Failures of Accountability

The UN plays a central role in the rules-based international order. To maintain credibility, the UN Secretary-General must accept that the UN itself is subject to rules. Publicly, the UN advocates for rule of law as follows:

> "The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."[1]

Unfortunately, not a single one of these principles is applied internally, creating a significant credibility and accountability gap that poses an existential challenge to the United Nations.

I will analyse compliance with the required measures in turn. I will include evidence from my own case, which demonstrates the broader issue of impunity. The UN Administration regularly abuses confidentiality requirements to threaten individual staff not to reveal systemic failures, falsely claiming that confidentiality exists to protect senior managers from public accountability for their decisions, rather than staff members from unwanted publicity or public defamation by the Administration.

1. Adherence to the principles of supremacy of the law

The supremacy of the law requires that no-one is above the law, that the law cannot be broken without consequence, and that breaches should be remedied. This is not the case within the UN, where written rules are regularly flouted for political advantage.

The hierarchy of laws applicable to UN staff gives the UN Charter primacy, followed by rules set by intergovernmental bodies, and finally internal UN rules, policies and procedures. However, this is reversed in practice. The UN Ethics Office and the Chair and Alternate Chair of the Ethics Panel of the United Nations all concur that individual UN staff may arbitrarily decide to ignore the provisions of the UN Charter on equal treatment of all member states, rules set by legislative bodies on the confidentiality of information, and the mandate of UN agencies and programmes (the principle of "do no harm" as regards OHCHR) in order to improve a political relationship with a single member state.[2] The UN senior management has adopted this position on the record before the UN Dispute Tribunal, arguing that it has no obligation to inform member states or even Presidents of intergovernmental bodies when the Administration decides not to apply rules to a particular member state. Indeed, the Administration argues that it may lie both to member states and in its public communications about its policies, and there is no forum in which such lies may be challenged.[3]

Under the tenure of Mr. Guterres, the principle of supremacy of the law has been significantly eroded, creating a class of UN staff that is not subject to rules, and a practice of changing rules in response to the loss of court cases. In particular, rules on abuse of authority and harassment previously required investigation where a report was made in good faith and included sufficient grounds to indicate that rules may have been broken. When a judgement in my own case found

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[1] https://www.un.org/ruleoflaw/what-is-the-rule-of-law/

[2] Outcome of the independent review by the Alternate Chair of the Ethics Panel of the United Nations of the determination by the UN Ethics Office regarding the request for protection against retaliation by Ms. Emma Reilly, 27 February 2018, at paras. 17-18.

[3] Respondent's Reply, case UNDT/2018/099, at para. 115, case UNDT/2017/052, at paras. 57-58, and statements made during hearing of 12 June 2019 in case UNDT/2017/052 (notably from timestamp 00:03:20 following confidential hearing to which I do not have access).

that Mr. Guterres himself had arbitrarily decided not to apply the rules,[4] and led to investigation of a former senior official, UN managers revised the policy to make investigations entirely discretionary in all cases. This was achieved by creating a loophole that already existed for the Office of Internal Oversight Services (OIOS), with the aim that it prioritise investigation of the most serious misconduct: where disciplinary sanctions, which are always at the entire discretion of senior managers, would be unlikely even if the allegations are true, no investigation is required.[5] Thus, cover-ups are now policy, however egregious the wrongdoing. This has an added advantage for corrupt managers of ensuring no staff member can ever access protection against retaliation, which becomes theoretically available only once an investigation begins.[6]

2. Equality before the law

In Mr. Guterres' UN, staff may essentially be divided into two categories: those who enjoy protection of management, to whom no rules apply; and those who do not, to whom rules may be arbitrarily applied to ensure their silence and, if that fails, justify their removal. Persons in the protected category are immune even from the possibility of accountability, and are aware they may breach their professional obligations, and even national laws, with impunity. An OIOS investigator, tired of the double standard, in December 2018 took an audio recording of the UN Director of Investigations, Mr. Ben Swanson, detailing a high-ranking female staff member coming to him in tears because a "favoured son" of the Secretary-General had groped her under her clothing in the workplace.[7] Despite his rhetoric on zero tolerance of sexual assault and harassment, it was only two years later, when the announcement of another promotion for the alleged perpetrator led to a small outcry, that Mr. Guterres finally consented to open an investigation into his "favoured son."[8] Such investigation is, of course, internal.

