U.N. Zalmay Khalilzad, acknowledged the confusion regarding the jurisdiction of the Ethics Office in a statement of August 23, 2007: “We believe the Ethics Office should have jurisdiction over all UN employees no matter where they work. We recognize that there are different jurisdictional interpretations and support the Ethics Office[’s] desired approach. We are committed to working with the Secretary-General to fix this problem.”

GAP Response: At GAP, we have cited the operative paragraph of General Assembly Res. 60.1, (para. 161 (d)) in many documents to demonstrate the intention of the General Assembly with respect to the establishment and scope of the UN Ethics Office. There have been numerous arguments developed by UNDP to circumvent the intention of the resolution, all of them spurious in light of the clarity of the expression used by the General Assembly:

We urge the Secretary General to scrupulously apply the existing standards of conduct and develop *a system-wide* code of ethics for all United Nations personnel. *In this regard*, we request the Secretary General to submit details of the establishment on *an* ethics office with independent status, which he intends to create, to the General Assembly at its sixtieth session (emphasis added).

In this resolution, the General Assembly says ‘an ethics office’ when directing the SG to apply a system-wide code of ethics. The intent could not be more explicit, yet UNDP insists on continuing to argue this point.

Similarly, in March, 2006, then SG Kofi Annan said: “[D]uring the course of 2005, I introduced a number of changes aimed at correcting the situation and giving senior management the tools necessary to ensure that *all employees of the Organization* adhere to the highest standards. In particular, the United Nations has established a dedicated ethics Office approved by the Member States; Promulgated strengthened rules to ensure protection against retaliation for those who report misconduct through a new “whistleblower” protection policy...”⁵

Further, we have said that it was the understanding of those who worked on the policy (the UN Under Secretary for Management and GAP), as well as of Robert Benson, who assumed the position of UN Ethics Officer, that a single standard of ethics would apply system-wide, whatever administrative steps would subsequently be necessary to effect that. While it may be true that an additional internal step was required to finalize the application of a single ethical standard across the UN system, there was no reason to assume that this step would be aborted.

Moreover, when GAP inquired of the UN Ethics Office in March, 2006 about the procedures necessary to file a retaliation complaint involving a whistleblower with a UNDP letter of appointment, a UN Ethics Officer told GAP to file it with her and sent a claim form. Earlier, she had done this with another UNDP whistleblower, and subsequently she did the same thing. All in all, these three UNDP whistleblowers, in addition to Artjon Shkurtaj (see below) were told by the UN Ethics Office to file their complaints there, so clearly the Ethics Office staff labored under the same illusions that GAP did about their jurisdiction.

In addition, Kemal Dervis, Administrator of UNDP, did not stop the UN Ethics Office from considering the case of Artjon Shkurtaj, a UNDP whistleblower who was also told to file his retaliation complaint with the UN Ethics Office. Only after the Ethics Officer found a *prima facie* case of retaliation did Mr. Dervis announce that UNDP was not subject to the jurisdiction of the UN Ethics Office. This chronology demonstrates that the decision by the UNDP Administrator to secede from Ethics Office jurisdiction was a purely opportunistic one. If the UN Ethics Office had no jurisdiction, in Mr. Dervis’ view, he should have stopped the review of the Shkurtaj case immediately so the Office did not waste time and energy examining a case it was not authorized to assess.⁶

Finally, the UN system has been reforming to avoid duplication of effort and ‘deliver as one’ for several years. In light of this general and overarching mandate for the system as a whole from the General Assembly, why would the Secretary General think it appropriate to fracture the Ethics Office rather than ratify its jurisdiction?

⁵ “Investing in the United Nations for a Stronger Organization Worldwide” A/60/692 Box 1.

⁶ Because of the extensive press coverage of the allegations, Mr. Dervis cannot credibly claim that he was unaware that a retaliation complaint had been filed with the UN Ethics Office.

While it may be true that an additional administrative step was necessary to clarify the relationship between the Ethics Office and the Funds and Programs, this is not the same as advocating the establishment of multiple ethics offices. The Heads of the Boards of the Funds and Programs report directly to the Secretary General, and he has authority if he wishes to exercise it.

There may be justification for some separate budgets, staff regulations, and mandates among the Funds and Programs. It is inexcusable, however, to claim after the fact that the Ethics Office conclusions are irrelevant, or that different ethical standards are necessary. As a consequence, for the past two years, numerous UN whistleblowers have been forced to play a shell game with their livelihoods, incomes and careers, while the Executive Heads of UN Funds and Programs, together with the Secretary General, move the applicable protections and regulations from one powerless venue to another.

UNDP Comment: Meanwhile, UNDP sought to revise and enhance its existing policies on employee conduct and reporting of wrongdoing. Those revised policies were set out in its September 20, 2007 “Legal Framework for Addressing Non-Compliance with UN Standards of Conduct”. They are based on the approach of the Secretariat in the Secretary-General’s two Bulletins of 2005. Where there are exceptions to the Secretariat’s approach, they relate to differences in organizational considerations and track provisions adopted earlier by UNICEF and UNFPA.

GAP Response: The fact that UNICEF and/or UNFPA adopted weaker provisions for whistleblower protections than the Secretariat’s is as unjustified as UNDP’s attempt to do so. Moreover, neither UNDP nor UNFPA did this in direct reaction to the ruling in a specific whistleblower complaint that found retaliation in their agencies. Nor did they take the further step of balkanizing the Ethics Office by setting up subsidiaries of their own. UNICEF only took this step later, after UNDP’s precedent.

