



# Investigators' Manual

## Investigation of Sexual Harassment Complaints

IN THE UNITED NATIONS



**CEB**

UN System Chief Executives Board for Coordination

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# Foreword

There is no place for sexual harassment in the United Nations, and we need to do everything in our power to eradicate it from our organizations. Sexual harassment goes against the most fundamental principles and core values of the United Nations and it is our joint responsibility to create safe, open, respectful and inclusive working environments, where sexual harassment does not occur, and is dealt with decisively if it does.

On the Secretary-General's proposal, the United Nations System Chief Executives Board (CEB) created a Task Force on Addressing Sexual Harassment within the Organizations of the UN System, to comprehensively and collectively address sexual harassment. Through the development of common policies, supportive frameworks and guidance, this Task Force is contributing towards effective, system-wide, prevention and response to sexual harassment.

Within these efforts, the strengthening of sexual harassment investigations remains a top priority. Thorough investigations of reports of sexual harassment, with just and timely outcomes holding perpetrators to account, are crucial to build confidence for victims considering whether to come forward.

I am, therefore, very pleased to share with you this Manual on Investigations into Sexual Harassment Complaints. Developed by the Task Force's sub-group on investigations for the benefit of investigation services across the UN system, this manual lays out common general principles to produce fair, transparent and accountable investigation processes and provides practical guidance in this respect.

While investigations are of crucial importance for the reasons set out, going through the investigative process can be very difficult for victims. This manual recognizes this; it considers the impact of sexual harassment and the importance of adopting a victim-centred approach throughout an investigation. It suggests a number of measures to lighten the burden on victims where possible, such as by ensuring all procedural steps are explained to them, identifying a focal point to serve as a contact point, and respecting informed consent and confidentiality. Applying a victim-centred approach is indeed a priority for all of our organizations when tackling sexual harassment.

For this reason, under its 2020-2021 workplan, the Task Force has established a workstream on a victim-centred approach. This workstream will, amongst other things, work towards an agreed common understanding of a victim-centred approach in cases of sexual harassment, with general principles that could help agencies in applying such an approach in their own policies and procedures, including investigations. It is my hope that engagement on best practices in this respect will remain a live issue in discussions amongst investigators. This manual will be updated to take into account additional future guidance in applying a victim-centred approach in the context of sexual harassment investigations.

This manual, in the hands of investigation services, enhances a common understanding and approach to investigations of sexual harassment complaints and has the potential to strengthen investigations in the long term. It is thereby an important contribution to our common aspiration to make the United Nations a safe and respectful work environment, free from sexual harassment.

**Kelly T. Clements**

*Chair, CEB Task Force on Sexual Harassment*  
March 2021

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# 1. General Principles

## 1.1 Background

The United Nations' (UN) Charter confirms that the paramount consideration in the employment of staff and their conditions of service is the highest standard of competence and integrity. By extension, the Secretary-General and his senior leadership have reiterated that sexual harassment in the UN workplace is unacceptable and must be eradicated from the UN's operations.

In November 2018, the Chief Executives Board for Coordination (CEB) endorsed the UN System Model Policy on Sexual Harassment. The Model Policy recognized that sexual harassment is the manifestation of a culture of discrimination and privilege based on unequal gender relations and other power dynamics. It may occur between persons of the same or different genders, and individuals of any gender can be either the victim or the offender.<sup>1</sup>

Before covering the receipt and handling of formal reports of sexual harassment, the Model Policy sets out a number of options for early intervention and receipt and handling of informal reports of sexual harassment, including early direct action, managerial intervention, seeking of confidential advice and informal resolution. Victims may, in a voluntary basis, pursue these options. Attempts at informal resolution do not preclude formal reporting of the matter.<sup>2</sup>

The Chair of the CEB Task Force on Addressing Sexual Harassment further committed to enhance the handling of formal reports of sexual harassment by strengthening and harmonizing investigatory capacity and improving the quality of investigations of sexual harassment. This included the establishment of a Task Force Sub-Group on Strengthening Investigative Capacity and Improving Investigations of Sexual Harassment within the Organizations of the UN System (the Sub-Group).<sup>3</sup>

The Sub-Group has developed this manual to reflect a system-wide common approach to, and understanding of, the investigation of sexual harassment complaints. It aims to bolster investigative capacity, harmonize victim-centered investigations, and improve communications with victims and other stakeholders. While the manual encourages a common approach, it recognizes that CEB entities have differing legal, administrative and policy frameworks. The manual must therefore be interpreted and applied in conjunction with each Organization's regulations, rules, administrative issuances and investigation policies.

The manual focuses on issues that arise in administrative investigations into sexual harassment complaints and does not address investigative issues that relate to administrative investigations into possible staff misconduct more broadly. Nor does it attempt to regulate how UN system entities collect and document evidence in an investigation, or the due process rights that apply routinely to subjects of investigations. Instead it contains an outline of the general principles which underpin a fair, transparent and accountable investigation process into sexual harassment complaints. It also reflects a common understanding and application of confidentiality and informed consent among all actors involved in the investigation process.

Sexual harassment investigations are inherently **victim centered**. Victims are at the heart of the investigation and the process must respect the difficulties victims experience coming forward with a complaint. This recognition is reflected throughout many of the steps described in this manual, including making early contact with victims, ensuring that the process is clearly explained to them, facilitating support pathways, conducting sensitive interviews, and keeping victims informed of the outcome of the investigation.

<sup>1</sup> [UN System Model Policy on Sexual Harassment](#), page 2.

<sup>2</sup> [UN System Model Policy on Sexual Harassment](#), pages 5-6.

<sup>3</sup> Membership of the sub-group was sought from those responsible for: undertaking investigations, taking decisions on disciplinary matters, providing victim support and providing legal advice.

The Sub-group recognizes that investigations are one of the tools available to combat sexual harassment in the workplace, but that it is not a perfect tool. Sexual harassment is often subtle and occurs unobserved. It is not always possible for investigations to obtain enough evidence to substantiate a complaint. An unsubstantiated allegation, even following an investigation, does not necessarily mean that the incident(s) did not occur; it means that, despite an investigation, there was insufficient evidence upon which the incident(s) could be established. However, by documenting a best practice framework, the manual aims to strengthen both the investigation and ultimately the accountability processes.

## 1.2 Definitions

In this manual, the following terms have the following meaning:

- Sexual harassment is “any unwelcome conduct of a sexual nature that might reasonably be expected or be perceived to cause offense or humiliation, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. Sexual harassment may occur in the workplace or in connection with work. While typically involving a pattern of conduct, sexual harassment may take the form of a single incident. In assessing the reasonableness of expectations or perceptions, the perspective of the person who is the target of the conduct shall be considered.”<sup>4</sup>
- Victim/alleged victim<sup>5</sup> means the person in the workplace or in connection with work towards whom the conduct constituting possible sexual harassment is directed.<sup>6</sup>
- Complainant is the person who lodged the formal complaint of sexual harassment.

- Offender/Alleged offender is the person in the workplace or in connection with work whose conduct constitutes sexual harassment.
- Outcry witness is a person who hears from the victim about an allegation of sexual harassment.
- Formal complaints of sexual harassment are complaints submitted to the appropriate mechanism for a decision on whether to launch an investigation.
- The formal process describes the administrative and disciplinary steps that may be taken following receipt of a formal complaint of sexual harassment, including the investigation process.
- Informal resolution refers to a voluntary attempt by a victim to address a situation of possible sexual harassment in an informal manner, including with the assistance of ombudsman and mediators.
- Focal point is a person designated by management to provide advice relating to a formal complaint. Where nominated, the focal point serves, inter alia, as a contact point for both the victim and the alleged offender throughout the handling of a formal complaint to provide information on the process and relevant time frames. The focal point remains in place for lifetime of the investigation and beyond.
- Support person is a person nominated by a victim to provide support during a formal process. The support may include emotional support, including attendance at interviews, but may not extend to legal representation or advocacy.
- The investigators or the investigative entity are those responsible for investigating sexual harassment and producing investigation reports.

<sup>4</sup> [UN System Model Policy on Sexual Harassment](#).

<sup>5</sup> Per the [UN System Model Policy on Sexual Harassment](#), victims may also be known as targets or affected individuals.

<sup>6</sup> Sexual harassment may occur outside the workplace and outside working hours, including during official travel or social functions related to work. Reference is also made to the “world of work” contained in Article 3 of International Labour Organization, [C190 - Violence and Harassment Convention, 2019](#).

## 2. The Review of Complaints

### 2.1 Making a formal complaint

It is imperative for CEB entities to have accessible, responsive and confidential mechanisms to receive complaints of sexual harassment.

#### **Formal complaints of sexual harassment:**

- May be made in person, in writing (including through electronic communications), or by telephone to entities/officials authorized to receive complaints (the receiving official/entity).
- Can be made by victims or by any person with knowledge of possible sexual harassment.
- Are not subject to deadlines and may be made anonymously, although the anonymity of reports and/or the passage of time may result in the report being more difficult to investigate and pursue through internal disciplinary proceedings.
- Should, to the extent possible, describe specific incident(s) of possible sexual harassment with details, including dates, locations, and identifying the alleged offender, victim and any witnesses.
- Should have receipt promptly acknowledged by the receiving official/entity with an explanation of the next steps in the process, including whether the complainant will be advised of the outcome of the assessment and information on support pathways.
- Should be handled by the receiving official/entity with the understanding that, while confidentiality will be respected to the extent possible throughout the formal process, the receiving official/entity is obliged to respond to the situation and will be providing details of the formal complaint on a “need to know” basis including to those responsible for reviewing the complaint to decide whether to investigate it (see also [Section 3.2](#) and [3.5.1](#)).
- If not received by those responsible for reviewing the complaint and deciding whether to investigate it, should be promptly forwarded to them.

### 2.2 Initial Review

#### **2.2.1 Appointment of a focal point**

On receipt of a formal complaint of sexual harassment, consideration should be given to appointing a focal point to serve as a contact point for the victim and the alleged offender throughout the formal process to provide information on the process and relevant time frames.

The focal point remains in place for lifetime of the investigation and beyond.

Additional information on the role and responsibilities of the focal point can be found in [Section 3.3.1](#). Generally, however, the role of the focal point is particularly important at the initial review stage of a formal complaint and following completion of an investigation. They may also provide information on support pathways and be available to discuss concerns arising from interim measures or accommodations put in place during the formal process.

#### **2.2.2 Conducting the initial review**

Formal complaints must be promptly reviewed for a decision as to whether it:

- Will be investigated
- Will be closed, with or without managerial or administrative action

On balance, the threshold for initiating an investigation into a complaint of sexual harassment should not be narrowly interpreted. Generally, a sufficiently detailed and verifiable complaint of sexual harassment will warrant investigation. In this context, a decision whether to investigate a formal report should take into consideration:

- Where the complaint was submitted by person other than the victim, the views or the situation of the victim.

- Whether the complaint responds to the definition of sexual harassment, e.g. does it contain details of “unwelcome conduct of a sexual nature” that might “cause offense or humiliation”, did the conduct interfere with work or create an intimidating, hostile, or offensive work environment, and did the conduct take place in the workplace or in connection with work?
- Whether the complaint contains enough information upon which an investigation could commence (specifics capable of being verified through a fact-finding inquiry).
- The reliability of the source of the complaint (anonymous/known, information directly or indirectly perceived by the source, supporting documents or facts). Anonymous complaints and, in particular, anonymous third-party complaints, should be treated with caution and preferably referred to an investigation service of a CEB entity for an intake decision to verify the complaint with the victim before making a decision.

An anonymous complainant claimed that a staff member had made unwelcome sexual advances towards a junior staff member during an official mission. When contacted, the alleged victim adamantly denied having received any unwelcome sexual advances. She confirmed having travelled with the staff member on official mission and said that, one evening, he messaged her proposing dinner. The invitation was declined, and the alleged offender had accepted her response. The alleged victim was surprised by being contacted by investigators. She recalled discussing the events with a colleague but said that she did not recall having said she was uncomfortable with the dinner invitation. She believed that the events had been blown out of proportion, to target the alleged offender. Following a preliminary assessment, the complaint was closed.

- Whether there is evidence that the complaint is based on intentionally false or misleading information.

A complainant reported having been told by a colleague that she had been sexually harassed by their mutual supervisor, who had possibly behaved similarly with other colleagues. The complainant said that the victim was reluctant to file a complaint for fear of losing her job, so he had submitted the report on her behalf. The alleged victim was contacted and denied having been sexually harassed or having witnessed any inappropriate behavior. She said that when she had been recruited other staff members had thought that her appointment was due to a previous working connection with the alleged offender, and that this could be the cause of the third-party report. Noting that the complainant had previously submitted three other reports implicating the alleged offender in other types of misconduct, which had not been substantiated, the complaint was closed.

The person/entity responsible for reviewing the complaint and deciding whether to investigate it may need to seek additional information from the complainant, or verification of the information provided by other means, before a decision can be made. For instance, if the formal complaint is submitted by a person other than the victim, the views or the situation of the victim should be considered in deciding whether to proceed with an investigation, noting that, ultimately, it is the victim’s choice whether such a complaint proceeds through a formal process, unless there is a conflict with the entity’s duty of care.<sup>7</sup>

<sup>7</sup> [UN System Model Policy on Sexual Harassment](#), pages 7 and 8.

Any such inquiries must seek to preserve the integrity of any investigation. Additional information should only be sought when there is otherwise insufficient information available to inform a decision. The inquiries should therefore not be directed at obtaining a fuller account of the sexual harassment or attempting to corroborate it. The inquiries:

- Should be limited to obtaining important missing details, such as dates and locations, the name of the alleged offender, or documents referred to but not provided
- May be conducted verbally or in writing but should not take the form of a formal interview
- Will normally exclude contact with the alleged offender.<sup>8</sup>

### 2.2.3 Outcome of initial review

Following the initial review, a decision will be made to either:

- Investigate the formal complaint
- Close the formal complaint with or without managerial or administrative action

If there is a decision to investigate, the formal complaint should be referred for investigation (see [Section 3](#)).

Where there is a decision to close the formal complaint:

- If the formal complaint was submitted by the victim, the victim should be informed of the decision, giving reasons. This is an important communication which may form the basis of an appeal by the victim.
- If the alleged offender was made aware of the complaint (e.g. if the offender was contacted during the review), the alleged offender should be informed of the closure of the matter.

- The person/entity responsible for deciding not to investigate the complaint should consider informing management of the decision so that management can take other administrative or managerial action, as appropriate. The type of administrative or managerial action will vary among entities but may include training on behaviour which constitutes sexual harassment; training on gender relations/power dynamics; an oral or written caution/reprimand; referral to the Staff Counsellor; reassignment and/or change of duties, or exploration of informal resolution.
- At all stages after a formal complaint has been lodged, the option of voluntary informal resolution remains, requiring the agreement of the victim, and should normally be reserved for complaints of lesser severity, for example where the behaviour was unwelcome but, according to the victim, was isolated and did not upset them, or where the complaint does not fall fully within the definition of sexual harassment. Where the possibility of informal resolution is being explored after an investigation has commenced, the investigation may be paused, pending notification of whether the complaint has been resolved and the formal complaint withdrawn.

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<sup>8</sup> Where the decision maker is not an investigation service, contact with the alleged offender should be done in consultation with a CEB investigation service.



## 3. The Investigation

### 3.1 Who should conduct it?

Cases of sexual harassment should be investigated by an entity's investigative service, where in place. Cases considered to be of lesser severity may be referred by that service for investigation by at least two individuals trained to investigate sexual harassment complaints.<sup>9</sup>

Entities without professional investigative services should consider seeking the services of an investigation service of a CEB entity.<sup>10</sup> Alternatively, at least two trained individuals should be appointed to conduct the investigation. In this latter case, the investigators should be provided with clear terms of reference, setting out the scope of the investigation.

### 3.2 The investigation process, guiding principles

Investigations into sexual harassment must respect the rights of victims and alleged offenders and are to be carried out in line with the entity's legal framework for investigation of possible misconduct. Where conducted by a CEB investigation service they shall also follow that services' standard operating procedures.

While **victim assistance and support** lie outside of the scope of an investigation, it is recognized that assistance and support is not dependent on an investigation or its outcome. Investigators should therefore be sufficiently familiar with the available assistance and support pathways to assist with their facilitation.