In the circumstances where investigations into alleged wrongdoing do occur, a majority is conducted not by professional investigators, but by two individuals hand-picked by the manager ordering investigation among current and former UN staff. Such staff receive at most a brief, five-day course on investigation techniques. Persons placed under investigation have no means to object even to the most egregious conflict of interest, and results are almost universally pre-determined. The manager who ordered the investigation has unfettered power to "summarise" the findings to suit the purpose of the investigation, which may or may not reflect the actual findings, which are not required to be revealed in full to the accused.[9] In my own case, while the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG for Management") is supposed to have been under investigation for retaliation against me as a recognised whistleblower since July 2020, she herself placed me under investigation in January 2021 explicitly for the act of whistleblowing itself, despite holding no authority under UN rules to do so.[10]

An essential element of equality before the law is equality of arms. The UN Administration is regularly criticised by the Tribunals for failing to disclose relevant documents. In my own case, the Administration actively sought to conceal a direct instruction from the Secretary-General to the former High Commissioner for Human Rights to comply with recommendations of Ethics Officers

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[4] Judgement UNDT/2019/094, at para. 50.

[5] The test in ST/SGB/2008/5, para. 5.14 was replaced by that in ST/SGB/2019/8, section 5.5, which integrates ST/AI/2017/1 sections 5-12, including notably "[w]hether there is a likelihood that an investigation would reveal sufficient evidence to further pursue the matter as a disciplinary case" (para. 5.5(c)). The Administration has interpreted this to mean that, because disciplinary cases are never pursued where they may cause embarrassment to senior managers, investigation of senior managers is never required.

[6] ST/SGB/2019/8, para. 6.10.

[7] Audio available here: https://soundcloud.com/innercitypress/after-inner-city-press-scoop-on-un-prostitution-now-audio-on-guterres-covering-up-hands-in-pants

[8] See https://www.passblue.com/2021/01/27/the-new-un-tech-envoy-is-put-on-leave-pending-an-investigation/

[9] See ST/SGB/2019/8 and ST/AI/2017/1.

[10] According to ST/AI/2017/1, para. 2.1(a)(v), only the High Commissioner for Human Rights may place staff of OHCHR under investigation, and the High Commissioner denied a conflict of interest in writing by email of 15 May 2020. No intervening circumstance could justify a later conflict.

for my immediate protection, dated 2 April 2018 and still not implemented.[11] As the case concerns failure to protect me, this cannot have been a mere oversight. The Administration suffers no consequences for such contempt of court. Before the UN Tribunals, the UN Administration relies on a substantial legal department, whose lawyers appear to be subject to no accountability. While the rules require that lawyers appearing before the Tribunals comply with rules of Bar Associations, these are rendered meaningless by refusals of UN lawyers and their supervisors to disclose such memberships, which are not in all cases public. Such disclosures are, of course, required from lawyers representing staff as a pre-condition of appearing before the Tribunal. In my own case, there is significant evidence of subornation of perjury, but there is no mechanism by which either the UN lawyer, who refuses to disclose his Bar membership, or even the UN witness who committed perjury can be held accountable.[12]

The only free legal representation for staff members comes from the Office of Staff Legal Assistance (OSLA). The many fewer lawyers employed by that entity are seriously overworked, discouraged by appearing before such a biased court where their opponents will simply re-write rules in rare cases of victory, and subject to a serious, structural conflict. The second reporting officer of every staff lawyer is the Executive Director of the Office of Administration of Justice (OAJ), who in turn reports to the Secretary-General, the opposing party in every court case. The structural conflict is perhaps best demonstrated in my own case, where the Executive Director of OAJ actively misled the General Assembly, engineering the immediate removal on 10 July 2019 of Judge Rowan Downing, who had heard my cases and drafted his judgement, which he expected to issue within 10 days (see section 5, below). While the Administration paid Judge Downing for a further three weeks, he was not permitted to issue judgement but was instead replaced with a new judge. The Administration, of course, declined to investigate this serious interference in the independence of the judiciary, leaving me no option but to represent myself before the Tribunal to challenge the refusal, as OSLA has a structural conflict in every case, but even more so where the misconduct was committed by the very person to whom every OSLA lawyer reports.[13]