UNDP Comment: The Legal Framework provided a comprehensive expression of the application of UN Staff Regulations 10.1 and 10.2 and Chapter X of the Staff Rules to UNDP. This document updated and replaced the Accountability, Disciplinary Measures and Procedures that were approved on 1 January 2004. Among the major changes were:

- Expanded provisions defining the rights and obligations of staff in reporting wrongdoing, including regarding whistleblower protection;
- More detailed definition of the delegation of authority, including the authority of the Associate Administrator in the application of the disciplinary process and measures; and
- Clarification of the due process rights of staff members in the course of, and conclusion to, an investigation.

GAP’s different assumption about the 2005 Bulletin accounts for its assertion that the second Bulletin on ethics reform issued by the Secretary General on November 30, 2007, weakens whistleblower protections and “complicates and confuses the

issue...exempting the Funds and Programmes from the jurisdiction of the U.N. Ethics Office.” In fact, the 2007 Bulletin is a step in the direction of greater coherence, reflecting a consensus among the Secretariat and the Funds and Programmes to promote a more harmonized ethics system, notwithstanding the formal differences in jurisdiction. This Bulletin, reflecting consultations with the Funds and Programmes, was a significant achievement, not a step backward.

GAP Response: This Bulletin is a step backward, because the SG chose to interpret his predecessor’s Bulletin in restrictive way. However, even with this interpretation, the Secretary General is empowered to extend the jurisdiction of the UN Ethics Office to the Funds and Programs unilaterally.⁷ While the specialized agencies may require separate negotiations because of their relationship to the Secretariat, this is not true of the Funds and Programs, where the Executive Heads report directly to the Secretary General and are subject to his authority.

In electing to allow the fragmentation of the UN ethics system rather than insisting on a single set of standards, the SG opened up to internal debate a proliferating set of questions involving appeal, prevailing standards, decision-making, parallel authorities, separate exemptions and types of protection for different classes of employees, etc. GAP has elaborated in another document the escalating confusion as a result of SGB/2007/11.

UNDP Comment: The same difference of assumptions is also the basis for GAP’s criticism of UNDP’s Administrator, Kemal Dervis, in declining in June 2007 to recognize the jurisdiction of the U.N. Ethics Office to take up the case of Artjon Shkurtaj, who claimed whistleblower status for his accusations about UNDP’s operations in North Korea. That case is now being reviewed by the External Independent Investigative Review commissioned by UNDP in September

GAP Response: This body is an *ad hoc* committee established directly by the Administrator himself, without transparent or objective criteria. Its members were not impartially chosen and have no particular expertise in retaliation complaints. The review panel has already made significant errors in the conduct of its inquiry that prejudice the interests of the whistleblower. For example, the transmission of evidence from Pyongyang to New York was not safeguarded to ensure that no tampering occurred. Nor did the panel act to safeguard the integrity of relevant electronic information. It is not clear whether these shortcomings were the result of inexperience, incompetence or disregard, but the end result could seriously jeopardize the appellant’s case.

(According to its website, GAP represents Mr. Shkurtaj in this matter.)

⁷ The Charter describes the Secretary-General as "chief administrative officer" of the Organization, who shall act in that capacity and perform "such other functions as are entrusted" to him or her by the Security Council, General Assembly, Economic and Social Council and other United Nations organs. As cited above, the General Assembly clearly charged the Secretary General with the establishment of a *single ethics office* (General Assembly Res. 60.1, para. 161 (d)).

GAP Response: We represent Mr. Skurtaj in a non-litigation capacity, but Mr. Shkurtaj is represented by George Irving in his dealings with the review.

However, Mr. Dervis' understanding was also supported by the head of the U.N. Ethics Office, Robert Benson, in his recent appearance before the Senate Permanent Subcommittee on Investigations—despite the initial statements he made shortly after assuming his new position last spring.

GAP Response: No comment necessary here concerning Mr. Benson's shifting positions.

UNDP Comment: The new approach by the Secretariat and the Funds and Programmes should accomplish much of what the GAP is advocating, by promoting greater clarity and consistency throughout the U.N. system on the basic rights and standards that should apply in all organizations and affording staff members an opportunity for a review of their claims, on appeal, by the U.N. Ethics Office.

GAP Response: On the contrary, the SGB/2007/11 opened a Pandora's Box of questions and confusion about which standards and authorities apply in which instance, and which standards will prevail on appeal. In fact, even the procedures of appeal to the new Ethics Committee are unclear and can be changed from case to case. Mr. Benson, speaking in a press conference, told a questioner that in dealing with existing whistleblower allegations, decisions would be made on a case-by-case basis. This *ad hoc* decision-making is exactly what meaningful enforcement of ethical standards is meant to eliminate.

UNDP Comment: Point-by-Point responses. Regarding the more specific issues covered in the GAP memo:

Original GAP Comment

- “The [2005] policy covered all United Nations operations, down to the level of contractors, without any stated exceptions.”

UNDP Comment: This is mistaken. Both UNDP and the UN treat contractors in the same manner. In fact, both use the same language: “Any retaliatory measures (including threats) against a contractor or its employees, agents or representatives, or any other individual engaged in dealings with [UNDP] because such person has reported allegations of wrongdoing by a staff member will be considered misconduct that, if established, will lead to administrative and/or disciplinary action” (see section 8 of the SGB and para. 53 of the UNDP Legal Framework (LF); and UNICEF (para. 25).