**Understanding confidentiality** is central to the investigation of sexual harassment complaints. It is critical that the concept be uniformly understood and explained to witnesses, including victims and alleged offenders. In the investigative context, confidentiality means that information provided to investigators will be shared on a "need to know" basis including with other witnesses, the

alleged offender, and those responsible for acting on the outcome of the investigation. Where an investigation results in a sanction challenged by the offender, the evidence collected by the investigators may also come before a dispute mechanism, such as an administrative tribunal. This means that, within a formal process, there is limited scope for anonymity. Witnesses must also preserve the confidentiality of the process by not speaking with others about their knowledge of the alleged sexual harassment or the content of their interview with investigators. Confidentiality and the issue of consent are often intertwined and are addressed in more detail in [Section 3.5.1](#).

With these principles in mind, the following guidance reflects best practice in the investigation of sexual harassment complaints.

### 3.3 The investigation process, initial steps

#### 3.3.1 Early contact with the victim

Early contact with a victim recognizes that victims are at the center of sexual harassment investigations:

- The victim should be made aware of the identity of the focal point, where applicable, or otherwise made aware of assistance and support pathways, such as psychosocial support from a Staff Counsellor.
- At this initial stage, the victim should be advised that they may nominate a **support person** for the duration of the investigation. The support may include emotional support but may not extend to legal representation or advocacy. The support person may accompany the victim to the fact-finding interview/s. The support person should be asked to sign a confidentiality agreement and must not be a witness in the investigation or be subject to any other conflict of interest.

<sup>9</sup> [UN System Model Policy on Sexual Harassment](#), page 8.

<sup>10</sup> Entities within the United Nations system should consider seeking the services of an investigation service within the system.

- The investigative entity will make every reasonable effort to accommodate a victim's request to be assigned an investigator and a focal point (and, where applicable, interpreter) of the gender of their choice.
- Investigators should make prompt contact with the victim to advise that the complaint is under investigation and that the victim will soon be contacted for a formal interview.
- The victim should be encouraged to preserve and send to the investigators all information deemed relevant, (for example, text messages or e-mail), and to provide a list of persons the victim considers relevant to the complaint, such as witnesses to the alleged sexual harassment and outcry witnesses.
- The investigators should make themselves available to the victim to outline the process and to discuss any of the victim's concerns. The investigators must explain the confidentiality of the process, (see [Section 3.2](#) and [3.5.1](#) regarding possible confidentiality concerns raised by a victim).
- Thereafter, investigators should keep the victim informed of the status of the investigation.
- Organizations should consider providing victims with a document which explains the investigation process so that the victim is informed on what to expect from an investigation.

### 3.3.2 Early contact with the alleged offender

Affording due process to an alleged offender is a critical part of a sexual harassment investigation and may require prompt notification to the alleged offender:

- On a case by case basis, consideration should be given to early notification to the alleged offender that they are the subject of a sexual harassment investigation and that they will be contacted for an interview.

- Early notification is likely appropriate when the investigators intend to notify a focal point and/or the victim's management of the investigation, as these notifications may result in interim measures being put in place during the formal process, (see [Section 3.3.3](#)).
- When early notification is appropriate, the investigators must explain that the process is confidential and remind the alleged offender that they are not to discuss the matter with anyone who may be a witness in the investigation, including the victim(s), or engage in behaviour designed to undermine the investigation, such as destruction of evidence. Any such action could constitute separate grounds for disciplinary action. The alleged offender should also be reminded of the obligation to preserve and maintain a harmonious work environment.
- Where applicable, the alleged offender should be advised of the identity of the focal point.

### 3.3.3 Notification of the investigation to other stakeholders

Information exchanges among investigators, focal points, and management is of increased importance in sexual harassment investigations. The exchange of information is an important tool to protect victims, ensure the wellbeing of the victim(s) and alleged offender, preserve harmony in affected work units and to enable appropriate monitoring of the workplace:

- Investigators, as appropriate, should notify any focal point of the investigation, where appointed, to ensure that roles and responsibilities are understood.
- Investigators should consider whether it is appropriate to notify the victim and alleged offender's management of the investigation with a request that measures be taken to monitor the status of the victim, alleged offender and work unit(s) concerned until such time as the investigation is complete and any subsequent action has been taken. Management should consider whether any **interim measures** are appropriate, such as physically separating the

alleged offender and victim, reassignment, changing reporting lines or placing the alleged offender on **administrative leave**. The victim's work performance and general well-being should also be monitored, and appropriate support and accommodations put in place. Due regard to confidentiality must be given when communicating accommodations to supervisors or colleagues, as appropriate.

- The decision to notify a focal point and management should take confidentiality considerations into account, particularly any concerns expressed by the victim, as well as whether notification has the potential to undermine the integrity of the fact-finding process.
- While a decision to place an alleged offender on **administrative leave** normally rests with management, the decision should be made in consultation with the investigators to ensure that it does not undermine the investigation process. There may also be times when the administrative leave decision is based on information made available to management by the investigators. This information can be provided at any time during an investigation and should be carefully documented, setting out the available preliminary evidence to allow management to determine whether leave may be appropriate.

A staff member reported that a colleague was sending her multiple emails a day, signaling a sexual interest in her, despite being told to stop. After an investigation commenced, the victim informed the investigators that the alleged offender was continuing to send her emails. She also said that the alleged offender had recently grabbed her arm when walking past her. The investigators advised the alleged offender's management of these developments. Taking into consideration the possible risk to the victim's safety, the alleged offender was placed on administrative leave pending completion of the investigation and disciplinary process.

Management became aware that allegations of sexual harassment had been made implicating a staff member and proposed immediately placing the alleged offender on administrative leave. The investigation team requested that this not be done until the investigators had secured the alleged offender's mobile telephone. The telephone was believed to contain evidentiary material relevant to the allegations which could potentially have been lost if the alleged offender had become prematurely aware of the complaint.

### 3.4 The investigation process, gathering facts

#### 3.4.1 Interviews

a) Interviews, who should be spoken to

Investigators should speak with all relevant persons with knowledge of the alleged sexual harassment and its impact on the victim:

- While the order of the interviews is best left to investigators to decide, it often makes sense to start with the complainant, where not the victim, followed by the victim, as these accounts normally serve as the basis for the investigation.
- Outcry witnesses are particularly important in sexual harassment investigations as they often corroborate a victim's account and their evidence can be crucial to the credibility of a complaint, (see [Section 4](#)). Investigators may therefore be required to seek to interview persons outside of the Organization, such as the victim's family or former staff members. Every effort should be made to speak with these witnesses, bearing in mind that they are under no obligation to agree to the interview.

## b) Interviews, general:

Testimony is at the heart of a sexual harassment investigation. All interviews must be conducted sensitively, thoroughly, objectively and without bias:

- Interviews should be held in confidential settings, away from the witnesses' immediate workplace.
- Witnesses should be reminded, where applicable, of the duty to cooperate with investigations and of the entity's **protection against retaliation** framework.
- Investigators should explain the investigation process and purpose including possible outcomes; e.g. the purpose of an investigation is to establish the facts and, at the conclusion of the investigation, a report will be prepared and sent for a decision on whether the facts have been established to the requisite degree and amount to sexual harassment warranting a sanction.<sup>11</sup>
- Investigation witnesses shall be treated with respect for their dignity, safety and wellbeing. Age, sex, sexual orientation, gender identity, race, religion and other individual factors that may lead to increased vulnerability (including disability, socio-economic circumstances, legal status, health status) shall be taken into consideration at all times.
- Investigators should explain the importance and meaning of confidentiality within the investigation and formal process.
- Other than the victim and alleged offender, witnesses should be aware that they will not be advised of the outcome of the investigation.

## c) Interviews, victims

Sensitive, careful and transparent victim interviews undertaken by experienced investigators are essential in a sexual harassment investigation:

- The purpose of the victim interview is to obtain and explore the victim's full account of the alleged sexual harassment. This includes probing for the existence of possible corroborative evidence, such as emails, text/instant messages, notes of meetings, conversations with others about the sexual harassment, personal diaries, counselling records and medical records.
- Interviews with victims should normally be conducted by two investigators. In-person interviews strengthen the quality of victim testimony and are preferred; however, when an in-person interview is not possible, consideration should be given to conducting the interview remotely using audio/visual communications.
- Enough advance notice of the interview should be provided to allow the victim to prepare for the interview and secure the presence of any support person.
- As victims may display a heightened sense of anxiety and mistrust of the investigation process, investigators should take extra care to explain the process and their role in it.
- Investigators must be mindful of gender and other bias<sup>12</sup> which can undermine the integrity of the investigation.

<sup>11</sup> The report is sent to the office designated by the entity to make accountability decisions, often residing within human resources.

<sup>12</sup> Other types of bias include gender identity, sexual orientation, religion, disability and racial bias.

- Inappropriate interviewing techniques may also expose a victim to secondary trauma. To minimize this risk, there is generally no need to present the victim with evidence that contradicts their account. It is more important that the victim's account be thoroughly explored during the interview, using appropriate victim sensitive interviewing techniques. A victim may, however, exceptionally need to be re-interviewed when investigators consider that parts of the victim's testimony requires clarification, or they become aware of a material gap that was not covered in the victim's initial account. Any inconsistencies in the account, or with other evidence, can be considered by the investigators as part of their evidence analysis and credibility assessment (see [Section 4](#)).
- Consistent with the above, investigators should limit the number of times a victim is interviewed.
- Investigators should carefully explore and record the impact of the alleged sexual harassment on the victim. Sexual harassment can have a significant negative impact on the mental and physical health of victims. There are also often negative social and economic consequences for victims. Sexual harassment often leads to reactions of fear and helplessness in victims. A number of victims will experience PTSD symptoms following sexual harassment.
- In terms of how a victim presents, investigators should be conscious that victims may demonstrate a range of emotions during the interview, including fear, embarrassment, distress, shame and mistrust of the process. Investigators should anticipate these emotions and appropriately adjust their approach.
- Due to high cognitive load, victims may find it difficult to recall all the detail of their experiences. Trauma can sometimes lead to a 'distancing' which can result in a victim appearing disconnected from the experience, while others may be very emotional. Low self-efficacy is also a feature often present in victims, which can mean they are easily overwhelmed by what might seem like very small matters.

- It is important to recognize that there will also be individual differences between how victims present. Some victims may be organized and prepared for an interview. Others may recount their stories with seemingly little structure. Victims are often unaware of what details will be important to an investigator and may exhibit both under-sharing or oversharing.

A victim reported having been sexually harassed by a senior official. Her written complaint provided details of inappropriate touching. At the start of the interview, the victim disclosed to the investigators that her employment contract was nearing its end and she was frightened that coming forward would jeopardize a contract extension. She also told the investigators that she was receiving treatment for PTSD following the alleged sexual harassment. The victim was reassured that she could take a break during the interview at any time or ask for it to continue another day. It was evident to the investigators that recounting her experience caused the victim distress. Initially, the victim's account focused on instances of alleged harassment by the alleged offender, relating to the victim's colleagues. When asked to describe the inappropriate touching outlined in her written complaint, the victim stated that she had buried a lot of the details and it was difficult to talk about without worsening her emotional state. Realizing the stress being caused to the victim, the investigators drew the interview to a close and suggested to the victim that she talk to her health care providers before completing the interview. The victim was also encouraged to identify a support person to accompany her to the next interview.

#### d) Interviews, alleged offenders

The interview of an alleged offender is a critical due process right and full regard must be paid to the due process obligations embedded within an entities' legal framework:

- The purpose of the interview with the alleged offender is to obtain their account of the incidents under investigation and their response to the evidence collected during the fact-finding process.
- This means relevant evidence, such as victim and witness testimony, emails, and text/instant messages, must be put to the alleged offender for comment.
- Where possible, interviews with alleged offenders should normally be conducted in-person by two investigators. When an in-person interview is not possible, consideration should be given to conducting the interview remotely using audio/visual communications.
- Alleged offenders should be given an opportunity to contextualize the complaint, where appropriate, for instance by providing information on any pre-existing relationship with the victim, negative performance appraisals or relevant employment contract insecurities.
- The alleged offender should also be given an opportunity to nominate witnesses in support of their account.
- Investigators should be conscious that alleged offenders may demonstrate a range of emotions during the interview, including anger, embarrassment, shame and mistrust of the process. Investigators should anticipate these emotions and appropriately adjust their approach.

#### 3.4.2 Other Evidence

##### a) Digital evidence

Digital evidence is often central to investigations of sexual harassment, serving to corroborate a victim or alleged offender's account. Particular attention must be paid to its availability and handling:

- Digital evidence includes emails, text/instant messages, records of telephone calls, internet access, CCTV footage, social media entries, premises access logs, car logs, and photos.
- Witnesses should be asked to provide any relevant digital evidence.
- Investigators should have unrestricted access to all Organizational information and communication technology (ICT) resources and data. This includes emails, computers, official cell phones and other devices issued by the entity and used by witnesses. The investigators' access to ICT resources must be based on a legitimate, documented need to retrieve them.
- At times, communications between witnesses may have taken place using privately owned devices. Some entities' rules and regulations permit investigators to seek access to any information or device within a witnesses' control or used by them for official business. In the absence of any such provision, or where the privately owned device is withheld, investigators should consider whether any refusal to provide relevant digital evidence adversely impacts the witnesses' credibility, (see [Section 4](#)).
- Since digital evidence usually requires some analysis or handling to be interpreted, there is often an element of forensic evidence collection involved. Forensic investigation expertise should be called upon as necessary to extract digital evidence.

A victim alleged that she had been sexually harassed by a colleague. Evidence from her mobile telephone showed that, during a three-month period, she had received numerous messages from the alleged offender on a daily basis via three different apps, which either expressed sexual intentions towards her or were links to YouTube videos of “romantic” songs. When the victim asked the alleged offender to stop messaging her, he repeatedly asked her why she was not responding and that she was making him unhappy. He also messaged her that he knew when she was online and at what time she went to bed. The alleged offender claimed he sent the victim links to songs to “cheer her up” but was unable to explain the messages in which he expressed his feelings towards her. The volume of messages secured from the mobile telephone, and their content, corroborated the victim’s complaint.

A victim reported that an alleged offender had been sending her unwanted WhatsApp messages using his organization issued mobile phone. The alleged offender denied the communications and claimed the allegation against him was malicious. A forensic analysis of the alleged offender’s phone showed that that all communication between him and the victim had been deleted. The contact information was present on the phone, but the conversation page was empty, indicating that the alleged offender had selectively deleted the conversation between the two of them. A forensic analysis of the victim’s phone provided a full extraction of the WhatsApp conversations. All details provided in the initial allegation were confirmed. A forensic examination of the alleged offender’s corporate laptop uncovered an iPhone back up on his computer. The content of the conversation between him and the victim was still present, confirming the deletion on his phone took place at a later stage. The sexual harassment complaint was ultimately substantiated. There was also a finding that the alleged offender had intentionally attempted to destroy evidence crucial to the case.

#### b) Medical and counselling records

Medical and counselling records can be used to support a victim’s account of assault and/or distress. They can also be used to corroborate an alleged offender’s account, for example that the behaviour complained of was not physically possible. Access to medical records requires the consent of the person to whom they relate.

A victim said that, due to the behavior of the alleged offender, she had started avoiding events he might attend, had become very slow and insecure at work, and had trouble concentrating. Hence, she eventually sought counseling. The investigators obtained the victim’s consent to speak to her counsellor and to obtain records relating to the sessions. The interview with the counsellor and the counselling records supported the victim’s account regarding the incidents she had experienced and the distress she felt afterwards.

#### c) Documentary and physical evidence

Documentary evidence includes correspondence, forms and all information that may be maintained on paper in official archives, as well as external material such as personal letters, business records, etc. It may also include records of a site inspection.

When investigating sexual harassment complaints, investigators should consider the relevance of personnel records, leave and attendance records and work performance evaluations. These records may corroborate a victim’s account of the impact of the sexual harassment or serve to demonstrate an additional context to the complaint, such as the allegations arising along-side negative performance appraisals or an impending end of contract.