3. Accountability to the law

Senior managers enjoy absolute impunity in ignoring the provisions of the UN Charter, rules set by member states, and UN rules. In December 2018, the Director of Investigations of OIOS was caught on tape admitting collusion among three allegedly independent entities - the Administrative Law Section, OIOS and the UN Ethics Office - to ignore the provisions of the written UN policy on protection against retaliation.[14] Instead of conducting any investigation whatsoever, OIOS merely transfers the entirety of a whistleblower's report to the alleged retaliator and requests a written statement that the retaliator considers himself or herself innocent. The reason for this mockery of the written rules was explicit: the farce was necessary "to get the Americans off the UN's back."

Member states sought to allow the UN Administration an opportunity to resolve breaches of its rules before going to court, establishing the Management Evaluation Unit (MEU) in the office of the USG for Management, to which staff must report wrongdoing before applying to the Tribunals. However, this now acts as a mere formality delaying the staff member's access to justice and the possibility, however remote, of accountability. In my own cases, MEU has not even pretended to respect its mandate, but has simply sent a stock response that I should go to court.[15] When a cover-up has reached the highest levels of management, the systems designed to ensure accountability simply break down.

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[11] See Order No. 31/GVA/2019 (unpublished) and subsequent unpublished order currently unavailable to me due to removal of access to my own case files.

[12] As concerns the UN Administration, a formal complaint of abuse of authority and perjury by the Chief of Human Resources of OHCHR submitted to the High Commissioner for Human Rights and OIOS on 27 October 2020 remains without response.

[13] Case UNDT/GVA/2021/4.

[14] Audio available here: https://twitter.com/EmmaReillyTweet/status/1354141376187871235

[15] See, for example, emails of 16 October 2020 and 24 February 2021, available on request.

On rare occasions, the UN Dispute and Appeals Tribunals find the conduct of managers so egregious that they are referred for accountability. There is not a single documented case of such a referral in fact leading to accountability. Managers in the protected class simply continue to act with impunity. In fact, when choosing who should investigate me for the act of whistleblowing, the USG for Management selected a retiree who had been found in 2007 by the former Joint Appeals Board to use investigations for the purpose of retaliation, and referred for accountability by the UN Dispute Tribunal in 2014 for further breaches of the rules.[16] Not only is accountability completely lacking, but violation of rules is encouraged and rewarded when it serves the purposes of senior managers to conceal their own corruption.

4. Fairness in the application of the law

The lack of adherence to law, inequality before the law and lack of accountability outlined above clearly impact fairness. However, there is also evidence of unfairness at the level of the Tribunals themselves. While staff already have relatively low chance of success before the UN Dispute Tribunal, the situation is even worse upon appeal. As appeals relate to errors of law and do not re-consider the facts of the case, it would be expected that such errors would be evenly distributed among all decisions. However, according to the published judgements, when the UN Administration appeals a decision in favour of a staff member, an error of law is detected 93% of the time, with a ruling in the Administration's favour. When a staff member appeals, an error of law is detected only 2% of the time, preserving the ruling in the Administration's favour the other 98% of the time.[17] UN staff working on rule of law would be highly suspicious of the independence of the judiciary if such statistics existed in a national judicial system.