GAP Response: GAP is not mistaken. While the language above is the same, the provision cited by UNDP deals with establishing that a *retaliator* should be *disciplined*. GAP is more concerned with establishing that a *whistleblower* should be *protected*. In the UN policy, protection from retaliation, and therefore eligibility for relief and vindication, is extended to “any staff member, regardless of type of appointment, intern or United Nations volunteer” (para.2.1). In fact, after SGB/2005/21 was issued, GAP staff worked with the UN Under Secretary for Management to develop explicit language to cover UN

contractors. Before this language was finalized, the controversy involving UNDP developed and further progress on the explicitness of contractors' coverage stopped. To verify this, please contact Ms. Cass Durant, formerly from the office of the UN Under Secretary for Management.

In contrast, the UNDP Legal Framework explicitly *precludes* protection for: "Independent contractors working with UNDP under Special Service Agreements" (2.2. 6 (d)). Moreover, it does not apply to UNDP staff members seconded to another agency, locally-recruited staff seconded to another agency, people employed under service contracts, volunteers or interns. Ironically, those employees are now explicitly covered by the SG's 2005 policy, and explicitly excluded by UNDP's substitute.

The UNDP statement here is also an error of fact. UNDP misrepresents the terms of the UNICEF policy, which does not explicitly exclude contractors from coverage the way that the UNDP policy does. UNICEF's policy applies to all "UNICEF staff members," but the policy fails to define who is included under this definition. Presumably, contractors and others who are exempt under UNDP's policy, may be covered by UNICEF's policy. Interestingly, UNDP does not cite the WFP policy, which does include contractors explicitly.

Original GAP Comment

- *"But this year [2007] the United Nations Development Program (UNDP) has refused to honor the 2005 policy and accept the procedures, replacing a basis for genuine protection with a gutted policy of its own."*

UNDP Comment: UNDP's new Legal Framework in 2007 was intended to clarify and strengthen, not weaken the protection of whistleblowers (See paragraph above on narrowing the scope of protection at UNDP). To call it a "gutted policy" is inaccurate and unfair.

GAP Response: The GAP analysis sets out specific changes in language that weaken the policy, none of which are addressed in this UNDP response. Furthermore, the GAP memo discounts the steps taken in the Secretary General's Bulletin of November 30 to promote a more harmonized system, which UNDP does support and in fact was instrumental in facilitating among the Funds and Programs. **GAP Response:** If this step had not been taken in response to the Shkurtaj case, there would not be any need to 'harmonize' ethical standards in the first place. There would be a single set of ethical standards.

Original GAP Comment

- *"Most significant, UNDP has refused to accept the authority of either the Ethics Office or the U.N. appeals process as enforcement of the policy."*

UNDP Comment: This is not true. GAP confuses our original position that the U.N. Ethics Office lacked formal jurisdiction over UNDP (see above) with the current policy stated in the Secretary General's Bulletin of November 30, which we support.

GAP Response: GAP's position is accurate. The UNDP Administrator aborted an investigation after a finding of retaliation was returned by the UN Ethics Office, although the Ethics Officer appealed to him to allow investigators to proceed. Under the SGB of November 30th, whistleblowers may appeal an adverse decision from the ethics office of a Fund or Program to the Chairperson of the Ethics Committee, but the criteria for the committee's accepting the case for review are unspecified and completely discretionary.

Original GAP Comment

- *“Instead, whistleblowers must submit to an internal grievance system controlled by offices that represent the adverse parties in both the investigation and any subsequent appeal – an inherent conflict of interest.”*

UNDP Comment: This is incorrect. UNDP's appeals process is the same as in the UN -- the Joint Appeals Board and then the UN Administrative Tribunal; only the first level of review is within UNDP – the request for administrative review – as it is within the Secretariat and the other Funds and Programmes.

GAP Response: This statement was correct when it was written. Our statement dealt with whistleblowers and their lack of protection under the internal UNDP policy. Whistleblowers at the UN can appeal to an impartial and independent Ethics Office. They are not solely dependent on the Joint Appeals Process. Further, no one in the Organization can retaliate against a whistleblower for reporting to the Ethics Office. At the time GAP wrote this analysis, UNDP did not have an Ethics Office. The whistleblower (Artjon Shkurtaj) who was appealing for protection at the time was relegated to an inquiry conducted by a panel personally appointed by the UNDP Administrator, whom Shkurtaj has implicated in his case. This is a conflict of interest. At this time, also, the Office of Audit and Performance Review (OAPR) was to evaluate a complaint for a *prima facie* case of retaliation and then make a *recommendation* to the Legal Services Office (LSO) of UNDP. LSO, of course, defends management in an employment-related dispute. It is true that a second version of the UNDP Legal Framework partly corrected this explicit conflict of interest by having the Ethics Advisor decide whether or not there is a *prima facie* case. However, this decision can be made in partnership with the Office of Human Resources (OHR), which may have a conflict of interest. Retaliation often occurs as an administrative action that is implemented by Human Resources.⁸ Further, even in the new policy, once an investigation finds that retaliation or a threat of retaliation is established, the case is referred to LSO for disciplinary action. LSO, which has an inherent conflict of interest, can then recommend suspension, exoneration of charges, or other courses of action.

Original GAP Comment

- *“UNDP's secession threatens to precipitate a stampede among other U.N. agencies, which already are preparing their own internal Balkanized whistleblower programs.”*

UNDP Comment: There is no “secession” involved, because there was no unified system to secede from. The progression is actually in the opposite direction; UNDP's policy is

⁸ GAP represents a client who has suffered through this process, and has not been given access to an independent ethics office retroactively.

largely based on the Secretariat policy. All differences are consistent with the UNICEF and UNFPA policies which preceded the UNDP policy and hence did not originate with UNDP.