A victim reported that an alleged offender, a colleague, had asked to kiss her. The victim had refused, and the alleged offender had not further insisted. The victim alleged that, subsequently, the alleged offender stopped assisting her with her work, in what she perceived to be a reprisal for her refusal. The alleged offender denied the sexual advance. Emails and WhatsApp messages between the two staff members showed that the alleged offender's professional support of the victim had remained unchanged, even when the victim had become increasingly demanding of his time. The investigation determined that the victim's contract was coming to an end and the evidence tended to show she had been increasing her professional demands on the alleged offender in an effort to secure an extension.

Shortly after receiving a poor performance evaluation, a victim reported that the alleged offender, who was her supervisor, had sexually harassed him two years ago and claimed that his negative appraisal was because he had rejected her advances. The victim reported the sexual harassment, prior to his negative performance appraisal, to several outcry witnesses but, at the time, had not made a formal complaint. The allegation of sexual harassment was corroborated by these witnesses, plus a witness who had experienced similar behaviour by the alleged offender. Although no link was established between the victim's rejection of the alleged offender and her comments in his evaluation which were related to evidenced performance issues, the allegation of sexual harassment was substantiated. The delayed report, and the victim's unsubstantiated contention that his poor appraisal was linked to the sexual harassment, did not diminish his credibility.

## 3.5 Other issues

### 3.5.1 Consent and agreement of the victim

There are two distinct aspects to obtaining victim consent and agreement in a sexual harassment investigation.

The first aspect relates to a victim's consent to cooperate with an investigation by agreeing to a victim interview. There are times when a victim will be reluctant to proceed with an interview; for instance, when a complaint is made by a third party without the victim's knowledge, or when a victim makes a complaint but, mistrusting of the process, withdraws it before being interviewed by the investigators. Any obligation to cooperate with an investigation should not be enforced in these circumstances. Investigators should carefully and thoroughly explain the process to the victim, but ultimately respect a decision to decline a formal interview. When these concerns arise investigators should be clear with the victim, explaining that due process rights will require that their identity be disclosed on a "need to know" basis, including to the alleged offender and to those responsible for acting on the outcome of the investigation.

A human resources officer asked to meet an investigator in the company of a possible victim of sexual harassment. Following the meeting the victim agreed to move forward with an investigation but, when contacted for an interview, withdrew her cooperation. Another victim came forward regarding the same alleged offender, but she too was reluctant to proceed, as she mistrusted the process. The investigators spoke separately to each victim at length, giving the victims an opportunity to meet with the investigators face to face and to discuss in detail the investigation and disciplinary process. There were many questions about whether the alleged offender would become aware of their testimony, their roles in the investigation and fears of possible retaliation. In the end, both victims agreed to proceed and be interviewed, which resulted in several other victims coming forward during the investigation.



Possible measures to protect a victim and their identity should also be explained, including possible interim measures (see [Section 3.3.3](#)), the redaction of the victim's name in the investigation report (see [Section 3.6](#)) and an undertaking that, should an offender appeal a disciplinary sanction, the entity will request that the administrative tribunal (or other appeals mechanism) redact the victim's identity from any judgement/decision.

The second aspect relates to whether the entity may, in any event, proceed with the investigation. A victim's decision to withdraw a complaint is not necessarily a bar to the completion of an investigation or the decision to initiate a disciplinary process against the alleged offender. There may be times when the sexual harassment can be established through other means, either because it was witnessed by others, or because the victim's decision to withdraw the complaint occurred after they had provided credible testimony to the investigators. In these cases, the interests of the entity in holding offenders accountable, the duty of care owed to other staff members, and the need to preserve a harmonious workplace may prevail over a victim's unwillingness to engage in the process. The victim's wishes will, however, be an important factor for the respective decision makers to consider in this context.

A victim made a complaint of sexual harassment against a senior official. She provided the investigators with a detailed, sworn, account of the events and identified corroborating witnesses. She also provided the investigators with explicit text messages from the alleged offender requesting sexual favours. Following her interview, the victim told the investigators she no longer wished to be involved in the process. Witnesses confirmed that the victim had confided in them contemporaneously and that the events had caused the victim great distress, impacting her work performance. The victim's supervisor confirmed that the victim's work had taken a sudden deterioration around the time of the incidents in question and that she had taken unexpected sick leave. The alleged offender denied the allegations; however, his

denials took a different turn depending on the evidence presented to him by the investigators. The alleged offender was unwilling to provide the investigators with his personal mobile phone, citing privacy concerns. The investigation concluded there was sufficient evidence to substantiate the complaint.

A victim reported a possible pattern of sexual harassment and abuse of power by another staff member and participated in a formal interview. She told the investigators that other women had confided in her with experiences of similar conduct from the alleged offender but did not provide the names of these women, as they had spoken to her in strict confidence. Instead the victim provided the investigators with the name of one witness who could potentially corroborate her complaint. This witness had no direct knowledge of the incidents reported but confirmed that the victim had recounted them to him long after they arose. The victim also told the investigators she did not want her identity disclosed either during or after the investigation. Taking these concerns into account, and absent enough evidence to support the victim's complaint, the investigation was closed.

Investigators are best placed to lead these discussions with victims. They are trained interviewers with experience in sexual harassment investigations, responsible for recording and exploring testimony given by a victim. They are required to explain the formal process to the victim and have firsthand experience of the process in action. Any consent issue that arises in the handling of a formal complaint, no matter the stage, are best directed to the investigative entity or investigators to manage the response.

### 3.5.2 Communications during investigations

The responsibility for communicating with witnesses about the investigation process, including the victim and the alleged offender, lies primarily with the investigators. Similarly, subject to confidentiality considerations, the investigators are responsible for providing focal points and management with information they may need during the investigation to assist with their monitoring and other responsibilities (see [Section 3.3.3](#)).

Focal points, where in place, hold a complementary role, providing information on the process particularly before and after an investigation is complete. They may provide information on support pathways and are available to discuss any concerns arising from interim measures or accommodations.

On occasion, a sexual harassment complaint and investigation may attract **media attention**. Responses to the media should only be made through official channels, in consultation with the investigators. Any response given must respect the due process and confidentiality requirements of all investigation participants.

### 3.5.3 Investigative challenges

#### a) Expansion of scope – new victims

Investigations into sexual harassment complaints may lead to the identification of additional victims.

Sometimes this occurs when a witness voluntarily gives evidence about an unrelated sexual harassment incident which impacted them, involving the same alleged offender. After carefully recording this account, investigators should reiterate the formal process to the victim, keeping in mind the confidentiality and consent issues described in [Section 3.2](#) and [3.5.1](#). Thereafter, the investigators should seek to corroborate this account using the same methodology employed for the initial formal complaint, documenting it in the Investigation Report (see [Section 3.6](#)).

Other times, the identification may occur via witnesses telling investigators about other possible sexual harassment they heard about, or other situations they directly witnessed. In these cases, each possible victim should be approached by the investigators and asked whether they wish to formally come forward with their account. There is no obligation for victims to agree to a victim interview.

Some victims may be comfortable providing testimony to corroborate another victim's account but unwilling to testify as to their own experience. Investigators should accept the victim's wishes in this regard. Even in such cases, it may be possible to incorporate other witnesses' hearsay testimony as corroborative of the initial formal complaint, signifying a propensity or impulsive behavioural pattern on the part of the alleged offender (see [Section 4](#)).<sup>13</sup>

A third-party report was received alleging that an intern had been sexually harassed by a senior staff member. When the investigators approached the intern she declined an interview but denied the complaint. However, a witness came forward and said that the intern had confided in her but did not want to speak up because she was fearful of possible negative impacts on her job opportunities. The witness' statement was supported by digital evidence. Further outcry witnesses provided testimony, as did other junior personnel who had experienced similar unwelcome sexual advances from the same staff member. When interviewing the alleged offender, the identity of the victims – including the intern – was disclosed to him, but he was informed that the intern had declined to provide evidence to the investigation. The investigation found sufficient evidence to substantiate the complaint.

All relevant evidence should therefore be clearly documented in the Investigation Report for consideration by those responsible for deciding on disciplinary sanctions.

<sup>13</sup> See for example, [Mbaibolgem \(2018-UNAT-819\)](#).

## b) Timeliness

Entities should prioritize the investigation of sexual harassment complaints and seek to complete them in a timely manner of the decision to investigate.

This does not mean that sexual harassment investigations are always capable of swift resolution. Completion can be frustrated by the need to obtain and analyze digital evidence, the addition of new allegations as the investigation proceeds, the reluctance of witnesses to be interviewed, the volume of relevant witness testimony, and difficulties interviewing parties, for example on account of sick leave. Accordingly, sexual harassment investigations cannot work to a strict timeframe.

## c) Sick leave

Investigators should anticipate that victims or alleged offenders may be placed on certified sick leave during an investigation. The investigators will need to follow any procedures in place in their respective entities regarding obligations to participate in investigations while on sick leave. Absent any such procedures, the investigative processes should proceed as normal, subject to consultation with the entity's medical services team, where available, or otherwise in consultation with the staff member's medical professional/s.

## 3.6 The Investigation Report

An Investigation Report is prepared at the conclusion of the investigation. It summarizes the evidence obtained and is accompanied by supporting documentation, including records of interviews, written statements, digital evidence, or other reproductions of any physical evidence.

While the structure of an Investigation Report will vary between entities they will invariably:

- contain a complete and factually accurate summary of the evidence
- include inculpatory and exculpatory evidence
- be impartial and objective

- be concise and clear
- be logically organized
- contain a credibility assessment

Sexual harassment Investigation Reports should anonymize the name of victims using an appropriate descriptor (e.g. V01). Similarly, the names of any witnesses whose disclosure would necessarily lead to an identification of the victim should also be anonymized (e.g. W01). The anonymizing of names in the Investigation Report does not confer absolute anonymity and does not mean that the names will be redacted from the supporting documentation/evidence. The names of the victim and witnesses will be disclosed on a "need to know" basis, including to the alleged offenders and those responsible for acting on the Investigation Report (see [Section 3.2](#) and [3.5.1](#)).

Investigation Reports will include a section setting out the factual findings resulting from the investigation. The findings of fact will be based on an analysis of the evidence obtained during the investigation. In sexual harassment investigations, this will usually require a credibility assessment of the accounts provided by the victim/s and alleged offender (see [Section 4](#)). The findings of fact should appropriately set out the investigators' analysis and assessment of the evidence.

The Investigation Report should not make a finding as to whether sexual harassment has been established. This is a legal conclusion made by those responsible for deciding whether to initiate a disciplinary process against the alleged offender. These decision makers will first be required to determine whether the findings of fact made by the investigators have been established to the requisite degree, meeting the applicable burden of proof. This analysis will similarly require an understanding of the factors relevant to a credibility determination.

## 4. Credibility Assessments

Investigators are best placed to weigh and assess the credibility of a witness' account.

It is important to recognize that an investigator's role is not to assess the credibility of the witness *per se*. Rather, it is an objective and rational process by which a fact-finder assesses the weight to be given to a witness' testimony when there are meaningful discrepancies in the accounts provided by the victim/s and the alleged offender.

In conducting this credibility assessment, the investigators may consider:

- Any inconsistencies in the testimony provided, or inconsistencies with statements previously made by the witness, taking into account whether the inconsistencies are on a material point. Here investigators should be mindful that minor inconsistencies are to be expected and are not fatal to a witness' credibility. Conversely, repeated consistent statements may indicate the account is credible.
- Whether the testimony of the witness is supported by other evidence. This support may take many forms, including testimony from outcry witnesses, testimony of witnesses who saw the incident/s, emails, text messages or photos relevant to the circumstances of the incident/s, postings on social media, CCTV footage, notes or records contemporaneously made by a witness and medical records confirming impact on a victim.
- A witness' capacity to recollect or clearly communicate their account. Vague or unclear testimony may be given less weight if it is considered a sign that the witness' recollection has faded or has been reconstructed. A detailed account may be an indicator that the account is credible.
- The inherent probability of the account.
- The existence or nonexistence of a bias, interest or other motive. It may be relevant that the victim's contract is coming to an end or that they are facing other difficulties in the workplace. Conversely, the fact that a victim no longer works with the alleged offender could lend weight to the credibility of their account.
- Evidence of untruthfulness may be an indicator than an account lacks credibility; for instance, failure to disclose the existence of a pre-existing relationship might undermine a victim's account of sexual harassment. An alleged offender's complete revision of their account after being presented with evidence which contradicted their initial statement might suggest that the revision is not believable.
- Concessions by an alleged offender that material parts of a victim's account are truthful, for instance that there was touching, but it was not "sexual" and simply part of their "culture", may lend weight to a victim's overall account.
- A refusal to provide information within a witness' control, such as cell phones and email records, may reflect on the credibility of their account.
- Other instances of similar behaviour by the alleged offender, for instance an account by a witness that the alleged offender had once touched them in an uncomfortable manner, may lend weight to a victim's account.
- Caution should be exercised in using delay in reporting a complaint as an indicator militating against the credibility of a complaint. Sexual harassment complaints are often understandably delayed, for example because of mistrust of the process or a fear that a complaint could jeopardize harmony in the workplace or impact career progression.
- A witness' demeanor during an interview is not necessarily relevant to the credibility of their account. Nervousness, agitation and even anger are not uncommon in an interview setting. However, there may be times when the emotions displayed by a witness during an interview serve

to corroborate the account. For instance, a victim's observable distress during an interview may lend weight to the account and its impact on the victim. Conversely, a witness' deliberate refusal or obfuscation to avoid answering direct questions, may well be a sign that their account lacks credibility.

No one factor, or its absence, is determinative of the credibility of a witness' account. Careful consideration and evaluation of all the evidence is required.

The reasoning underlying the credibility assessment must be explained in the Investigation Report to guide those responsible for acting on its findings.

To further assist investigators and others in assessing credibility, the Sub-Group has prepared a note reviewing judgments in which disciplinary sanctions have been affirmed by UN international administrative tribunals. It identifies the types of evidence examined by international administrative tribunals when assessing whether misconduct has been established, as well as the approaches and elements relied upon by the tribunals when assessing credibility ([Annex A](#) – Assessment of Evidence).

Two separate victims, who had no relationship beyond working in the same organization, reported sexual harassment by the same alleged offender at different times. The first victim no longer reported to the alleged offender and the second victim never had. There was no obvious motive or agenda to the complaints. The testimony of the first victim was supported by outcry witnesses, as well as by a witness who had been approached by the alleged offender about the victim. The testimony of the second victim was similarly supported by outcry witnesses, as well as by contemporaneous emails. Three witnesses who did not wish to be identified as victims also disclosed their personal interactions with the alleged offender, some of which were similar to the interactions experienced by the two victims. Many witnesses indicated that the alleged offender openly expressed appreciation

for women and his supervisor reported having a #metoo specific discussion with him. Though the alleged offender denied having engaged in sexually harassing behaviour, he agreed that he had hugged, kissed and complimented the first victim, and that he may have touched the second victim during a professional meeting. Upon assessing all the information that was collected, the victims' testimony was deemed more credible than the alleged offender's denials.

A victim submitted a lengthy complaint, containing allegations of harassment, including sexual harassment, against her supervisor. The complaint was well organized, with dates, locations and supporting documentation. During the interview, the victim presented as thoughtful and credible. She was seemingly willing to cooperate and very responsive. However, as the investigation proceeded, the victim's description of events was not corroborated by any witnesses, including many suggested by her. In addition, the victim became less responsive and, despite telling the investigators she would submit additional evidence, she never did so. The victim further declined the investigators request to access her medical and counselling records, despite having indicated they would support her complaint. Instead, the victim offered to provide a summary of each session with the Staff Counsellor and a detailed narrative about what was discussed, which the investigators declined. The alleged offender provided plausible responses to the allegations which were corroborated by witnesses. Emails, as well as witness testimony, pointed to external issues contributing to the victim's many sick days. In addition, evidence indicated the victim was reluctant to follow her supervisor's instructions. On the basis of the available evidence, the victim's account was not found credible.

## 5. Post Investigation

Where an investigation does not substantiate the formal complaint, both the victim and the alleged offender should be informed. The victim should be provided with a summary of the reasons why the complaint was unsubstantiated.<sup>14</sup> This is a sensitive communication and requires careful consideration. The communication should be premised on an understanding that an unsubstantiated allegation does not necessarily mean that the incident/s did not occur; it means that there was insufficient evidence upon which the incident/s could be established.