5. Separation of powers

The ability of an independent judiciary to adjudicate on actions of the executive is at the heart of the rule of law. No independent judiciary exists in the UN. The justices themselves have repeatedly called for greater independence in their reports to the General Assembly, which are annexed to the report of the Internal Justice Council. Indeed, eight of the nine justices on the UNDT in 2018 voted to remove the President (Judge Bravo) due to perceived undue influence of the Administration on her decisions regarding the operation of the Tribunal.[18] Justices have pointed out that there is a structural conflict of interest in having the legal staff supporting them in their supposedly independent functions reporting to the Executive Director of OAJ (to whom OSLA lawyers also report), who in turn reports to the Secretary-General, necessarily a party to every case. Rather than addressing the conflict, the Administration appears to have resolved it by engineering the removal of all eight justices who voted to remove an apparently conflicted President, in at least three cases before the normal expiry of their terms.

Two of my own cases against the Administration were heard by Judge Downing in June 2019. Later that month, the Administration announced that elections for new half-time judges to the UN Dispute Tribunal would be held on 10 July 2019, despite normally being held in December. This was considerably less notice than previously provided to member states of such elections. In the normal course of events, judges elected after 1 July in any year would take up their functions on 1 July of the following year, with existing judges' contracts extended until the date of commencement (not election) of the new judges. This standard process was not followed. Member states were not advised of the non-standard process, and relied upon false assurances from the UN Administration, in the person of the Executive Director of OAJ. The Executive Director lied to at least one member state delegation just prior to the vote, stating that Judge Downing would continue to serve on the Tribunal until 31 July 2019. Furthermore, she expressly stated that Judge Downing had been informed of the forthcoming end of his contract. At the time of making these statements, the Executive Director knew them to be untrue. On the same date as the election, 10 July 2019, Judge Downing was informed that he was now *functus officio*, and

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[16] Joint Appeals Board in Confidential Report No. 1875, case no. 2007-027; Judgment No. UNDT/2014/102 at para. 74.

[17] As the UNAT has not yet issued judgements in 2021, statistics relate to judgements issued prior to 31 December 2020.

[18] Administration of Justice in the United Nations, Report of the Internal Justice Council, A/74/169 (24 July 2019).

should cease work on my cases, on which he had already drafted judgements. No transitional arrangements or handover of cases occurred, and the Administration instead reassigned my cases to Judge Bravo.

There is no greater possible interference in the independence of the judiciary than for a party to a case to remove a judge between hearing and judgement. Once again, UN staff have no recourse even against such blatant misconduct as lying to the General Assembly in order to effect a particular outcome, as investigation of misconduct is now entirely at the discretion of the Administration.

The structural conflicts also exist as regards the Ethics Office and OIOS, both of which report directly to the Secretary-General. Neither body in any case has any teeth. When even the Ethics Office recognised a conflict of interest in OIOS in investigating retaliation against me, and recommended external referral, the Secretary-General was in a position to completely ignore the recommendation, refer the investigation to OIOS in spite of the conflict and, judging from the failure to respond to my requests for information for the last six months, order that no investigation was in fact to take place.[19]

6. Participation in decision-making

Elected representatives of UN staff regularly complain of a lack of meaningful consultations when UN senior management decides to change rules affecting the terms and conditions of employment of staff. While one of the functions of staff representatives is to represent the interests of staff members facing harassment and retaliation, the experience of many whistleblowers is that staff representatives themselves fear reprisals from senior managers should they do so. No extra legal protection is available to staff representatives than for other staff, and retaliatory investigations leading to dismissal of staff representatives have been reported in more than one UN agency. Successive staff surveys show that staff have no confidence in current "accountability" mechanisms when they report misconduct by senior officials, and yet no credible measures are taken to involve staff in reforms.

In July 2020, an internal audit of whistleblower protection was undertaken by OIOS auditors. I was interviewed as part of this audit. When this fact was discovered by managers of OHCHR, they interfered in the independence of OIOS and insisted that my interview be deleted and my case, which auditors had intended to use to demonstrate the inadequacy of current mechanisms, discounted from the review.[20] Once again, a lack of real independence or any genuine political will to improve accountability prevented much-needed reform.

7. Legal certainty

Legal certainty holds that the content of the law must be clear, allowing individuals to regulate their conduct accordingly. This requires clarity of the written rules, but also encompasses principles such as non-retroactivity. Once again, this is not respected in the UN Administration, as my own case demonstrates.