GAP Response: The Secretary-General nominates the Administrator of UNDP, in this case Kemal Dervis, who therefore, reports to the SG. Dervis' decision to ignore the UN Ethics Office, established by the SGB, is tantamount to secession. In addition, UNDP's Executive Board is subordinate to the UN General Assembly. The Assembly elects ECOSOC, whose members elect UNDP's Executive Board. Therefore, unilateral action like the refusal to submit to a ruling of the Ethics Office is, at the very least, an act of insubordination.

Original GAP Comment

- *“The impact would be to limit the U.N. whistleblower policy’s authority to the relatively small Secretariat staff, allowing the much larger funds and programs to substitute a shell version weakened by conflict of interest, to deal with ethical breakdowns at their headquarters and country offices. This is especially troubling, given the unique oversight challenge for widely dispersed field offices where ethical violations most commonly occur and have the greatest impact. Since the U.N. has been the pace setter for other IGO whistleblower programs, the precedent can be expected to spread to the Multilateral Development Banks.”*

UNDP Comment: UNDP’s policy is not a “shell version.” Once again, this comment does not take into account the appeals mechanism established under the latest SGB that the UN Secretariat and the Funds and Programmes have agreed on. (Nor, for that matter, is the Secretariat staff “relatively small”. It includes several substantial organizations, including the Department of Political Affairs and the Departments of Peacekeeping which presently manages more than 100,000 civilian and military staff around the world).

GAP Response: As an example of the shell game played by UNDP, GAP represents a client who appealed to the UN Ethics Office for protection after he reported misconduct by the security officer in the UN house on Turkey. This whistleblower was a locally-recruited staff member (by UNDP) assigned to another agency (UNDSS). When he appealed to the UN Ethics Office in July, '07, the UNDP protection policy did not exist and he appeared to be covered by SGB/2005/21. In September, 2007, UNDP issued its own policy, which explicitly excluded from protection “locally-recruited staff assigned to another Agency, Fund or Programme who have UNDP letters of appointment but are considered staff members of the Agency, Fund or Programme and are administered on behalf of that Agency, Fund or Programme by UNDP” (2.2.6 (d)). Nonetheless, the UN Ethics Office then forwarded this complaint to the UNDP OAPR, which evaluated the complaint without considering the issue of retaliation and found the complainant was ineligible for relief.⁹ GAP will now appeal to the UN Ethics Committee, under the terms

⁹ There were serious due process issues in this investigation. For example, on November 5, GAP representatives and the whistleblower participated in a phone call with two OAPR representatives. During this discussion, OAPR officials told GAP they would report the conclusions of their investigation to LSO. GAP asked them if, when they reported to LSO, they would make a recommendation. They replied that they

of SGB/2007/11, but it is unclear whether the Committee can accept the case, as the complainant is not covered by the current UNDP protection policy (adopted *after* the complaint was filed), although he was covered by the original SGB on protection from retaliation 2005/21.

On staff size of the Secretariat:

As of 30 November 2005

Population: Includes internationally and locally recruited staff, regardless of length of contract; excludes United Nations staff administered by other organizations.

Location	Number of staff members	Percentage
Headquarters (includes UNOG, UNOV, UNON)	10,340	36%
Regional commissions	2,505	9%
Field locations	16,280	55%
Total number of staff members	29,125	100%

GAO data.

Roughly the same number of employees staff the Funds and Programmes. UNDP is correct about the additional size of the peacekeeping forces, however.

“Principal Distinctions between the U.N. Policy and the UNDP Legal Framework”

Original GAP Comment

“1. Statute of limitations: No other factor cancels rights more often than an unrealistic statute of limitations. The U.N. policy has a six year time limit to report misconduct and no time limit to report retaliation. (Section 2.1) UNDP’s substitute allows only 60 days to report retaliation, a restriction rejected in all relevant U.S. laws since the 1980’s. (Paragraph 40)¹⁰”

were only ‘finders of fact,’ and had no authority to draw conclusions from the information that came to light as a result of their inquiry. At this point in the discussion, GAP pointed out that, under the UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct, adopted September 20, 2007, OAPR was expressly charged with the responsibility for deciding, based on a preliminary review, whether a grievant had suffered retaliation as a result of a disclosure of misconduct. This determination was to be forwarded, not to LSO, but rather to the Director of OAPR, where the course of the subsequent investigation should be determined. OAPR investigators were not aware of their duties under the policy on November 5. The next day, however, a new Legal Framework was apparently adopted that shifted these responsibilities away from OAPR. Despite its representation of three UNDP whistleblowers, neither the whistleblowers nor GAP were informed that a new Framework had been adopted until several months later.

¹⁰ Citations to the U.N. policy are referenced as sections. Citations to the UNDP policy (September 20, 2007 version) are referenced as paragraphs.

UNDP Comment: This is incorrect. The UN policy requires that reports of misconduct be filed “as soon as possible”. UNDP’s policy does provide for reporting of retaliation within 60 days; the UNFPA policy provides for 30 days; UNICEF’s 60 days. Opinions will certainly vary as to whether it is preferable to have a lengthy opportunity to come forward with claims of retaliation, or whether it is more effective to promote more expeditious claims while the evidence is more readily available and remedial steps can more quickly be taken. Moreover, as indicated above, under the 2007 SGB UNDP staff members can now appeal to the United Nations ethics office if they feel unfairly limited by the time frames for reporting retaliation (section 4.3).