Investigation Reports which tend to substantiate a complaint should be submitted to those responsible for deciding whether to initiate a disciplinary process against the alleged offender (the decision makers).

The decision makers will first be required to determine whether the findings of fact made by the investigators have been established to the requisite degree, meeting the entity's applicable burden of proof, and whether the facts amount to sexual harassment. They will also consider whether due process has been accorded to the parties in the handling of the formal report.

In conducting a review, the decision makers will be required to evaluate the entirety of the evidence. There may be times when a material gap in the evidence is identified for possible follow up by the investigators. Such requests should be sent to the investigators/investigative entity for independent consideration on the need to conduct additional inquiries. The results of any such inquiries will be provided for consideration as to whether it affects the findings of fact.

To assist those responsible for acting on investigation reports, the Sub-Group has prepared a note focusing on evidentiary issues that arise in investigations, and their implications for investigations of sexual harassment. It examines the evidentiary standards for disciplinary sanctions that have been established by the international administrative tribunals ([Annex B – Evidentiary Standards](#)).

At the conclusion of this process, both the victim and the alleged offender should be informed of the outcome, with a summary of reasons provided to the victim should a decision be made to close the complaint at this stage.

The decision to provide the Investigation Report to the alleged offender or the victim normally rests with the decision makers/management and not with the investigative entity.

Where the investigation substantiated the sexual harassment complaint, it should be anticipated that the Investigation Report and underlying evidence will be disclosed to the alleged offender.

There may also be times when a victim will also be provided with a copy of the Investigation Report, such as when a victim has a right to contest a decision that their complaint is not substantiated by the evidence.

To assist investigators and others in understanding when Investigation Reports may be provided, the Sub-Group has prepared a note focusing on the practice of international organizations as to when and the extent to which a report may be disclosed to a victim or alleged offender ([Annex C – Disclosure of Investigation Reports](#)).

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<sup>14</sup> The responsibility for this communication will vary, often depending on the Organization's legal framework. Generally, however, it will be the responsibility of either the investigation service or those responsible for assessing the sufficiency of evidence in a possible disciplinary context.

Focal points, and managers who have been made aware of the investigation for possible interim measures, should also be advised that the investigation has concluded, and whether the complaint was closed or is undergoing a disciplinary process.



# ANNEX A:

## Note on the Assessment of Evidence

### I. Introduction

1. The present note reviews judgments in which disciplinary sanctions have been affirmed by UN tribunals (UN Appeals Tribunal (UNAT) and UN Dispute Tribunal (UNDT), the ILO Administrative Tribunal (ILOAT) and the World Bank Administrative Tribunal (WBAT), primarily during the period from 2010 – March 2019. It identifies the types of evidence examined by international administrative tribunals when assessing whether misconduct has been established, as well as the approaches and elements relied upon by the tribunals when assessing credibility.

### II. Types of evidence supporting a finding of misconduct

2. The international administrative tribunals have accepted the following types of evidence as supporting a finding of misconduct.

- a) Statements of victims
- b) Statement of witnesses present at incident
- c) Statements of witnesses who saw/ spoke to victim after the incident
- d) Concessions or admissions by alleged perpetrator
- e) Medical evidence
- f) Other instances of similar misconduct by perpetrator
- g) Recorded or electronic communications, including social media
- h) Identification in a photographic array
- i) Findings and opinions of experts

### III. Assessing credibility

3. In assessing the credibility of statements of victims and witnesses, the jurisprudence of the international administrative tribunals has reflected two approaches:

- a) **Presumption against false testimony:** The tribunals have declined to presume that a victim or a witness will give false testimony, particularly, absent an established motive or evidence of collusion.
- b) **Statements cannot be discounted based on relationship or speculative motive:** A relationship between a victim and a corroborating witness, including a familial relationship, does not provide a basis to disregard automatically the witness testimony of a family member, a friend or a co- worker. Likewise, an assertion that a witness might have a financial incentive to give false testimony will not be accepted if it is simply speculative and is unsupported by evidence.

4. The international administrative tribunals have considered these elements when assessing the credibility of a victim, witness, or alleged perpetrator:

- a) Timing of reporting
- b) Inconsistent, vague or inaccurate statements
- c) Implausible explanation or unusual behavior
- d) Fabrication of evidence to discredit witnesses
- e) Statements, whether or not taken under oath
- f) Demeanor as observed by the tribunal



## IV. Application of these elements to sexual harassment cases

5. Sexual harassment may involve actions undertaken surreptitiously or in private settings. In such cases, it is not uncommon to have no eyewitness to an incident at the time that it happens. This does not mean that when faced with two competing accounts from a victim and an alleged perpetrator, an organization is unable to proceed. Reconciling two competing accounts of an incident requires assessing other forms of corroborative evidence, if available. As discussed in section II above, the jurisprudence of the international administrative tribunals accept that corroborative evidence can come in many different forms. Evidence does not have to come only from a direct eyewitness present at the time of the incident in order to be considered as corroborative evidence.

6. Moreover, the absence of corroborating evidence in a sexual harassment case should not, in and of itself, defeat an allegation of sexual harassment where conclusions can be drawn about the respective credibility of the victim and alleged perpetrator. As the UNDT found in Hallal:

“ The Tribunal wishes to emphasise that, in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required...It is not always the situation in sexual harassment cases that corroboration exists in the form of notebook entries, email communications, or other similar documentary evidence, and the absence of such documents should not automatically render a complaining victim’s version as being weak or meaningless. As is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case.”<sup>1</sup>

7. As discussed in section III, credibility can be assessed by the quality of the statements and explanations provided, particularly, if they are inconsistent, vague, implausible or at odds with the evidence on the record. One factor that has been taken into account to assess the credibility relates to whether a victim has promptly reported an incident either to the relevant authorities or to friends and family. While the UNAT has considered that a prompt reporting of an incident enhances its evidentiary weight, a reluctance to report sexual harassment resulting in delayed reporting should not be used to undermine the credibility of an allegation. As recognized by the WBAT in Rendall-Speranza,

“ [D]elay in reporting instances of harassment may be explainable for reasons other than that the victim has welcomed the sexual advances. There may be strong pressures not to make even a well-based complaint, such as fear that one will be branded as a troublemaker, a fear that one’s image for ethical probity may become tarnished, uncertainty about the definitions in the employer’s policy or the commitment to its implementation, a wishful belief that the victim can handle the matter herself without creating undue inconvenience or embarrassment to others, and ultimately perhaps by a fear of retaliation by the harassing party.”<sup>2</sup>

## V. Recommendation

8. The Sub-Group encourages the CEB members to take note the types of evidence examined by international administrative tribunals when assessing whether misconduct has been established, as well as the approaches and elements relied upon by the tribunals when assessing credibility. Reference to this jurisprudence will be reflected in the relevant Guidance Notes under preparation by the Sub-Group to assist officials who exercise responsibilities during the investigative and disciplinary processes.

<sup>1</sup> UNDT Judgment No. 2011/046 (Hallal), para. 55. See also ILOAT Judgment No. 2771, cons. 23: “As is usual in relation to events of the kind alleged to have occurred in the hallway of the hotel in Honduras, the only direct evidence was that of the subordinate herself. The charge in relation to this matter depended on her credibility and that of the complainant.”

<sup>2</sup> WBAT Decision No. 197 (Rendall-Speranza), para. 75

## Attachement 1 to Annex A

### 1. Types of evidence supporting a finding of misconduct

	UNAT/UNDT	ILOAT	WBAT
1. Statements of victims	✓	✓	✓
2. Statement of witnesses present at incident	✓	✓	–
3. Statements of witnesses who saw/ spoke to victim after the incident	✓	✓	–
4. Concessions or admissions by alleged perpetrator	✓	✓	✓
5. Medical evidence	✓	✓	–
6. Other instances of similar misconduct by perpetrator	✓	✓	✓
7. Recorded or electronic communications, including social media	✓	✓	✓
8. Identification in a photographic array	✓	–	–
9. Findings and opinions of experts		✓	–

### 2. Assessing credibility

	UNAT/UNDT	ILOAT	WBAT
Approaches to assessing credibility			
1. Presumption against false testimony	✓	✓	✓
2. Statements cannot be discounted based on relationship or speculative motive	✓	✓	–
Elements relevant to assessing credibility			
3. Timing of reporting	✓	–	✓
4. Inconsistent, vague or inaccurate statements	✓	✓	–
5. Implausible explanation or unusual behavior	✓	✓	✓
6. Fabrication of evidence to discredit witnesses	✓	–	–
7. Statements, whether or not taken under oath	✓	✓	–
8. Demeanor as observed by the Tribunal	✓	–	–

The relevant judgments and decisions of the international administrative tribunals are listed in Annex 2.

## Attachement 2 to Annex A

### 1. Types of evidence supporting a finding of misconduct

#### 1.1. Statements of victims

2018-UNAT-889 (Sall), para. 40: “The complainant made several subsequent statements which display a conspicuous consistency with her initial report.”

2014-UNAT-480 (Oh), para. 26: “The evidence of misconduct was based on witness statements from four anonymous victims, admissions made by the staff member that corroborated the victims’ witness statements, and the identification of the staff member by two of the victims from a photo array.”

2013-UNAT-302 (Applicant), paras. 42, 47: “[They] provided statements explaining in detail what had occurred. Several statements by the complainants describe strikingly similar events. . . . They identified his appearance, first name, and the tent he was living in when staying at the camp site. . . . While investigated only now, several of the allegations were raised previously at the time the incidents took place to the respective supervisors of the camp staff. This reporting of incidents at different times in the past, while not submitted to the UN formally at that time, provides further credibility to the statements, and rules out that the allegations were fabricated. . . . The UNAT observed that in assessing the credibility of the witness statements “the UNDT mistakenly focused on minor inconsistencies in their statements, rather than focusing on the clear and convincing evidence established by the record. Such minor inconsistencies were adequately explained in the investigation report, but the UNDT incorrectly viewed the Investigator’s explanations as showing bias and lack of objectivity. Moreover, in erroneously finding that the complainants were not credible, the UNDT failed to take into account the quite unique and detailed accounts of their conversations with the staff member, as well as the Complainants’ youth and culture.”

UNDT Judgment No. 2011/046 (Hallal), paras. 37 – 38: “In his legal challenge to the evidence presented in this case, the Applicant focuses on

the Complainant and contends that her version of what took place contained numerous discrepancies that have never been adequately resolved, that the Complainant had exercised “prevarication” over her own statements and had displayed ambivalence over the Complainant’s attempts to privately resolve the matter at the canteen and then proceeding with a formal complaint several weeks later. . . . The Applicant’s criticisms of the evidence in this case simply are unfounded, for: (a) the Complainant’s version of events has remained consistent from the time of her initial complaint through her testimony to the Tribunal; (b) the Complainant’s version of events has been analysed independently by three different investigating bodies (the UNICEF managers in Banda Aceh who conducted a preliminary investigation in October 2007, the formal investigation team in January 2008, and the JDC in 2008), all of which found the Complainant’s version of events to be true true; (c) the Complainant’s version of events is corroborated by physical evidence in the form of her notebook description, in the form of emails sent to the Applicant, and by the layout of the project site itself.”

UNDT Judgment No. 2011/046 (Hallal), para. 55: “The Tribunal wishes to emphasise that, in sexual harassment cases, credible oral victim testimony alone may be fully sufficient to support a finding of serious misconduct, without further corroboration being required. Indeed, in this particular case where the Complainant has provided such reliable and credible oral testimony, the Tribunal would be justified in rendering its judgment relying on this oral testimony alone. It is not always the situation in sexual harassment cases that corroboration exists in the form of notebook entries, email communications, or other similar documentary evidence, and the absence of such documents should not automatically render a complaining victim’s version as being weak or meaningless. As is always the case, any witness testimony should be evaluated to determine whether it is believable and should be credited as establishing the true facts in a case.”

ILOAT Judgment No. 3640, cons. 21, 24: “[T]he investigation report contained an extremely detailed description of all the instances of unwelcome behaviour by the complainant towards the 21 women identified as victims of his conduct, and their names were given in almost all cases.. [I]n view of the documentation in the file and the content of the numerous concurring witness statements recorded in the investigation report, the Tribunal considers that it cannot seriously be disputed that the various instances of unwelcome behaviour by the complainant towards women who had to work with him at the Organization actually occurred.”

ILOAT Judgment No. 2771, cons. 23: “As is usual in relation to events of the kind alleged to have occurred in the hallway of the hotel in Honduras, the only direct evidence was that of the subordinate herself. The charge in relation to this matter depended on her credibility and that of the complainant.”

WBAT Decision No. 207 (Mustafa), paras. 4, 20: “Ms. X, after discussions with the Human Resources (HR) Officer, made a formal complaint against the Applicant alleging that he had sexually harassed her at the workplace... The central issues regarding the question of misconduct relate to (i) the credibility of the Applicant, of Ms. X and of the witnesses that the investigator interviewed in order to establish whether the Applicant had sexually harassed Ms. X.” The WBAT confirmed that the Applicant had harassed Ms. X on the basis of the record.

### **1.2 Statements of witnesses present at the incident**

2019-UNAT-913 (Siddiqi), para. 30: ““Statements of the three witnesses, who were present during the meeting on 16 May 2017 (Ms. LM, Mr. KR and Mr. EM), render clear and convincing evidence that Mr. Siddiqi did not only utter an unspecified threat but that he had threatened to kill identified staff members.”

2013-UNAT-366 (Abu Ghali), para. 36 “In assessing the credibility of the various witnesses and their statements, the UNRWA DT concluded that the statements ‘given to the Anti Drug police by [Mr.

Abu Ghali] and the witnesses shortly after they were arrested, and before they could discuss their statements together and recant them’ were more credible than their later statements to the police and the LAA/G during the Agency’s investigation, which were made after the witnesses ‘had ample time to talk to each other and deliver a standardized version of the events’. The UNRWA DT also found that Mr. Abu Ghali generally was not credible. The Appeals Tribunal agrees with the UNRWA DT’s credibility determinations.”

ILOAT Judgment No. 3927, cons. 11: The ILOAT confirmed that the facts had been established where the “auditors found that, in substance, the alleged statements had in fact been made by the complainant, based solely on the three witness testimonies (of Ms B., Ms E. and the complainant).”

### **1.3 Statements from witnesses who saw/ spoke to victim after incident**

2018-UNAT-889 (Sall), para. 40: “It is not disputed that the complainant was found at approximately 2:45 pm on the day in question sitting on the ground outside her room in the compound, naked except for a torn bra, crying for help and having suffered injuries to her body... Additionally, one UNAMID staff member provided a statement on the situation she found the complainant in immediately after the incident and three other UNAMID staff members provided statements related to the complainant’s apparent physical state shortly thereafter. These various evidentiary statements consistently relayed the complainant’s version of the events which added to their credibility.”

2018-UNAT-862 (Majut), paras. 86-89: “Mr. Moyo’s report that he had been assaulted by Mr. Majut was supported by Mr. Sadrulola’s witness statement... Mr. Sadrulola said, in his statement of 31 July 2015, that ‘...Thabani informed me that Paul hit him and his ear was swelling. I noticed some bruises on his right ear. I noticed Thabani had a small cut with some dry blood near his right ear. Thabani said he informed Security and was on his way to the Medical Unit for a check-up’... In view of the corroborating evidence, we find that the UNDT erred in fact and law in holding that the absence of the oral testimony by Mr. Moyo diminished

the credibility of his incident report and witness statement... In conclusion, we find that the UNDT did not evaluate the evidence objectively. It gave misplaced importance to minor inconsistencies, came to unreasonable conclusions on the facts which were not supported by the evidence, and made speculations instead of findings based on the evidence.”

2018-UNAT-819 (Mbaigolmem), paras. 7, 31: “Seven witnesses were interviewed between August and October 2014 as part of the investigation, including the complainant and Mr. Mbaigolmem, as well as two trainers and three participants in the WEM, to whom the complainant had confided about the alleged incident on the following day or a few days later. ...[V]arious evidentiary statements relayed the version of the complainant with a conspicuous consistency that added to their credibility.”