In response to criticism in the press, the former USG for Management clearly and unambiguously stated that the UN does not prevent staff from speaking to the press.[21] The meaning of those words is clear. Nonetheless, I was placed under investigation for reporting wrongdoing to both member states and, when that failed to stop a dangerous policy, to the press. The justification provided by the UN was that the USG, in using the word "staff" meant "formally recognised whistleblower." My queries asking for a justification for such in any dictionary or UN rule remain unanswered, as do my communications pointing out that I was formally recognised as a whistleblower in July 2020, six months before being placed under investigation.

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[19] Memo from Elia Armstrong, Director, UN Ethics Office, to Emma Reilly, 5 October 2020.

[20] Anonymised correspondence with auditors available on request.

[21] See https://www.theguardian.com/world/2018/jan/21/un-is-dealing-with-sexual-harassment

UN policies provide for particular processes for a staff member to be placed under investigation, but these are regularly flouted when the UN Administration decides that it wants rid of a particular employee. In my own case, I had named the USG for Management as the person leading retaliation against me. While only the High Commissioner for Human Rights may place staff of OHCHR under investigation, and even then only after referral by OIOS, the USG for Management nonetheless initiated an illegal investigation into me, apparently without referral by OIOS. Once again, I have no recourse to challenge this obviously retaliatory act which clearly flouts the written rules.

Legal certainty is further undermined by the explicit argument of the UN Administration in my court case that it has a right to lie to member states, the public and the press about the content of its own policies, notably as regards informing one member state of applications for accreditation in advance.

The UN Administration also applies rules retroactively to further disadvantage staff who may seek protection. My application for protection against retaliation was initially considered under policy ST/SGB/2005/21. In January 2017, this was replaced with a new policy, ST/SGB/2017/2, which is much less advantageous to staff, introducing a time limit of only six months for staff to take what is effectively the nuclear option of applying for protection, and providing that time limits are reset every time an Ethics Officer requests a new document, however irrelevant to the case. Over my objections, consideration of my case was retroactively moved under the new policy, and I had no recourse to challenge this.

8. Avoidance of arbitrariness

As detailed above, application or otherwise of rules within the UN Administration is now utterly arbitrary. Senior managers have absolute and unfettered discretion to favour their friends and retaliate against anyone they perceive as a threat or who raises uncomfortable truths. Because almost all information provided to member states about the operation of UN policies comes via those same senior managers, a picture of accountability is provided that is unrecognisable to staff working within the UN system who report wrongdoing or try to ensure respect of UN rules and their rights.

9. Procedural and legal transparency

Procedural and legal transparency requires, for example, access to case files and all evidence, public hearings and respect of court orders. Once again, these principles are not respected in cases UN senior management wishes to cover up.

Following referral of my own case to Judge Bravo after the illegal removal of Judge Downing, she ruled that, due to the "political sensitivity" of my case (i.e. the fact that the UN Administration's position in court is the opposite of its public position), it should be held behind closed doors. When I sought to file evidence of the illegality of the removal of Judge Downing, acting separate from Counsel due to the conflict of interest, Judge Bravo removed my access to my own case files. When I informed the Tribunal that I would exercise the same right exercised by other staff members to act as my own co-Counsel to address the conflict, Judge Bravo invited comment from the Administration on the issue of my legal representation, a matter that should be for the complainant alone, and not the judge or opposing party, to decide. When I finally convinced Judge Bravo to allow me to make legal arguments regarding the removal of Judge Downing, she set a deadline of 1 July 2020 for their receipt, before unilaterally issuing judgement against me prior to the expiry of her own deadline. While closing arguments had been heard in June 2019, and Judge Bravo was proceeding based entirely on tapes of the hearings, she relied in her judgement on a document dated October 2019 which was not on evidence in the case.[22]

The allegations of her fellow justices of undue influence on Judge Bravo by the Administration have never been investigated, so it would be inappropriate to directly attribute these actions to

[22] Orders all unpublished.

the UN Administration itself. However, it is of note that the Administration's lawyers encouraged all of these decisions despite the clear violations of my procedural and due process rights. As the Administration itself decides which orders are made public, it is impossible to determine how frequently such blatant violations occur.