GAP Response: The response here does not contradict what GAP has said, i.e., the UN policy has no time limit to report retaliation and the UNDP policy does (60 days). Many whistleblowers do not even realize that there has been retaliation until their contract is not renewed, for example, some months after they have reported misconduct. Moreover, the explanation UNDP provides here simply illustrates the problem of proliferating statutes that GAP has emphasized throughout this exercise. If a whistleblower at UNDP appeals within 90 days but not 60 and receives no relief from UNDP Ethics, can he or she then appeal to the UN Ethics Committee? The Committee would then presumably apply the limit of 60 days for reporting retaliation to UNDP whistleblowers, but Secretariat whistleblowers appealing to the same committee have an unlimited period in which to report. At the same time UNFPA whistleblowers must report retaliation within 30 days. As it stands, the Ethics Committee must apply the three different reporting standards to staff members of the different agencies, although there is no reasonable justification for doing so.

Original GAP Comment

*“2. **Staff covered:** Access to the U.N. whistleblower policy is loophole free while the UNDP substitute is saturated with arbitrary loopholes limiting its relevance. UNDP excludes protection for seconded staff members, independent contractors, employees with service contracts, employees without a formal UNDP letter of appointment, some locally recruited staff, interns and volunteers (Paragraph 6).”*

UNDP Comment: This is also not correct. The UN policy covers staff, interns and volunteers. It does not cover contractors or people on service contracts. The UNDP policy covers staff, but not contractors, which is also the position of UNICEF (paragraphs 1 to 3) and UNFPA (paragraph 3). The fact that UNDP excludes staff members seconded or exchanged with regard to incidents that occur during their secondment or exchange is appropriate, since during this period seconded staff are serving with the receiving organizations and would be covered by their policy on protection against retaliation. This is consistent with the general framework for seconding staff among UN organizations. The fact that the protection against retaliation provided for in the UNDP Legal Framework does not apply to contractors, contract employees, volunteers and interns is consistent with the scope of application of the Framework itself (which is limited to UNDP staff).

GAP Response: UNDP’s explanation is not correct. As explained above by GAP, the UN policy does not explicitly exclude contractors – or anyone else – from coverage. UNDP’s policy does.

The World Food Programme’s (WFP’s) policy, in contrast, is much more inclusive than UNDP: it covers national and international staff, consultants, interns, service contract holders, special service agreement holders and volunteers.

UNDP Comment: Moreover, as indicated above, the UNDP Legal Framework seeks to prevent retaliatory measures (including threats) against contractors or any other “individual engaged in dealings with UNDP” who report allegations of wrongdoing. Under paragraph 53 of the Legal Framework, retaliatory measures (including threats) could, if established, lead to administrative and/or disciplinary action.

GAP Response: As also explained above, UNDP’s policy only mentions contractors in the context of potential discipline of those who retaliate against them, which is not the same thing as protecting them from retaliation in the first place.

Original GAP Comment

“3. ***The independence of investigations:*** *While impartiality in the investigation process is difficult to ensure, the establishment of the U.N. Ethics Office independent of both the Office of Human Resources (OHR) and the Office of Legal Counsel was an important step in protecting internal review from improper influences. The U.N. policy empowers the Ethics Office to do investigations of alleged retaliators like the Office of Human Resources (OHR). (Section 5).”*

UNDP Comment: Actually, this is not true. The U.N. Ethics Office does not conduct formal investigations. It receives complaints of retaliation, does a preliminary review and if warranted refers to the Office of Internal Oversight Services (OIOS) for further investigation. UNDP has the same approach: preliminary review and referral for investigations. Furthermore, as in the Secretariat, the Ethics Office in UNDP is independent of both OHR and the Legal Support Office (LSO).

GAP Response: At the time GAP made this observation, UNDP had rejected the jurisdiction of the UN Ethics Office but did not have an Ethics Office of its own. During that period, the determination of a *prima facie* case of retaliation was made by OAPR, which transmits its conclusion to the Legal Services Office. LSO is, in fact, the office that defends management in a retaliation dispute and therefore has a structural conflict of interest. This changed in November, 2007, but a case remains in the dispute process that has not yet been decided anywhere.

Original GAP Comment

- “*However, under the UNDP policy, its internal ethics office consults with OHR to determine if a violation has occurred. (Paragraphs 12 and 28) This substitutes a process for consensus with the target of what should be a wrongdoing investigation.”*

UNDP Comment: This is incorrect. Para. 12 refers to the policy on Sexual Harassment, not the policy on Retaliation. There is no reference in the retaliation policy about consulting with OHR to determine if a violation has occurred. Para. 28 provides that reports of retaliation should be submitted to the Ethics Advisor and/or to the Office of Audit and Performance Review (OAPR). (OAPR would refer the report to the Ethics Advisor for a preliminary review, per Chapter II of the Legal Framework, if it relates to retaliation).

GAP Response: GAP referenced an earlier version of the framework, which was the only one available at the time. We now have the November 6, 2007 version. The UNDP assertion is a bluff. The relevant structure with an institutionalized conflict of interest remains in place. In the latest version the operative paragraph is 42 (c), with emphasis added.

42. The functions of the Ethics Advisor with respect to protection against retaliation for reporting allegations of wrongdoing are as follows:

- (a) to receive complaints of retaliation;
- (b) to keep a confidential record of all such complaints;
- (c) *to do an initial review of the complaint to determine (if necessary, in consultation with OHR and OAPR) if:*
 - (i) the complainant engaged in a protected activity;
 - (ii) the action alleged to be retaliatory or a threat of retaliation did take place; and
 - (iii) there is a prima facie case that the protected activity was a contributing factor in causing the action alleged to be retaliatory or a threat of retaliation.