UNDT Judgment No. 2011/181 (Choi), para. 40: “It appears from the case record that, in the days immediately following the incident, the Complainant reported the facts in a consistent manner to five different people, as confirmed by the statements of those people or other written documents. First, on Monday, 28 January, or two days after the dinner, she confided in an ESCAP female staff member of the same nationality as herself and the Applicant. On the same day, the Complainant chatted with a friend via instant messaging, telling her that her supervisor had asked her to go to his home to clean and cook and to sleep. In these written exchanges, she told her friend how very uncomfortable she felt after this incident. Also on Monday, 28 January, she recounted the incident to another female intern working in human resources. Shortly afterwards, she told a human resources staff member, who had been alerted by the above-mentioned intern under his supervision, that she had accepted a dinner invitation from the Applicant and that during the dinner he had asked her to go to his home to clean and cook and that his conversation had sometimes had sexual overtones, even though he had not touched her. The human resources staff member told the investigators that the Complainant seemed very upset. Lastly, during the same week, the Complainant confided

in another ESCAP staff member, also of the same nationality as herself and the Applicant.”

ILOAT Judgment No. 2771, cons. 23: “To some extent, the subordinate’s credibility was bolstered by evidence that she reported the incident to her husband in a telephone call the next morning. That evidence, albeit that there were no independent witnesses, was sufficient to support the finding of sexual harassment.” ILOAT Judgment No. 3682, cons. 9: “[T]he record shows, the factual findings of the investigation report were reached following a thorough review of interviews carried out between the external investigator and thirteen witnesses with direct knowledge of the facts in the case. Consequently, it cannot be said that the decision to dismiss the complainant suffered from a manifest error of fact.”

#### **1.4 Concessions or admissions by alleged perpetrator**

2014-UNAT-480 (Oh), para. 26: “The evidence of misconduct was based on witness statements from four anonymous victims, admissions made by the staff member that corroborated the victims’ witness statements, and the identification of the staff member by two of the victims from a photo array.”

2013-UNAT-381 (Applicant), para. 42: “The UNDT not only reviewed the evidence gathered by the OIA and considered by the decision maker, but also heard evidence from the Applicant, in which he accepted that there was a physical altercation in his office between himself and Ms. H and that he grabbed her in an attempt to push her out of the office. He also admitted using strong language as alleged by the complaint. The UNDT concluded that the facts on which the decision to demote him was based were established by clear and convincing evidence.”

ILO Judgment No. 4106, cons 3, 11: ILOAT noted the “free admissions of guilt made by” the complainant.

ILOAT Judgment No. 3968, cons. 24: “The claim that there was nothing offensive in the 12 June email is contradicted by the complainant’s admission that she was conscious that Mr A. ‘would feel highly offended’ by her statement.”

ILOAT Judgment No. 2771, cons. 22: “[T]he complainant conceded in his reply to the subordinate’s complaint that something had happened when he acknowledged that he ‘did express concern and worry when [he] was unable to find [her] for over 2 hours at the hotel in Salvador, at a time when [he] was under the impression that she was in her room’. There was, thus, sufficient evidence on which to base a finding of harassment in relation to this charge.”

WBAT Decision No. 581, paras. 54, 56: “The Applicant has admitted that she made several false representations to her supervisor and to the administrative staff of the country office regarding the circumstances by which her access card was in her friend’s possession... The essential facts of the case are therefore established.”

### **1.5 Medical evidence**

2018-UNAT-889 (Sall), para. 40: “Added to that, contemporaneous medical reports for the complainant dated 6 November 2012 and Mr. Sall dated 7 November 2012, both stamped and signed by a medical doctor employed by UNAMID, are consistent with the assault described by the complainant.”

2018-UNAT-862 (Majut), para. para. 62, 66. “The UNDT erred in finding that there was insufficient corroboration of Mr. Moyo’s injury. It appears from the evidence that it was not a serious injury, and probably not very prominent, but Mr. Moyo’s statement and his incident report, Mr. Sadrulola’s evidence and the treating doctor’s report put the question beyond doubt that Mr. Moyo suffered an injury... Contrary to the UNDT’s view, the doctor’s report corroborates Mr. Moyo’s claim that he had been assaulted and had suffered an injury. The UNDT was wrong to dismiss the medical report because it did not have a date and time of issuance. The report clearly states that Mr. Moyo came to the clinic on 5 November 2014 complaining of pain and swelling behind his right ear caused by being punched 30minutes earlier”

ILOAT Judgment No. 3968, cons. 25: In a case involving a staff member dismissed for sending a harassing email, the ILOAT found that the “link

between the complainant’s 12 June email and Mr A.’s serious illness is proven by the temporal connection as well as by the assessment by the Occupational Health Physician.”

### **1.6 Other instances of similar misconduct by alleged perpetrator**

2018-UNAT-889 (Sall), para. 40: “Finally, several witnesses testified that Mr. Sall had already physically assaulted the complainant prior to November 2012 (in August 2011 and February 2012).”

2018-UNAT-819 (Mbaigolmem), paras. 7, 31: “Two [witnesses] stated, after the complainant recounted the incident to them, that Mr. Mbaigolmem had also acted in an inappropriate manner with them during the training. One of them claimed that Mr. Mbaigolmem had touched her neck during a coffee break. The other said that she had encountered Mr. Mbaigolmem in the hotel corridor one evening during the WEM and he had proposed to her that they spend the night together. Neither of these participants brought a complaint against Mr. Mbaigolmem regarding these allegations... [O]ther participants at the [meeting] gave statements, admittedly hearsay, alleging like conduct by Mr.

Mbaigolmem, such also being exceptionally admissible as similar fact evidence signifying a propensity or impulsive behavioural pattern on the part of Mr. Mbaigolmem.”

2014-UNAT-486 (Khan), para. 43: “Clear and convincing evidence showed that Mr. Khan repeatedly sexually harassed Ms. T. R. and Ms. A. A., as the UNDT correctly found. The statements by Ms. T. R. and Ms. A. A. are corroborated by statements of other female staff members, Ms. H. G, Ms. S. K., and Ms. M.K.”

2010-UNAT-040 (Aqel), para. 33: “Nor should it be forgotten that some years previously, Aqel encountered a similar problem that was settled through mediation. The direct and indirect evidence gathered support the factual findings that form the basis of the contested decision on the balance of probabilities.”

ILOAT Judgment No. 3640, cons. 5, 14, 15: “First, the complainant submits that the facts considered in these proceedings should have been confined to those directly concerning Ms M. and that it was therefore wrong also to take account of allegations related to his behaviour towards other persons.

However, contrary to what the Appeals Board seems to believe, in the context of an inquiry into a sexual harassment complaint, it is by no means abnormal that the investigations conducted with a view to ascertaining the truth of the statements contained in the complaint should be widened to encompass other similar behaviour on the part of the alleged harasser. In fact, that is often the best means of corroborating the allegations of the complainant in an area where, as noted above, it may be impossible to produce material evidence. ...In addition, although the other acts taken into consideration had not led to the lodging of harassment complaints – in many cases this may be explained by the inherent risks of making an accusation against a supervisor – this did not pose a legal obstacle to their being taken into account. All that mattered here was that these acts had actually occurred, irrespective of the action which might have been taken on them at an earlier stage. The fact that they did not lead to the lodging of a complaint does not make them any less relevant as evidence corroborating the allegations of Ms M. (see, in respect of this latter point, Judgment 2521, under 10, *in fine*). The reprehensible conduct of an international civil servant may well give rise to a disciplinary measure taken by the employing organisation on its own initiative, regardless of whether one of his or her colleagues files a complaint.”

WBAT Decision No. 207 (Mustafa), para. 24: “In addition to the clear inconsistencies in the Applicant’s testimony and in his presentation of the facts, Ms. X’s allegations are reinforced by the testimony of Ms.Y who had worked for the Applicant as a temporary staff member for almost two-and-a-half years. This evidence was not objected to by the Applicant as Ms. Y was in fact the witness who the Applicant said would ‘clear [his] name.’ Ms. Y described to the investigator instances of sexual harassment on the part of the Applicant that had striking similarities with those instances alleged by

Ms. X. When the Applicant was informed of Ms. Y’s testimony, he claimed that she was retaliating for her appointment not being confirmed. This claim is not supported by the record. The Applicant asserts that Ms. X’s charges of sexual harassment were also motivated by retaliation, a claim which is equally not supported.”

### **1.7 Recorded or electronic communications, including social media**

2019-UNAT-918 (Nadasan), para. 15: In reaching the conclusion that the staff member engaged in sexual harassment, the “the UNDT found *inter alia* that Mr. Nadasan had repeatedly contacted Ms. X via telephone, e-mail, and Facebook messages despite her repeated and clear demands that he stop contacting her. The content of his messages was clearly sexual in nature and it was clear from Mr.

Nadasan’s application before the UNDT that he knew his advances were not welcome.”

2013-UNAT-280 (Applicant), para. 59: The Appeals Tribunal is satisfied, having regard to the contents of the e-mail exchanges which took place between the Applicant and the Complainant in January 2005 (and, indeed, having regard to the earlier e-mail exchanges between them, as referred to above), that the Complainant did not share the Applicant’s desire to pursue a sexual relationship ... The transmission by the Applicant of a photograph of his genitalia to a female colleague, much less a female colleague under his direct supervision, irrespective of whether the photograph was sent within or outside work hours, can at its best, as found by the JDC, ‘be characterised as outrageous, and most probably unwanted’. ...Accordingly, we are satisfied (applying the test set out in Molari) that the Secretary- General had clear and convincing evidence that the Applicant’s conduct on 15 March 2005 was unwelcome to the Complainant.

UNDT Judgment No. 2011/046 (Hallal), para. 38: “[T]he Complainant’s version of events is corroborated by physical evidence in the form of her notebook description, in the form of emails sent to the Applicant, and by the layout of the project site itself.”

ILOAT Judgment No. 3649: The staff member was found to have “accessed Ms M.’s Hotmail account and had sent the emails referenced in his 16 May 2013 complaint to himself, and had reported it to the Agency management as having been sent by her in an attempt to cause harm to Ms M. In addition, the OIOS had recovered emails of a threatening nature sent to Ms M. from the complainant’s official Agency account.”

ILOAT Judgment No. 3126: “[A]lthough the complainant advances an argument that certain comments did not refer to the Senior Human Resources Officer, the e-mails were insulting, highly offensive and inconsistent with the duty of an international civil servant to respect the dignity of other staff members. Those actions constitute ‘improper action by a staff member in the performance of his duties’ and, thus, amount to misconduct.” WBAT Decision No. 516, para. 68: “Nevertheless, the Tribunal is satisfied that even in the absence of such evidence, other facts on which the disciplinary measures were based namely: the email messages the Applicant sent to, and about, Mr. X and Mr. Y; the fact that the Applicant undertook activity he had been instructed not to do; and that he was sometimes absent from work without leave, permission, notice or explanation, have been established.”

WBAT Decision No. 476, para. 32: “In the present case, it is undisputed that the Applicant sent the Complainant several e-mail messages of a personal nature to both his personal and work e-mail addresses. Some of these messages were on subjects of general interest such as art, history, travel and news; other messages concerned the tensions in interactions between the Applicant and the Complainant; others were unreciprocated invitations to socialize. In all these instances, the e-mail messages sent by the Applicant were unsolicited.”

### **1.8 Identification in a photographic array**

2017-UNAT-741 (Mobanga), para. 28: “[I]t is our finding that the UNDT erred when it considered that the identification of Mr. Mobanga by the complainant in the photo array was not reliable on the basis that the use of MONUSCO grounds passes

in the array may have influenced the complainant. All the photographs were marked “MONUSCO” and, indeed, she had informed the investigators before the identification that the person whom she had sexual intercourse with was from MONUSCO. This is not a case where there was only one photograph with the word ‘MONUSCO’ among an array of unmarked photographs, so that one photograph could stand out and possibly influence someone. Therefore, the photographs constitute evidence that was reasonably considered by the Administration.”

2014-UNAT-480 (Oh), para. 56: “This Tribunal has viewed the array of six photographs and is of the view that Mr. Oh did not stand out as all the photographs were of Asian men. Accordingly, we find that the identification of Mr. Oh from six photographs by each of the two victims, independently and separately from each other, constitutes evidence that was reasonably considered by the Administration and the UNDT as supporting the finding of his misconduct.”

### **1.9 Findings and opinions of experts**

ILOAT Judgment No. 3875, cons. 9: “[...] CERN was right to regard these suspicions as being objectively confirmed by the information gleaned from the technical examination of the computers concerned. [...]”

ILOAT Judgment No. 3888, cons. 29, quoting the Investigation Unit’s report: “[...]’78. It is noted, firstly, that the credibility of the expert employed by [the] IU is beyond any doubt. The expert neither has a personal interest in the matter nor any other reason to falsely claim that [the complainant’s] certificates were falsified. The contract concluded with the expert specifically provid[ing] that the expert would be paid the same fees for his services whether he was able to prove that the certificates were authentic or false, or whether he found that it was not possible to obtain verification as to whether they were authentic or false. 79. Secondly, it is further noted that the expert presented conclusive evidence which also fit the irregularities already established previously [by NUFFIC], and which are neither addressed nor explained by [the complainant’s] comments.”



## 2. Assessing credibility

### Approaches to assessing credibility

#### 2.1 Presumption against false testimony

2019-UNAT-913 (Siddiqi), para. 30: “There is no reason to believe, and the UNDT did not find, that the witnesses colluded and knowingly gave a false statement.

2018-UNAT-862 (Majut), para. 80. “No logical reason was established on the evidence as to why Mr. Moyo would make a false claim of assault. Also, his documentary evidence was strongly corroborated by the other evidence on record.”

2018-UNAT-819 (Mbaigolmem), para. 31: “[I]t is objectively unlikely that the various witnesses against Mr. Mbaigolmem, who came from different countries to attend the WEM, and appeared to have no prior association with each other, would have colluded or conspired with the complainant to falsely incriminate Mr. Mbaigolmem. They had no reason to do that.”

2018-UNAT-811 (Aghadiuno), para. 96: “To reject Mr. Baily’s evidence and accept the version of Ms. Aghadiuno, we need to find that he opted to commit fraud, forgery and uttering, as well as the crime of conspiracy, by concocting and delivering forged enrolment contracts to OIOS; and that he then went onto perjure himself in his testimony before the UNDT. It is hard to understand why Mr. Baily would expose himself in this way to a real risk of censure and prosecution. He had little or nothing to gain personally from such a course of conduct.”

2015-UNAT-537 (Wishah), para. 32: “The Appeals Tribunal is cognizant of the possible interest of the complainants, their two sisters and the wife of one of them, but finds that the UNRWA Dispute Tribunal erred in disregarding their testimonies without explaining why those five persons would repeatedly lie to prejudice the staff member.”

ILOAT Judgment No. 3757, cons. 7: “[I]t cannot be held that the Organization acted arbitrarily in giving credence to the allegations contained in the e-mail

of 16 January 2010. The Tribunal finds it reasonable to consider that the author of that e-mail did not act with the intention of harming the two staff members of whom he complained, especially in view of the fact that by spontaneously stating that he had bribed them, he in effect accused himself of participating in a corrupt transaction.”

ILOAT Judgment No. 3640, cons. 26: “[T]he investigation report shows that, with regard to the five identified cases of sexual gestures or attempts at molestation, the actions in question were spread over a ten-year period and that the persons concerned, most of whom did not know one another, harboured no other grievance against the complainant, which makes it inconceivable that they could have conspired for the sole purpose of harming him.”

WBAT Decision No. 366, para. 69: “[T]he corroboration of third parties present in the same workplace, even if subjective, may be entitled to cumulative weight in circumstances where there is no discernible motivation for such persons to take sides.”

WBAT Decision No. 207, para. 36: “[T]he Tribunal notes that there is no reason to believe that Ms. X, Ms. Y and the driver of the car used for the trip to Lahore were conspiring in any way against the Applicant, as the Applicant has alleged. Indeed, the Applicant has not shown that ‘conspiring’ against him would have benefited them in any way.”