Conclusion and way forward

The tenure of the current Secretary-General has seen an increase in public statements about the importance of accountability, but significant worsening of the policies and systems that could allow UN officials to be held accountable in practice.

No independent accountability mechanisms exist in the UN Secretariat, and all have been corrupted under Mr. Guterres' tenure. Reform has been delegated to the managers who have most to gain from ensuring there is never accountability. Mr. Guterres himself has the final say on whether even the most egregious abuses are investigated, and has consistently chosen to follow his managers' advice to support a cover-up over choosing the more difficult but necessary path of reform and accountability to prevent future abuses.

The UN Administration now fails to meet even a single aspect of its own 9-point test for commitment to the rule of law. The Secretary-General himself formally acts as judge, jury and executioner, ignoring and rewriting rules at will, hand-picking investigators, firing judges before they can rule against him, ignoring inconvenient findings, refusing all referrals for accountability, protecting his friends, and aiming the wrath and power of the entire organisation at any staff member who dares prioritise principle over career. All of this happens with absolute impunity. In the case of Mr. Guterres, he in fact delegates a majority of these tasks, and simply claims inability to control the mangers to whom he delegates, because he acceded to pressure from powerful member states to appoint them. The managers thus consider that they report to the powerful member state that placed them in post, and not to the Secretary-General, who apparently accepts a political reality that the requirement of the UN Charter that staff not accept instructions from member states is ignored by everyone reporting directly to him.

This creates an untenable but self-reinforcing paradox. Member states hear fewer and fewer reports of wrongdoing, because reporting wrongdoing almost automatically results in the end of a staff member's career. Indeed, daring to report misconduct is now - as in my own case - considered not an obligation under the rules, but grounds for investigation with a view to firing the staff member. The Administration claims fewer reports as demonstrating less corruption, when the opposite is true. Every few years, a major scandal will erupt, and another task force will be appointed to reach the same, tired conclusions, with an experienced manager who has benefitted from the corrupt system appointed to oversee ‘"implementation" and ensure ineffectiveness in practice, until the next time. The UN Administration cannot point to a single public interest whistleblower who has been able to continue a normal career in the UN system.

Current accountability systems are ineffective, expensive and waste significant funds. A genuine, independent accountability system reporting to member states through the General Assembly is long overdue, and would save significant resources. Clearly, the type of reform required can be achieved only through negotiation of a resolution by the General Assembly itself, disbanding and replacing the current, ineffective, expensive "accountability" mechanisms.

However, the UN has many experts in the rule of law who are capable of designing a genuine accountability system. Whoever becomes Secretary-General must be capable of commanding the respect of managers and staff. This requires genuine compliance with the rule of law, and external oversight.

Structurally, the Joint Inspection Unit is closer to independence than any other mechanism in the UN system. It reports directly to the General Assembly, and its members have fixed term limits. As a first step towards genuine accountability, the mandate and functions of JIU should be expanded, absorbing the investigative, audit and protection against retaliation functions currently undertaken by OIOS and the Ethics Office. A slimmed-down Ethics Office, under new management, could exercise responsibility for training and advising staff. The recommendations

of the former UN Special Rapporteur on Freedom of Opinion and Expression[23] provide valuable guidance on how accountability should work in practice in international organisations.

The Tribunal system could be made genuinely independent by, as a first step, amending reporting lines so its staff report to the justices and not to the Administration. Referrals for accountability should be binding on the Administration, with results to be reported to the justices and to the General Assembly. The recommendations issued by justices themselves as annexes to reports of the Internal Justice Council could form the starting point for reforms.

This is but one possible model. But the challenges of the 21st century require a UN that is fit for purpose and staffed at all levels by individuals dedicated to the principles of the UN Charter. To retain such staff, the UN must accept that it is subject to rules, and capable of both errors and, hopefully, of learning from mistakes.

Emma Reilly, 30 March 2021

[23] See UN Doc. A/70/361: https://www.undocs.org/A/70/361