Original GAP Comment

- *“Further, the UNDP Legal Support Office is responsible for receiving reports of allegations of wrongdoing, reviewing those reports, deciding whether an allegation is worth investigating and, in the event of a hearing, representing the administration. (Paragraph 10) Establishing a structure in which the same office that will represent UNDP management decides whether an allegation, possibly implicating management, will be pursued institutionalizes a conflict of interest.”*

UNDP Comment: The text does not provide for the Legal Support Office to decide whether an allegation is worth investigating. LSO recommends action based on an investigation, except that in connection with claims of retaliation, the Ethics Advisor recommends appropriate action following the investigation. In addition, OAPR itself receives directly reports of wrongdoing; OHR receives reports of harassment, and Ethics receives complaints of retaliation. Moreover, the role of LSO in UNDP is consistent with

the roles of the legal functions in the other Funds and Programmes and of the Administrative Law Unit in the Secretariat.

GAP Response: Once again, GAP is dealing with a moving target. We were citing the September 20th framework and UNDP now refers to the November, '07 framework. Between the two versions, the division of labor changed, but the conflict of interest for LSO again remains.

November '07 version:

Para. 50. If the investigation finds that retaliation or threat of retaliation is established, the Ethics Advisor shall:

- (a) Refer the case to the Director, LSO for disciplinary action against the staff member who was found to have engaged in retaliation;
- (b) Make recommendations, *in consultation with the Director, OHR and the Director, LSO*, to the Administrator for appropriate measures aimed, to the extent possible, at correcting negative consequences suffered by the staff member as a result of the retaliatory action.

LSO remains in the position of representing the defendant, deciding on relief for its client's victims, and deciding on discipline to hold its client accountable.

Original GAP Comment

“4. Public freedom of expression: The U.N. policy allows whistleblowers, in certain instances, to make their disclosures outside internal channels, enabling them to go to the public, media or Congress. UNDP, however, defines “external” as outside of “established UNDP internal mechanisms,” and cites a preference for ‘external’ disclosures directly to the Administrator or Office of Internal Oversight Services (OIOS). While these offices are outside of the ‘established internal mechanisms,’ they are still internal. In other words, in the UNDP Legal Framework, ‘external’ reports ‘must’ be preferably made to ‘internal’ offices.”

UNDP's provision 32 on this point is identical to the UNICEF provision 11. As in any public or private sector organization, the right of freedom of expression does not extend to information that is appropriately treated as confidential for the purposes of internal operations. For this reason, the Legal Framework, para. 32, which is in line with the UN SGB and the UNICEF document, provides for an exception so as not to be in violation of the UN Charter or Staff Regulations.

GAP Response: Although the UNICEF provision is similar to the UNDP policy, neither meets the standards set in the UN SGB policy, which allows for disclosures that are “external” to the UN. This was the cornerstone of the U.N. reform: for the first time at an IGO, the right to public freedom of expression was codified. The agency policies entirely eliminate that First Principle.

Further a whistleblower policy should include a ban on "gag" orders through an employer's rules, policies or nondisclosure agreements that would otherwise override free speech rights and impose prior restraint. Neither the UNICEF nor UNDP policy prohibits gag orders, and both treat institutional confidentiality as more important than public health and safety or the law.

Original GAP Comment

- *“Given the confused and confusing semantics of this provision, it is unlikely that a whistleblower, forced to go to the press with a disclosure about imminent danger to public health, for example, would be protected. (U.N. Section 4; UNDP Paragraph 32) This would functionally eliminate the right to public freedom of expression, which was the primary reform of the U.N. policy. That right is the cornerstone for the 2005 Leahy-Lugar MDB transparency amendments for MDB’s now codified in Sec. 1505 of 22 USC 262o et seq. It should apply to any IGO, especially the U.N.”*

UNDP Comment: The UN Charter and the Staff Regulations and Rules restrict staff members’ rights to speak to external sources, including member states, about internal UN information and affairs so as to protect the independence of the international civil service. This principle is fundamental to the United Nations and is enshrined in Article 100 of the Charter. The retaliation policy is thus a narrow exception to these prohibitions. Staff are encouraged to address matters using internal mechanisms and only resort to external mechanisms strictly in accordance with the policy. Moreover, UNDP has followed the UNICEF policy here.

GAP Response: UNDP does not contradict GAP’s argument in any way. UNDP (and apparently UNICEF) complicated the matter of external disclosure for a whistleblower reporting a danger to public health and safety and seeking protection from retaliation.

Original GAP Comment

“5. Non-emergency third party disclosures of illegality: The UNDP substitute adds a poison pill to the scope of protected external disclosures of illegality, even when national or international law is violated and internal mechanisms are unavailable. Whereas the U.N. policy allows a whistleblower to make a public disclosure to avoid “violations of national or international law” (Section 4), the UNDP Legal Framework (paragraph 31) enables whistleblowers to report externally only if they are seeking to avert a “violation of national or international laws with immediate adverse impact on life or property.” In addition to drastically shrinking potentially protected disclosures, it is impossible for any whistleblower to know the gravity of the result until after the fact. It means employees must guess whether they have rights before breaking ranks to challenge illegality.”

UNDP Comment: UNDP again adopted the UNICEF approach here – the provisions are identical. As already stated, reporting outside of the Organization should be exceptional and the provision is making that clear; otherwise reports should be made using existing mechanisms as required in the UN Charter and the Staff Regulations.