#### 2.2 Statements cannot be discounted based on relationship or speculative motive

2015-UNAT-537 (Wishah), para. 25-26: “[T]he alleged misconduct was committed in a domestic context against the relatives of the staff member. In that context, the testimonies obtained usually come from persons directly affected by the event or closely related to the victims and/or offenders. Consequently, their subjective character cannot be disregarded, nor can the investigation avoid interviewing these persons, since they are the “necessary” witnesses to the facts under investigation... This context is particularly common in cases that involve gender violence”

2010-UNAT-040 (Aqel), para. 31: “Contrary to Aqel’s contention, the investigation has not uncovered evidence to attribute any spurious claims to the victim. Poverty alone does not constitute such grounds and it is important to note that the victim and her family (who have an impeccable reputation, as the FFC was able to ascertain) rejected offers of financial compensation for them to drop the charges.”

ILOAT Judgment No. 3725, cons. 12: “The IOS report shows that IOS generally sought corroboration of the information which emerged from its interviews. It identified the instances in which some aspects of that information were corroborated or not corroborated. The complainant suggests that there was a relationship between his wife and staff members who lodged complaints against him. The suggestion seems to be that the staff members were influenced to lodge their complaints as a result of that relationship. Even if it existed, the nature of the relationship is vague and would not in itself have negated the evidence which the staff members gave.”

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## Elements relevant to assessing credibility

### 2.3 Timing of reporting

2018-UNAT-889 (Sall), para. 40: In the “immediate aftermath of the event, the complainant made a first report to the UNAMID/SIU describing in detail the preceding assault by Mr. Sall. That report is a previous consistent statement and of considerable evidentiary weight.”

2018-UNAT-819 (Mbaigolmem), para. 31: “It is equally not disputed that the complainant made a first report about the incident at the first reasonable opportunity in the immediate aftermath of the event. That report is a previous consistent statement of the kind exceptionally admissible in cases involving sexual harassment or assault and is of considerable evidentiary weight.”

WBAT Decision No. 207 (Mustafa), para. 25: „The Applicant further suggests that the fact that Ms. X filed her complaint ten months after the alleged incident in Lahore, and that Ms. Y never reported

any incident of sexual harassment until interviewed by the investigator, is proof that their claims were based on retaliatory motives. The Tribunal, however, has found that delays in reporting claims of sexual harassment do not necessarily negate the credibility of those claims. In Rendall-Speranza (Decision No. 197 [1998], para. 75), the Tribunal held that it

appreciates that delay in reporting instances of harassment may be explainable for reasons other than that the victim has welcomed the sexual advances. There may be strong pressures not to make even a well based complaint, such as fear that one will be branded as a troublemaker, a fear that one’s image for ethical probity may become tarnished, uncertainty about the definitions in the employer’s policy or the commitment to its implementation, a wishful belief that the victim can handle the matter herself without creating undue inconvenience or embarrassment to others, and ultimately perhaps by a fear of retaliation by the harassing party.

Some of these reasons were given by Ms. Y when she was asked by the investigator why she never came forward with her allegations against the Applicant. She did, indeed, mention that she “did not trust the system,” that she feared that she would be blamed and that her name “would go to mud.” She also stated that she did not want to hurt her employment opportunities with the World Bank. Similarly, fear of “name smearing” was one of the reasons given by Ms. X for not coming forward with her complaint until only twelve days after the Chief, RMP, assured members of its staff that sexual harassment in the workplace would be taken seriously.”

WBAT Decision No. 197 (Rendall-Speranza), para . 75: The WBAT “appreciates that delay in reporting instances of harassment may be explainable for reasons other than that the victim has welcomed the sexual advances. There may be strong pressures not to make even a well-based complaint, such as fear that one will be branded as a troublemaker, a fear that one’s image for ethical probity may become tarnished, uncertainty about the definitions in the employer’s policy or the commitment to its implementation, a wishful belief that the victim can handle the matter herself without creating undue

inconvenience or embarrassment to others, and ultimately perhaps by a fear of retaliation by the harassing party.”

#### **2.4 Inconsistent, vague or inaccurate statements**

2018-UNAT-889 (Sall), para. 40 (“By contrast, Mr. Sall’s statements reveal that he was vague, evasive and contradictory in his account. His credibility has been additionally damaged by countervailing evidence, including a statement of a UNAMID staff member who refuted Mr. Sall’s account of the morning preceding the incident.”

2018-UNAT-862 (Majut): UNAT overturned judgment, finding that the UNDT “gave misplaced importance to minor inconsistencies, came to unreasonable conclusions on the facts which were not supported by the evidence, and made speculations instead of findings based on the evidence.”

2018-UNAT-819 (Mbaigolmem), para. 31: “the statement of Mr. Mbaigolmem revealed that he was vague, elusive and contradictory in his account.”

2010-UNAT-040 (Aqel), para. 33: “Aqel’s entire statement is full of hesitations, inconsistencies, and falsehoods that, read together with the other evidence, suggest that the events occurred as recounted by the FFC and reviewed by the Commissioner-General.”

UNDT Judgment No. 2011/046 (Hallal), para. 40: “The Tribunal heard the testimony of the Applicant. Many difficulties were noted in the Applicant’s testimony, and these discrepancies (as well as the Applicant’s general lack of credibility) do not render his version of events credible: (a) Throughout the entire investigation, the Applicant admitted to touching the Complainant at the project site, but claimed he only touched her “shoulder”. During the substantive hearing, however, the Applicant testified Page 13 of 22 Case No. UNDT/NY/2010/020/UNAT/1623 Judgment No. UNDT/2011/046 that he did not touch the Complainant at all. Such inconsistent statements show that Applicant’s version of events is not credible and cannot be believed; (b) The day after

the incident, the Applicant apologised to the Complainant—if the Applicant had not touched the Complainant in an inappropriate manner, why did he then apologise to her the next day? What would be the reason for an apology, if the Applicant did not engage in unacceptable behaviour towards her? The Applicant testified that he forwarded the Complainant’s email to his senior manager, the Chief of Field Office. If the Applicant did not “touch” the Complainant, why would the Applicant initiate the involvement of his senior managers, who are obligated to respond to sexual harassment complaints? ... (c) During the substantive hearing, the Applicant testified that the Complainant’s complaint was based on a conspiracy against him either involving the UNICEF Banda Aceh Office or outside vendors. The Applicant did not proffer any evidence to support this defence and this part of the testimony should be disregarded.”

ILOAT Judgment No. 3875, cons. 9: “[I]n view of all the circumstances of the case, that information [suggesting the staff member engaged in hacking] could appear to be corroborated by the manifestly confused, often contradictory, scarcely credible explanations provided by the complainant throughout the investigation, combined with some of his actions, the most striking of which was indisputably the untimely, bizarre destruction of the laptop computer which he had set up on his desk where there was already a desktop computer.”

ILOAT Judgment No. 3578, cons. 15: “What the complainant did not say in his response to the first IOS report was that either he paid about 56 participants and Dr A. paid (or purported to pay) the remaining 24 or thereabouts, or that he simply could not recall how many he paid. Had he given that response, real doubts could have arisen about his culpability. But the answer he actually gave was

precise and contrary to the facts as established by the IOS (at least as to who was not paid either in full or in part the amount on the receipt). It was an answer cast in terms to exculpate the complainant.

However, to the contrary, it is evidence of a pattern of conduct consistent with guilt.”

WBAT Decision No. 207 (Mustafa), para. 21: “With regard to the trip to Lahore, the claims made by Ms. X are denied by the Applicant. Both parties have presented opposing versions of the same events.... An examination of the investigator’s findings and a review of all the documents related to this trip tend to lend credibility to Ms. X and to cast serious doubt on the Applicant’s credibility; many discrepancies appear between the Applicant’s testimony and the facts established through the investigation. The contentions presented and the facts established by the investigation are as follows: ... (ii) The Applicant claimed that Ms. X had stayed at her aunt’s house rather than at the hotel. This, however, does not explain how Ms. X was able to give an accurate description of her room. It is noteworthy that hotel records indicate that telephone calls were made from Ms. X’s room.”

## **2.5 Implausible explanation or unusual behavior**

2015-UNAT-550 (Mizyed), para. 24: “The evidence that Mr. Mizyed was in possession of the stolen card and that he used it to refuel his own private vehicle was not contested by Mr. Mizyed. His explanation of how he came into possession of the stolen card and how he came to use it is incapable of belief.”

2011-UNAT-164 (Molari), para. 31: “In Ms. Molari’s case the facts are so clear as to be irrefutable. No matter what the standard, the Administration has met the burden. Who buys 19 litres of milk from seven different brands containing four different levels of fat content in one day with nine different bankcards?”

ILOAT Judgment No. 3888, cons. 28: “It is important to note that the complainant did not provide any evidence to refute the findings of the [investigators]: she did not provide any witnesses in the form of fellow students who could confirm her participation in the programs or at the exams, she did not produce copies of any dissertations or thesis papers, and she was unable to provide any material showing that she took online classes for ‘Hartford University’”

ILOAT Judgment No. 3875, cons. 9: “[I]n view of all the circumstances of the case, that information [suggesting the staff member engaged in hacking] could appear to be corroborated by the manifestly confused, often contradictory, scarcely credible explanations provided by the complainant throughout the investigation, combined with some of his actions, the most striking of which was indisputably the untimely, bizarre destruction of the laptop computer which he had set up on his desk where there was already a desktop computer.”

ILOAT Judgment No. 3297, cons. 8: “The complainant submits the theory of identity theft but did not even raise charges against Ms A. when he was told that she had used a document naming him as contact person, nor does he put forward any evidence to support this idea.... Further, the explanation offered by the complainant is implausible to a degree and is simply incompatible with the circumstances put in evidence by the Organization” (see Judgment 2231, under 5). The timing of the phone calls and e-mails is such that the idea of a third party entering the complainant’s office to use his equipment and escaping prior to the official use of the equipment by the complainant (once with a margin of 30 seconds between calls) becomes entirely unrealistic. It can be considered even more improbable considering it had to have happened at least nine times.”

WBAT Decision No. 486, paras. 72 and 77: “He denied sending the 24 September e-mail. He suggested someone must have hacked his personal e-mail account and manipulated it, that he suspected a work colleague and that he would reveal his or her name in due course.... The Tribunal also notes that the Applicant has not substantiated his claims that his personal e-mail account was hacked and manipulated, nor identified the party he suspected to be involved in such acts. The Tribunal weighs the detailed explanation of the 24 September e-mail that INT obtained from Mr. SA against the Applicant’s speculations and concludes those speculations lack credibility.”

## **2.6 Fabrication of evidence to discredit witnesses**

2013-UNAT-292 (Abu Jabrou), para. 43: “Perhaps most damning of all, Mr. Abu Jarbou fabricated memoranda after-the-fact alleging acts of misconduct by staff members with whom he was having problems or who had made complaints against him in an effort to demean those staff members and to cast them into disrepute.”

## **2.7 Statements, whether or not taken under oath**

2018-UNAT-862 (Majut), para. 79: “[T]he UNDT failed to take into account that Mr. Moyo provided a signed incident report and a signed witness statement which bore the affirmation: ‘I have read over the statement on pages numbered from one and [sic] to two in the English language which I clearly understand and I solemnly declare upon my honor and conscience that it is the truth, the whole truth and nothing but the truth.’”

2013-UNAT-364 (Nyambuza), para. 35. “Written witness statements taken under oath can be sufficient to establish by clear and convincing evidence the facts underlying the charges of misconduct to support the dismissal of a staff member. When such statement is not made under oath or affirmation, there must be some other indication of reliability for it to have probative value.”

ILOAT Judgment No. 2771, cons. 21: “The direct evidence in relation to the incident in the hotel lobby in San Salvador consisted of that of his subordinate and of the partner of her cousin who was present in the hotel lobby at the relevant time. The evidence of the latter is not rendered inadmissible simply because he did not provide a sworn statement.”

## **2.8 Demeanor as observed by the tribunal**

2012-UNAT-237 (Bagula), para. 24: “Before the UNDT, eight witnesses testified against the Appellant. They were cross-examined by the Appellant. The Dispute Tribunal held that the evidence of the witnesses was credible, truthful and was properly acted upon. The Dispute Tribunal had observed the demeanour of the witnesses, examined and analyzed their evidence and was therefore in the best position to judge their truthfulness. The Dispute Tribunal concluded that the case against the Appellant stood substantiated and corroborated and the evidence sufficiently supported the charge of improperly soliciting and receiving money from local people in exchange for their recruitment and service as United Nations staff.”

UNDT Judgment No. 2011/046 (Hallal), para. 39: “The Tribunal itself heard the Complainant’s testimony by telephone link and assessed her credibility. Her testimony continued to be consistent with her previous statements made during the preliminary and formal investigations that the Applicant engaged in sexual harassment through an unwelcome sexual advance.”

# ANNEX B:

## Note on Evidentiary Standards

### I. Introduction

1. The present Note focuses on evidentiary issues that arise in the context of investigations, and their implications for investigations of sexual harassment. It examines the evidentiary standards for disciplinary sanctions that have been established by the international administrative tribunals.

### II. Evidentiary standards for disciplinary sanctions

2. When a staff member challenges the imposition of a disciplinary sanction, the organization must show sufficient evidence to support the facts. The administrative tribunals have established different evidentiary standards for assessing whether the misconduct has been established.

#### United Nations Appeals Tribunal

3. The UN administration of justice system is a two-tiered system, comprising the UN Dispute Tribunal (UNDT) and the UN Appeals Tribunal (UNAT). Eleven CEB members fall under the jurisdiction of both the UNDT and UNAT.<sup>1</sup> Additionally, four CEB members have accepted the jurisdiction of the UNAT, while providing for a separate first instance process other than the UNDT.<sup>2</sup> As the UNAT has held that the “UNDT has the duty to apply Appeals Tribunal jurisprudence,”<sup>3</sup> the present Note primarily discusses the jurisprudence of the UNAT.

4. In 2011, the UNAT held that misconduct must be established by “clear and convincing evidence” which means that the truth of the facts asserted is “highly probable.” While the UN administrative

instruction governing the disciplinary process (ST/AI/2017/1) provides for two standards – “clear and convincing evidence” for separation or dismissal; and “preponderance of the evidence” for all other disciplinary measures, the standard for less severe disciplinary sanctions has not been expressly tested before the UNAT to date.<sup>4</sup>

5. From 1 January 2010 to 31 March 2019, there were 72 judgments in which the UNAT reviewed disciplinary sanctions (Annex 1). Of these judgments:

- a) Disciplinary sanctions were affirmed in 57 judgments and rescinded in 15 judgments.
- b) Of the 15 judgments in which disciplinary sanctions were rescinded by the UNAT, there were 6 judgments in which the rescission was primarily based on the UNAT’s finding that the facts were not established.
- c) In 9 judgments, the rescission of the disciplinary sanction was due to other reasons unrelated to the establishment of facts. Those reasons related to the UNAT’s findings that:
  - i. There were procedural irregularities during the investigations or disciplinary process, or other relevant processes.
  - ii. The sanction was disproportionate, in light of the facts of the case or mitigating circumstances.
  - iii. The decision-maker lacked the authority to impose the disciplinary sanction.

<sup>1</sup> United Nations, UNCTAD, UNDP, UNEP, UNFPA, UN-Habitat, UNHCR, UNICEF, UNODC, UNOPS and UN Women.

<sup>2</sup> ICAO, IMO, UNRWA and WMO.

<sup>3</sup> UNAT Judgment No. 2015-UNAT-530 (Ovcharenko et al.), para. 34.

<sup>4</sup> ST/AI/2017/1 is applicable to the UN Secretariat, but not to the UN funds and programmes. In Benamar, the UNDT held that where the disciplinary sanction does not entail separation from service, the applicable standard is preponderance of the evidence or balance of probabilities. On appeal, the UNAT primarily reviewed the proportionality of the disciplinary sanction (censure) but also affirmed the UNDT’s finding that the facts were established (UNDT Judgment No. 2017/025, para. 48 and UNAT Judgment No. 2017-UNAT-797, para. 36).

## ILO Administrative Tribunal

6. Fourteen CEB members recognize the jurisdiction of the ILO Administrative Tribunal (ILOAT).<sup>5</sup>

7. In 1989, the ILOAT held that “[a]lthough the proceedings are not criminal the seriousness of the charges and the concomitant penalty demand that before there can be a finding against the complainant the charges must be proved beyond reasonable doubt.”<sup>6</sup> Since 2010, the ILOAT has affirmed that this standard applies in cases of misconduct, irrespective of the disciplinary sanction imposed.<sup>7</sup> This standard is to be applied at the disciplinary phase, by the person with the authority to impose the disciplinary measure, usually the organization’s executive head, and by any internal disciplinary body mandated under an organization’s framework to recommend a sanction to the executive head. This standard is not to be applied by investigators at the investigation stage.<sup>8</sup>

8. From 1 January 2010 to 31 March 2019 (Annex 2), there were 66 judgments in which the ILOAT reviewed disciplinary sanctions. Of these judgments:

- a) Disciplinary sanctions were affirmed in 36 judgments and rescinded in 30 judgments.
- b) Of the 30 judgments in which disciplinary sanctions were rescinded by the ILOAT, there were 7 judgments in which the rescission was primarily based on the ILOAT’s finding that the facts were not established.

- c) In 23 judgments, the rescission of the disciplinary sanction was due to other reasons unrelated to the establishment of facts. Those reasons related to the ILOAT’s findings that:
  - i. The Executive Head departed from the findings and/or recommendations of the joint review body.
  - ii. The conduct did not qualify as misconduct.
  - iii. There were procedural irregularities during the investigations, disciplinary process, or other relevant processes.
  - iv. The Administration failed to take necessary actions such as considering arbitration or recusal in the case of conflict of interest.
  - v. The Administration failed to consider relevant factors, including medical conditions.
  - vi. The sanction was disproportionate or not adequately justified.

## World Bank Administrative Tribunal

9. In 2001, the World Bank Administrative Tribunal (WBAT) ruled that the standard of evidence for decisions leading to disciplinary sanctions “must be higher than a mere balance of probabilities.”<sup>9</sup> In other decisions, the WBAT has emphasized that there must be “substantial evidence” to support the finding of facts which amount to misconduct.<sup>10</sup> In 2007, the WBAT stated that the standard of evidence for sexual harassment cases must be “clear and convincing.”<sup>11</sup> The World Bank staff rules and directives governing the investigation process for staff misconduct provide that the purpose of an investigation is to “establish the facts...by obtaining all available information and evidence to substantiate or refute the allegations.”<sup>12</sup>

<sup>5</sup> FAO, IAEA, IFAD, ILO, IOM, ITU, UNESCO, UNIDO, UNWTO, UPU, WFP, WHO, WIPO, and WTO. (See also: <https://www.ilo.org/tribunal/membership/lang--en/index.htm>)

<sup>6</sup> ILOAT Judgment No. 969 (1989).

<sup>7</sup> ILOAT Judgment No. 2879 (2010)(examining ban on promotion); ILOAT Judgment No. 3725 (2017) (examining demotion);

<sup>8</sup> ILOAT Judgment No. 3725 (2017), consideration 17; ILOAT Judgment No. 3862 (2017), considerations 23-24; and ILOAT Judgment No. 4047 (2018), consideration 9.

<sup>9</sup> *Dambita*, Decision No. 243 [2001], para 21; and *Arefeen*, Decision No. 244 [2001], para 42.

<sup>10</sup> *Carew*, Decision No. 142 [1995], para 32; *Planthara*, Decision No. 143 [1995], para 25; *Mustafa*, Decision No. 207 [1999], para 17; *CK*, Decision No. 498 [2014], para 58; and *CB*, Decision No. 476 [2013], para 31.

<sup>11</sup> *M*, Decision No. 369 [2007], para 60.

<sup>12</sup> Staff Rule 3.00 – Office of Ethics and Business Conduct (EBC) and Directive/Procedure, “Conduct of Disciplinary Proceedings for EBC Investigations.”

10. From 1 January 2010 to 31 March 2019, there were 21 judgments in which the WBAT reviewed disciplinary sanctions (Annex 3). Of these judgments:

- a) Disciplinary sanctions were affirmed in 12 judgments and rescinded in 9 judgments.
- b) Of the 9 judgments in which disciplinary sanctions were rescinded by the WBAT, there were no instances in which the rescission was based on the WBAT's finding that the facts were not established. Rather, the reasons for the rescission of the disciplinary sanction related to the WBAT's findings that:
  - i. There were significant procedural breaches.
  - ii. The sanction was disproportionate.
  - iii. The impugned actions did not constitute misconduct.

### **III. Future work**

11. In the coming months, the Sub-Group reviewing the jurisprudence of the administrative tribunals will examine:

- a) the treatment of corroborative evidence and credibility in the jurisprudence; and
- b) common procedural errors that lead to rescission of disciplinary sanctions by the tribunals.

### **IV. Recommendation**

12. The Sub-Group encourages the CEB members to take note of the evidentiary standards established by their respective administrative tribunal. These evidentiary standards will be reflected in the relevant Guidance Notes under preparation by the Sub-Group to assist officials who exercise responsibilities during the investigative and disciplinary processes.



## Annex 1 to Annex B

### UNAT judgments reviewing disciplinary sanctions (1 January 2010 – 31 March 2019)

Table 1.1: Outcome of UNAT review of disciplinary sanctions, by year and total number of judgments

	Outcome of disciplinary sanction		
	Affirmed	Rescinded because facts were not established	Rescinded due to other reasons unrelated to establishment of facts
2019	2	--	--
2018	5	--	2
2017	6	1	1
2016	2	--	1
2015	7	--	2
2014	7	2	--
2013	14	2	--
2012	4	--	--
2011	1	--	1
2010	9	1	2
<b>Total</b>	<b>57</b>	<b>6</b>	<b>9</b>

Table 1.2: Outcome of UNAT review of disciplinary sanctions, by year and judgment number.

	Outcome of disciplinary sanction		
	Affirmed	Rescinded because facts were not established	Rescinded due to other reasons unrelated to establishment of facts
2019	913, 918	--	--
2018	889, 888, 862, 819, 811	--	859 (Samandarov) 839 (Hamdan)
2017	797, 781, 776, 745, 741, 738	718 (Bagot)	782 (Muindi)
2016	702, 668	--	700 (Negussie)
2015	550, 549, 545, 537, 523, 511, 510	--	535 (Rangel) 525 (Flores)
2014	486, 480, 436, 431, 408, 407, 398	442 (El-Khalek) 403 (Diabagate)	--
2013	388, 381, 374, 366, 362, 337, 336, 334, 326, 310, 302, 292, 280, 274	364 (Nyambuza) 291 (Perelli)	--
2012	237, 209, 207, 195	--	--
2011	164	--	168 (Yapa)
2010	98, 89, 84, 80, 40, 38, 28, 24, 18	87 (Liyanarachchige)	25 (Doleh) 22 (Abu Hamda)

**Table 1.3: UNAT rescissions of disciplinary sanctions due to reasons unrelated to the establishment of facts, by reason, and judgment number.**

Reason	Judgment No.
1. Procedural irregularity	
a. Non-compliance with procedures during investigations	2015-525 (Flores)
b. Reliance on anonymous witnesses	2010-087 (Liyanarachchige)*
c. Reliance on faulty witness statements (unsigned, unsworn or lacked proper averment of truthfulness)	2014-403 (Diabagate)* 2013-364 (Nyambuza)*
d. Failure to bring formal charge of misconduct, staff member not informed of charge	2017-782 (Muindi) 2015-535 (Rangel)
e. Failure by UNDT to address all elements, resulting in remand	2016-700 (Negussie)
2. Sanction was disproportionate	2018-859 (Samandarov) 2010-025 (Doleh) 2010-022 (Abu Hamda)
3. Decision-maker lacked authority to impose sanction	2018-839 (Hamdan) 2011-168 (Yapa)

\* These judgments are listed in Table 1.2 as rescissions based on the UNAT's finding that the facts were not established. However, they are also listed in Table 1.3, as it is important to be aware of the procedural irregularities found by the UNAT.

## Annex 2 to Annex B

### ILOAT judgments reviewing disciplinary sanctions (1 January 2010 – 31 March 2019)

**Table 2.1: Outcome of ILOAT review of disciplinary sanctions, by year and total number of judgments**

	Outcome of disciplinary sanction		
	Affirmed	Rescinded because facts were not established	Rescinded due to other reasons unrelated to establishment of facts
2019	1	1	3
2018	7	1	7
2017	8	1	3
2016	7	-	1
2015	4	-	-
2014	2	1	3
2013	3	-	2
2012	1	1	4
2011	1	-	-
2010	2	2	-
<b>Total</b>	<b>36</b>	<b>7</b>	<b>23</b>

**Table 2.2: Outcome of ILOAT review of disciplinary sanctions, by year and judgment number.**

	Outcome of disciplinary sanction		
	Affirmed	Rescinded because facts were not established	Rescinded due to other reasons unrelated to establishment of facts
2019	4106	4115	4065, 4063, 4058,
2018	4050, 3971, 3968, 3964, 3953, 3944, 3927	4047	4052, 4051, 4043, 4042, 4011, 3969, 3962
2017	3888, 3882, 3875, 3872, 3863, 3852, 3757, 3725	3880	3972, 3960, 3887
2016	3704, 3682, 3649, 3640, 3581, 3578, 3575	-	3602
2015	3502, 3496, 3430, 3402	-	-
2014	3297, 3295	3312	3364, 3348, 3289
2013	3236, 3227, 3184	-	3212, 3200
2012	3126	3083	3137, 3123, 3119, 3099
2011	2989	-	-
2010	2944, 2914	2892, 2879	-

**Table 2.3: ILOAT rescissions of disciplinary sanctions due to reasons unrelated to the establishment of facts, by reason, and judgment number.**

Reason	Judgment No.
1. Departure from findings and/or recommendations of joint review body	4063, 4058 (also in 4b below), 3969, 3348, 3289
2. Conduct did not qualify as misconduct	4043, 4042
3. Procedural irregularity a. Non-compliance with procedures during disciplinary proceedings b. Non-compliance with procedures during investigations c. Case handled by Ombudsman who did not speak French d. No performance evaluation completed e. Failure to provide investigation report to staff member	4065, 4011, 3137, 3123 3200, 3119 3212 4115 (with respect to one of the charges) 3364
4. Omission by administration a. Failure to consider arbitration b. Failure to recuse where there was a conflict of interest	4052 4058, 3960
5. Relevant factors not considered a. Role of mental illness in misconduct b. Medical condition relevant to assessing proportionality of sanction c. Sanction inconsistent with medical expert's findings that staff member could not be held accountable	3972, 3887 3602 4051
6. Sanction not justified: failure by administration to justify extent of reduction in grade	3962
7. Sanction was disproportionate	3099

## Annex 3 to Annex B

### WBAT judgments reviewing disciplinary sanctions (1 January 2010 – 31 March 2019)

**Table 3.1: Outcome of WBAT review of disciplinary sanctions, by year and total number of judgments**

	Outcome of disciplinary sanction		
	Affirmed	Rescinded because facts were not established	Rescinded due to other reasons unrelated to establishment of facts
2019	--	--	--
2018	1	--	--
2017	3	--	1
2016	1	--	3
2015	2	--	1
2014	4	--	2
2013	1	--	--
2012	--	--	--
2011	--	--	2
2010	--	--	--
Total	12	0	9

**Table 3.2: Outcome of WBAT review of disciplinary sanctions, by year and judgment number.**

	Outcome of disciplinary sanction		
	Affirmed	Rescinded because facts were not established	Rescinded due to other reasons unrelated to establishment of facts
2019	--	--	--
2018	581	--	--
2017	573, 568, 562	--	557
2016	543	--	550, 544, 532
2015	516, 511	--	512
2014	492, 489, 487, 486	--	498, 497
2013	476	--	--
2012	--	--	--
2011	--	--	455, 448
2010	--	--	--

**Table 3.3: WBAT rescissions of disciplinary sanctions due to reasons unrelated to the establishment of facts, by reason, and judgment number.**

Reason	Judgment No.
1. Procedural irregularity	532 (2016)
2. Sanction was disproportionate	557 (2017), 544 (2016), 512 (2015), 498 (2014), 455 (2011), 448 (2011)
3. Impugned actions did not constitute misconduct	550 (2016) 497 (2014)

# Annex C:

## Note on the Disclosure of Investigation Reports

### SUMMARY NOTE ON DISCLOSURE OF AN INVESTIGATION REPORT

#### I. Introduction

13. The present Note focuses on the practice of international organizations as to when and the extent to which a report produced as a result of an investigation into misconduct, particularly, sexual harassment, is disclosed to a complainant and/or an alleged offender. In this regard, it examines applicable statutory frameworks and relevant jurisprudence of the international administrative tribunals. Annexed to this Note is a more detailed explanation of the jurisprudence and legal frame under the ILO Administrative Tribunal (ILOAT) (at [Attachment 1](#)).

#### II. United Nations Dispute and Appeals Tribunals

14. In the UN Secretariat, ST/SGB/2019/8 (“Addressing discrimination, harassment, including sexual harassment, and abuse of authority”) effective 10 September 2019 which replaced ST/SGB/2008/5 (“Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority”) provides that ST/AI/2017/1 (“Unsatisfactory conduct, investigations and the disciplinary process”) largely governs the formal process for dealing with sexual harassment complaints. In giving effect to the victim-centered approach in dealing with sexual harassment complaints, ST/SGB/2019/8 provide some additional requirements governing the formal process to those specified in ST/AI/2017/1.

15. Under section 5.5 (i) of ST/SGB/2019/8, the alleged offender and the affected individual, i.e., complainant, is given “the outcome of the matter” at the end of each possible scenario following the handling of a formal complaint. ST/SGB/2019/8 focuses on who should provide this information, and who would be copied on this information.

16. ST/SGB/2019/8 does not mandate full disclosure of the investigation report to the complainants, which is consistent with the previous policy under ST/SGB/2008/5 which provided that where a matter is closed by a responsible official, without further action, both the complainant and alleged offender are given a summary of the findings and conclusions of the investigation.<sup>13</sup>

17. Where the responsible official takes managerial or administrative action against the alleged offender, or refers the matter for possible disciplinary action to the Office of Human Resources, the alleged offender is normally provided with the investigation report and supporting documentation prior to action being taken. At the end of the process involving the alleged offender, the complainant is provided with the outcome of the investigation report and information about any action taken.

18. It is expected that the practice followed under ST/SGB/2008/5 of providing the complainant with a summary of the investigation and subsequent action for his/her understanding of the basis for the decisions will be continued under ST/SGB/2019/8.

<sup>13</sup> UNDT held that under section 5.18(a) of ST/SGB/2008/5, “the Administration was under no obligation to provide [the complainant] with the report itself.” See Ivanov, UNDT/2014/117, para. 54 (upheld, except order of additional compensation, by 2015-UNAT-572); Masyllkanova, UNDT/2015/088, paras. 97- 99 (affirmed by 2016-UNAT-662).

19. If a matter under ST/SGB/2019/8 (formerly, ST/SGB/2008/5) is appealed, a copy of the investigation report (either redacted or not) may be released to the complainant pursuant to an order from the UN Dispute Tribunal (UNDT).<sup>14</sup> The UNDT has taken a case-by-case approach as to whether to provide a complainant with a copy of the investigation report taking into account the “requirements of good faith and fair dealing”.<sup>15</sup> In general, a complainant will be provided with a copy of the investigation report if the complainant shows “extraordinary circumstances” to warrant the release of an investigation report.<sup>16</sup>

20. The UN Appeals Tribunal (UNAT) affirmed this position and it held that the complainant “though entitled to receive a summary of the findings of the investigation report, is not entitled to receive a copy of the full investigation report” and that the complainant “therefore will have to present convincing arguments to show that there were exceptional circumstances which might otherwise have entitled [the complainant] to the full investigation report”.<sup>17</sup>

### III. ILO Administrative Tribunal

21. In determining whether a complainant must be provided a copy of the investigation report and if so, the extent of any redactions, the ILOAT considers: whether the report was the basis of a final administrative decision adversely affecting the complainant;<sup>18</sup> whether there is a need to protect any information in the report, such as the identities of interviewees or of confidential information;<sup>19</sup> and whether the complainant has been provided a sufficiently detailed summary of the report to allow a proper defence (or, in the case of a reporter of misconduct, to establish harassment).<sup>20</sup> The ILOAT has held that the right to have access to the investigation report applies equally to the accused and to the reporter of misconduct.<sup>21</sup>

22. The ILOAT has acknowledged a legal framework by which a reporter of misconduct has no right to receive an investigation report at the time when an investigation is closed.<sup>22</sup> When a complainant, the reporter of misconduct, requested a copy of an investigation report shortly after the completion of the report and prior to any internal proceedings being initiated, the ILOAT accepted that confidentiality concerns could justify a refusal to provide the report.<sup>23</sup>

<sup>14</sup> The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings. See Article 18.2 of UNDT Rules of Procedure.