GAP Response: The fact that UNICEF also adopted a more restrictive standard for external disclosure does not make the UNDP policy any more respectable.

Original GAP Comment

*“6. **Protection against passive retaliation:** The U.N. policy covers “any direct or indirect detrimental action recommended, threatened or taken” because of protected conduct. (Section 1.4) This approach protects against common forms of passive retaliation, such as refusal to give assignments, or denial of training/resources/access to information. The UNDP substitute eliminates the ban on passive reprisals, requiring that “the action ... did take place.” (Paragraph 41)”*

UNDP Comment: The Legal Framework does not exclude passive retaliation. The point is that whatever the form of retaliation, the individual is requested to provide substantiation in submitting the complaint. This wording is identical to the UNICEF policy, para. 13.

GAP Response: With respect to passive retaliation, once again, the fact that UNICEF also adopted a more restrictive standard does not make the UNDP policy any more respectable.

Original GAP Comment

*“7. **Whistleblower’s legal burden of proof:** No matter what the stated rights and due process rules, whistleblower laws are traps to rubberstamp reprisals without fair standards to decide who wins and loses. The U.N. policy specifies that an employee’s burden is that protected whistleblowing was relevant as a “contributing factor” to alleged retaliation. This objective test is the standard in every American whistleblower law since 1989, as well as in OAS, World Bank and African Development Bank policies. UNDP’s substitute has no objective test. It can vary arbitrarily from case to case based on subjective judgments of the ethics-HR team or Administrator. The UNDP Legal Framework also gratuitously shifts the burden of proof to employees in summary dismissal cases. (Paragraph 2.7.2 (b))”*

UNDP Comment: GAP is mistaken: they refer to the provision in the Rules of procedure of the DC (Annex I to the Legal Framework) which explains under what conditions a former staff member can file an appeal of the summary dismissal imposed on him/her. It states that “the requesting party bears the initial burden of showing the invalidity or disproportionality of the summary dismissal”. This is normal practice and fully consistent with the jurisprudence of the U.N. Administrative Tribunal. This provision is related to disciplinary action and has nothing to do with retaliation.

GAP Response: UNDP does not recognize that summary dismissal is often a form of retaliation, and without adequate uniform ethical standards a whistleblower could find himself or herself before a disciplinary committee.

Original GAP Comment

“Normally the burden of proof is on the moving party, not the alleged victim. This modification cancels the second cornerstone for any credible whistleblower policy – realistic, modern legal burdens of proof. “

UNDP Comment: If the Ethics Advisor feels there is a prima facie case, it is referred to OAPR for investigation. Based on that investigation, the Ethics Advisor will recommend appropriate action. GAP is here referring to the disciplinary process and the burden in that context is established in the jurisprudence of the U.N. Administrative Tribunal.

GAP Response: GAP wrote this analysis before UNDP had an appointed Ethics Adviser. As the Legal Framework now stands, this process is still unclear, and it is quite feasible that a whistleblower still could confront a disciplinary committee.

Original GAP Comment

*“8. **Poison pill interim relief:** Both policies provide for interim relief, but the language in the U.N. policy creates a legitimate remedy: appropriate measures to safeguard the interests of the complainant may only be taken “with the consent of the complainant.” The UNDP Legal Framework substitutes a Trojan horse by saying that decisions on interim relief will be made “in consultation with the complainant,” which indicates that the whistleblower does not have veto authority over the type of interim relief awarded. These measures, such as transfer or administrative leave, can and often are used as forms of harassment or maneuvers designed to isolate a whistleblower and deny him or her access to evidence. As such, they should only be applied if and when the whistleblower has expressly agreed to them. (U.N. Section 5.6; UNDP Paragraph 46)”*

UNDP Comment: UNICEF also takes this approach to consultation, and UNDP’s policy is based on that approach.

GAP Response: Once again, why are there different standards for consultation in different UN agencies and why does UNDP adopt the weaker of the two?

It is also worth noting that UNICEF’s approach to interim relief is slightly better than UNDP’s. According to UNICEF’s whistleblower protection policy (16 January 2008 version)¹¹, the Ethics Officer can recommend interim relief measures to the Executive Director. UNDP, on the other hand, allows the Ethics Advisor to make interim relief suggestions “in consultation with OHR and OAPR,” a conflict of interest that does not exist in the UNICEF policy.

“Other Issues of Concern”

Original GAP Comment

“A series of additional differences between the two policies are of concern. These include, but are not limited to:

¹¹ It appears that UNDP has referenced the old version of UNICEF’s whistleblower protection policy (20 April 2007) in their responses rather than the new version (16 January 2008).

9. **Diluting language in the U.N. policy:** *It is worth noting that the UNDP Legal Framework often borrows paragraphs virtually verbatim from the U.N. policy, deleting (or adding) only select words and phrases. In doing so, the UNDP Legal Framework weakens the original policy developed for the Organization. For example, the UNDP Legal Framework (Paragraph 41) says (emphasis added to show UNDP language not found in the UN policy):*

The functions of OAPR with respect to protection against retaliation for reporting misconduct are as follows:

- (d) to receive complaints of retaliation;*
- (e) to keep a confidential record of all such complaints;*
- (f) to do an initial review of the complaint to determine (if necessary, in consultation with OHR) if:
 - (i) the complainant engaged in a protected activity;*
 - (ii) the action alleged to be retaliatory or a threat of retaliation did take place; and*
 - (iii) there is a prima facie case that the protected activity was a contributing factor in causing the action alleged to be retaliatory or a threat of retaliation.**

UNDP Comment: This is identical to the UNICEF policy except that OAPR has been changed to the Ethics Advisor and the consultation can be with OHR or OAPR. In any case, the consultation is determined by the Ethics Advisor.