<sup>15</sup> Adorna, UNDT/2010/205, para. 29; Haydar UNDT/2012/201, para. 56; Ivanov, UNDT/2014/022, para. 27 (affirmed by 2015-UNAT-519); Ivanov, UNDT/2014/117, para. 54 (affirmed, except for its order of additional compensation, by 2015-UNAT-572); Masykkanova, UNDT/2015/088, para. 99 (affirmed by 2016-UNAT-662). 5 Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ivanov, 2015-UNAT-572, para. 26.

<sup>18</sup> ILOAT Judgment No. 3831 (2017), Consideration 16; ILOAT Judgment 3347 (2014), Consideration 19.

<sup>19</sup> ILOAT Judgment No. 3732 (2017), Consideration 6; ILOAT Judgment No. 3640 (2016), Consideration 20.

<sup>20</sup> Ibid.

<sup>21</sup> ILOAT Judgment No. 3732 (2017), Consideration 6.

<sup>22</sup> ILOAT Judgment No. 3831 (2017), Consideration 11.

<sup>23</sup> ILOAT Judgment No. 3287 (2014), Consideration 15.

23. The ILOAT, however, subsequently distinguished that case on the basis that the prior case “was not a situation in which a final administrative decision adversely affecting the complainant was based, or was intended to be based, on the report”.<sup>24</sup> In another judgment, where a complainant challenged the administrative decision that her harassment allegations were unsubstantiated, the ILOAT held that she was entitled to the entire investigation report on the basis that “a decision cannot be based on a material document that has been withheld from the staff member”, rejecting non-disclosure on the basis of confidentiality.<sup>25</sup>

24. However, the ILOAT has also recognized the need to balance the right of the complainant to have access to all evidence on which a decision against him/her is based (which normally cannot be withheld on the grounds of confidentiality), with the “confidential nature of information and documentation pertaining to the investigation”.<sup>26</sup> For this reason, even if an investigation report is disclosed, witness statements contained in an investigation report resulting from allegations of harassment are understood to enjoy confidentiality and should, in most cases, not be disclosed to complainants.

25. According to the ILOAT, when a summary of an investigation report is provided instead of the report itself, a complainant should be provided with a “*sufficiently detailed*” summary of the report.<sup>27</sup> For example, the ILOAT found that a summary of an investigation that did not outline the evidence on which the conclusion was based was not sufficient.<sup>28</sup>

26. In sum, a review of the ILOAT jurisprudence reveals that an investigation report (redacted or unredacted) or a summary of the report which complies with the standards articulated by ILOAT should be disclosed to a complainant in a harassment case when: (i) the investigation report is a material document upon which the administrative decision was based;<sup>29</sup> and (ii) the request for review is submitted to the Director General by a staff member who has been adversely affected by the decision and the Director General provides a decision in response to that request for review.<sup>30</sup>

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<sup>24</sup> ILOAT Judgment No. 3831 (2017), Consideration 16

<sup>25</sup> ILOAT Judgment No. 3347 (2014), Considerations 17-21.

<sup>26</sup> ILOAT Judgment No. 3640 (2016), Considerations 19-20; ILOAT Judgment No. 3995 (2018), Consideration 5. The ILOAT stated that: “the obligation to disclose must be balanced against the need to respect the confidential nature of some aspects of an inquiry, particularly that of witness statements gathered in the course of the inquiry”.

<sup>27</sup> ILOAT Judgment No. 3732 (2017), Consideration 6, recalling Judgment No. 3640. The ILOAT held that, “[a]lthough that Judgment No. 3640 refers to ‘allegations made against [the complainant]’ and to ‘the accused official’ as well as to the right ‘to defend herself or himself fully in [disciplinary] proceedings’, it is equally applicable in the present case, to the complainant who is seeking to establish a case of harassment in the internal appeal.”

<sup>28</sup> ILOAT Judgment No. 3347 (2014), Consideration 20.

<sup>29</sup> ILOAT Judgment No. 3347 (2014), Consideration 21.

<sup>30</sup> ILOAT Judgment No. 3831 (2017), Consideration 16; ILOAT Judgment No. 3413 (2015), Consideration 11.

## Annex 1 to Annex C

### IAEA Note re. disclosure of investigation reports

This Note describes the legal basis for disclosure of investigation reports in light of the jurisprudence of the ILO Administrative Tribunal (“Tribunal”).

#### 1. General obligation to disclose

In Judgment 3347 (2014), the Tribunal considered a WIPO case in which the complainant had not been provided a copy of the report prior to filing her internal appeal in November 2009. In that case, the complainant had been informed, on 25 June 2009, that the Internal Audit and Oversight Division (IAOD) had concluded its investigation and that the Director General agreed with the findings of the IAOD that there was no factual basis to support the harassment allegation. The Director General subsequently denied the complainant’s request for reconsideration, and the complainant filed an appeal against the 25 June 2009 decision in November 2009. The ILOAT noted that, **at the time the complainant filed her internal appeal**, she had not been provided with a copy of the IOAD report, however, WIPO disclosed the report to the Tribunal in December 2017 in the context of other proceedings before the Tribunal<sup>31</sup>, and the Tribunal itself forwarded a copy of the report to the complainant (Consideration 4). The Tribunal held that the reporter of harassment should have been given the report **before** the Director General of WIPO advised her of his decision of 25 June 2009 to accept the investigation findings and close her case as unsubstantiated (Consideration 21). The ILOAT recalled the following principles with respect to the obligation to disclose:

“ 19. It is well settled that a staff member must have access to all evidence upon which a decision concerning that staff member is based. As the Tribunal observed in Judgment 3264, under 15: “It is well established in the Tribunal’s case law that a ‘staff member must, as a general rule, have access to all evidence **on which the authority bases (or intends to base) its decision against him**’. Additionally ‘[u]nder normal circumstances, such evidence cannot be withheld on grounds of confidentiality’ (see Judgment 2700, under 6). It also follows that a decision cannot be based on a **material document** that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23).” (Emphasis added).

The Tribunal further found that the fact that a staff regulation or internal document states that a report is confidential will not shield it from disclosure, and in the absence of any lawful reason, the non-disclosure of a report will constitute a serious breach of the complainant’s right to procedural fairness (Consideration 19, citing Judgment 3264 (2014), under 16). The Tribunal held that it was irrelevant whether the complainant had requested the report, as she was entitled to it (Consideration 20).

In Judgment 3831 (2017), an Agency case, the Tribunal rejected the Agency’s reliance on Judgment 3287 (2014)<sup>32</sup> to justify non-disclosure of an OIOS investigation report. In particular, the Agency had argued that, in the same way that the ILOAT had recognized that non-disclosure of an investigation report was justified in light of the wording of

<sup>31</sup> Namely, the case which was the subject of Judgment 2915 (2010) which concerned the complainant’s appeal to the Tribunal against the decision to refer her complaint to IOAD for investigation in the first place.

<sup>32</sup> In Judgment 3287, the ILOAT accepted that specific provisions of the WIPO Internal Audit Charter justified the non-disclosure, on confidentiality grounds, of WIPO’s Internal Audit and Oversight Division investigation report.



paragraph 9 of the WIPO Internal Audit Charter, the Agency was justified in not disclosing an internal investigation report based on paragraph 6 and related provisions of the OIOS Charter, in essence because maintaining the confidentiality of investigation reports was essential to ensuring an objective and effective investigation system. The ILOAT considered that Judgment 3287 did not support the Agency's argument. The ILOAT considered that it was relevant to consider that Judgment 3287 concerned a factual situation where WIPO refused to provide the complainant (who was the reporter of misconduct) with a copy of an Internal Audit and Oversight Division report, in circumstances where the request was made shortly after the completion of the report and prior to any internal proceedings being initiated, and "[t]hus, it was not a situation in which a final administrative decision adversely affecting the complainant was based, or was intended to be based on the report, as in this case [i.e. Judgment 3831]." (Consideration 16). The Tribunal further held, in Judgment 3831, that since the Agency provided the report, with minimal redactions, in the proceedings before the Tribunal, the failure to provide the complainant in that case with a copy of the report at an earlier stage, even with redactions, was in breach of the complainant's right to procedural fairness (Considerations 16, 17).

It should also be noted that in Judgment 3995 (2018) the Tribunal recognized that, in some cases, the error of not disclosing a report may be corrected "when this flaw is subsequently remedied in proceedings before [the Tribunal] (see, for example, Judgment 3117, under 11)" (Consideration 5), even though in this case it held that because the documents in question were of vital importance for the purposes of the dispute, the non-disclosure on the part of the IFAD tainted the internal appeal process and breached the organization's obligation to disclose. In Judgment 3117 (2012), mentioned as an example by the Tribunal in Judgment 3995, the Tribunal held that the failure to disclose "an item of information" will not render a decision unlawful if it can be shown to have been "remedied in the course of an internal appeal procedure or of proceedings before the Tribunal..." (Consideration 11). Based on Judgments 3995 and 3831 above, it is understood that whether an attempt to rectify the breach of an organization's non-disclosure of a report at a

later stage is successful or not depends on whether the report in question is of vital importance to the subject matter of the dispute and whether it forms the basis for the final administrative decision taken.

## 2. Timing of disclosure

- i) No obligation to share an investigation report at the time an investigation is closed

The Tribunal has acknowledged that, under the Agency's framework, a reporter of misconduct has no right to receive an investigation report at the time that an investigation is closed. In a recent Agency case, the Tribunal held:

“ It is also important to note that beyond a provision in the OIOS Procedures which provides that the reporter of the alleged misconduct shall be informed that the investigation has been concluded, **there are no provisions in the IAEA Administrative Manual that have been referred to by the parties which provide for or authorize the disclosure of any investigative materials or the OIOS report to the reporter of the alleged misconduct.** [...] Thus, in the present case, **at the time the complainant was informed of the Administration's decision to close her harassment case, the IAEA was under no obligation, statutory or otherwise, to disclose the OIOS report or its investigative materials to the complainant**”

(emphasis added) (Judgment 3831, Consideration 11).

As such, the Tribunal did not take issue with the Agency's policy in AM.III/4 that a reporter of misconduct is usually informed that the investigation is completed, but not automatically given the report.

- ii) Obligation to disclose an investigation report when a decision is challenged

As noted above, in terms of timing, in Judgment 3347, the Tribunal set a very early standard for disclosure of the relevant investigation report. In that case, the Tribunal held that the reporter of harassment should have been given the report

before the Director General of WIPO advised her of his decision to accept the investigation findings and close her case as unsubstantiated (Consideration 21). However, in the later Agency case described above (Judgment 3831), the Tribunal accepted that the Agency's legal framework does not foresee the disclosure of an OIOS report when an investigation is closed.

That said, as noted above, it is clear from Judgment 3831, Consideration 16, that the Tribunal will not accept non-disclosure on the grounds of confidentiality where *"a final administrative decision adversely affecting the complainant was based, or was intended to be based on the report"* as occurred in that case. It follows that documents should be disclosed at the time the Director General communicates his final administrative decision in response to a request for review under Staff Regulation 12.01.1(D)(1).

In addition, any documents which are considered by an internal appeals panel must also be disclosed at the time of their consideration by that body. In Judgment 3413 (2015), an Agency case, the Tribunal held that *"because the OIOS report was provided to and relied on by the JAB, a redacted copy of the report should have been provided to the complainant"* (Consideration 11). This was reaffirmed in the recent Agency case mentioned above (3831). In both cases, the relevant OIOS report was provided to the JAB, but not the staff member, on the basis of the confidentiality provisions in paragraph 6 of the AM.III/4. As such, where the Agency discloses an OIOS report to the JAB, it should also be provided to the complainant.

### 3. Confidentiality and the form of disclosure

In Judgment 3347, the complainant and reporter of harassment was provided with a summary of the investigation report due to concerns of confidentiality. The Tribunal held that *"[the complainant] was entitled to receive a copy of [the investigation report]. Equally, it is not an answer to say that the complainant was given a summary of the report"* (Consideration 20). This was due to the fact that the summary of the investigation report did not outline the evidence on which the conclusion to dismiss the complainant's claim of harassment was based.

In Judgment 3640 (2016), a UNESCO case in which the complainant challenged the decision of his summary dismissal following a sexual harassment complaint filed against him by a colleague, the Tribunal held that a balance must be struck between internal rules and regulations pertaining to the strictly confidential nature of reports and the right for due process of the complainant. In achieving this, the Tribunal noted the following: *"where disciplinary proceedings are brought against an official who has been accused of harassment, testimonies and other materials which are deemed to be confidential pursuant to provisions aimed at protecting third parties need not be forwarded to the accused official, but she or he must nevertheless be informed of the content of these documents in order to have all the information which she or he needs to defend herself or himself fully in these proceedings."* (Consideration 20). To therefore respect the confidentiality stated, the Tribunal explains that *"it is sufficient for the official to have been informed precisely of the allegations made against her or him and of the content of testimony taken in the course of the investigation, in order that she or he may effectively challenge the probative value thereof"* (Consideration 20, citing Judgment 2771, under 18).

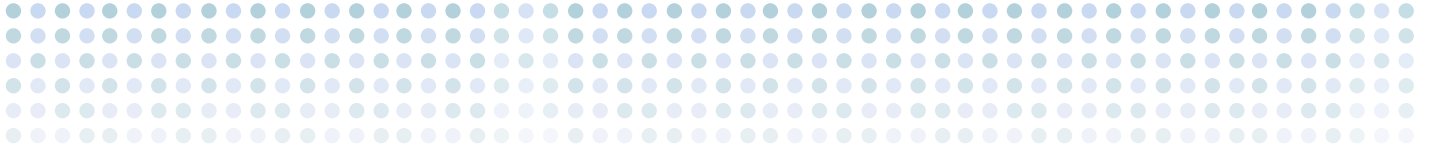
In Judgment 3732 (2017), a UPU case, the Tribunal held that the well-established principle that a staff member have access to all evidence on which the authority bases, or intends to base, a decision against him applies not only to a staff member who is the subject of a disciplinary process, but “*is equally applicable [...] to the complainant who is seeking to establish a case of harassment in the internal appeal*” (Consideration 6). Recalling Judgment 3640, the Tribunal held that the complainant should have been provided with a “*sufficiently detailed*” summary of the Internal Auditor’s report, in the absence of the report being disclosed to him in full or redacted form.

The balance that must be achieved, discussed in Judgment 3640, was also reiterated in Judgment 3995 with the Tribunal stating that “the obligation to disclose must be balanced against the need to respect the confidential nature of some aspects of an inquiry, particularly that of witness statements gathered in the course of the inquiry” (Consideration 5). The complainant in this case was challenging the measures taken by IFAD following the investigation the organization conducted into the complainant’s allegations of harassment. For this reason, witness statements contained in OIOS investigation reports resulting from allegations of harassment are understood to enjoy confidentiality and should, in most cases, not be disclosed to complainants that have made such allegations in order to ensure the protection and freedom of expression of the witnesses.

## 4. Conclusion

In light of the above, OLA considers that an investigation report (redacted or unredacted), or summary of the report which complies with the standards articulated by the Tribunal (see e.g. Judgment 3640, under paragraph 3(ii) above), needs to be disclosed to a complainant in a harassment case when:

- i. the investigation report is a material document upon which the administrative decision was based (Judgment 3347); and
- ii. the request for review is submitted to the Director General by a staff member who has been adversely affected by the decision (Judgment 3831) and the report would be provided when the Director General provides his decision in response to that request for review (Judgment 3831).



**CEB**

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