GAP Response: Our original comment is undisputed.

Also, UNICEF's new whistleblower policy (16 January 2008) is *not* identical to UNDP's language. Although section (ii) is in the UNICEF policy, the language "in consultation with OHR" is not included. Therefore, UNICEF's policy does not have the conflict of interest that is introduced when OHR is able to consult on an initial review.

Original GAP Comment

- *"This section, which is nearly identical to section 5.2 of the U.N. policy, deletes or rewords specific provisions in such a way as to prejudice the interests of the whistleblower. Once again, the participation of OHR is introduced into the initial review, which institutionalizes collusion with the defendant and cancels credible impartiality. Moreover, the burden of proof on the whistleblower has been subtly but substantially increased by requiring the complainant to establish that "the action alleged to be retaliatory... did take place." Often, the retaliatory measure is, in fact, a lack of action rather than an explicit action. For example, a staff member's contract is not renewed, or a promotion is not awarded. Under the provisions of the UNDP Legal Framework, the whistleblower in such a circumstance must now establish that non-renewal was, in fact, a retaliatory action."*

UNDP Comment: Evidence of retaliation could be a legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance and non-extension or termination of appointment/employment (para. 52) The burden of proof here, consistent with the Secretariat document, provides: “However, in applying such regulations, rules and administrative procedures to any UNDP staff member, UNDP management must prove by clear and convincing evidence that it would have taken the same action absent the protected activity.” Whatever the circumstances of the retaliation, the individual can provide the substantiation and the matter is reviewed based on the information provided and the investigation.

GAP Response: Substantiating retaliation is not the same as determining that an action did take place. Much retaliation is passive (the training not given, the raise not awarded, the promotion withheld). See above.

Original GAP Comment

“10. Ignoring the realities of U.N. internal justice reform: In December, the UN General Assembly passed a resolution establishing a new system for the administration of justice (A/62/597). This resolution promotes a unified internal justice system and creates a single, integrated Ombudsman office for the UN Secretariat and all funds and programs. The General Assembly is also trying to create a more coherent and unified U.N. structure at the country level through the establishment of Joint Offices and the “Delivering as One” pilot initiative. But at the same time that the U.N. is promoting the idea of a more unified organization, it is taking whistleblower rights in the opposite direction, creating separate systems with no unified standards. The new internal justice system, which has been in development for the past two years, will not function as intended if the funds and programs may select elements that will apply to them and reject others that are inconvenient. The nature of an effective justice system is that it applies to all in the same way, with the same processes, standards, relief and penalties. If the UNDP Legal Framework selectively substitutes itself for the terms of the U.N. policy, the General Assembly’s reform has been disregarded and the process of reform that is underway has been successfully and significantly subverted.”

UNDP Comment: GAP repeatedly exaggerates the distinctions between the UN approach and that taken by UNDP, UNICEF and UNFPA. The few differences highlighted will not “subvert” the process of reform, which will be an ongoing and collaborative process across the organizations involved. UNDP policies are based on the UN approach and only depart where this is consistent with either the pre-existing UNICEF or UNFPA policy for sound operational reasons.

In any case, the latest SG Bulletin of 30 November brings the Ethics Officers together under the Chairmanship of the UN Ethics Advisor to ensure consistency and coherence and an appeals mechanism is contained therein. UNDP is committed to working within this system and making revisions to its policies in the interests of its own Staff, the effective functioning of the organization, and the coherence of the U.N. system as a whole.

GAP Response: GAP will soon release an analysis that exhaustively details how the whistleblower protection policies differ and the dimensions of the developing confusion within the UN system. UNDP is right here, in one sense, however: UNICEF, too, has adopted a lower standard of protection for whistleblowers than the UN Secretariat.

UNDP is not considering the implications for the Organization as a whole of the splintered Ethics Offices and the powerless UN Ethics Committee established by SGB/2007/11. For example, ST/SGB/2007/11 states that:

“In order to safeguard and ensure that all matters associated with the discharge of duties and responsibilities of the Ethics Office of the separately administered organ or programme are independent and free from any undue pressure and influence, *solely at the discretion of the head of a separately administered organ’s or programme’s Ethics Office*, he or she may refer any matter within the Office’s area of responsibility, at any time, to the Chairperson of the United Nations Ethics Committee for advice and guidance, and shall inform the Executive Head of the separately administered organ or programme of the referral made.” (paragraph 4.1, emphasis added)

The Bulletin also states that “Each Ethics Office of a separately administered organ or programme shall be headed by an Ethics Officer, who shall function independently and report directly to the Executive Head of the respective separately administered organ or programme.” (paragraph 2.1). Given this:

- a) If a whistleblower came forward with allegations that implicated senior managers in a program, how would the Ethics Officer deal ‘independently’ with this conflict of interest if he or she reports directly to the head of the program?
- b) Would an Ethics Officer be *required* to refer such a conflict of interest case to the UN Ethics Committee?
- c) What standards would apply to determine that a conflict of interest existed?
- d) Because the program Ethics Officer reports directly to the Executive Head, could the Executive Head of the Program overrule the Program Ethics Officer’s decision to refer a matter to the UN Ethics Committee?

Moreover, these are only a few of the problematic issues created by ST/SGB/2007/11.