

NATIONS UNIES
LE HAUT COMMISSAIRE
POUR LES RÉFUGIÉS



UNITED NATIONS
THE HIGH COMMISSIONER
FOR REFUGEES

Case Postale 2800
1211 Genève 2
Suisse

PERSONAL AND CONFIDENTIAL

21 June 2004

Dear Mr. Secretary-General, *Dear Kofi,*

Here enclosed, I would like to send you the response you asked for in your letter of 3 June 2004.

I attach to this response the analysis of the OIOS report by Mr. Max van der Stoep. Should you wish to receive this analysis directly from him, I am sure this can be arranged. I could also imagine that there is a direct telephone contact between you and him.

In drafting this response, I was assisted by Mr. Kelvin Widdows, former Principal Legal Officer at ILO.

In the interest of the United Nations, I have refrained from requesting any outside legal counsel.

I trust you will close the case.

But that, in itself, does not answer the questions on what to do from here on.

On this, I will try to contact you separately.

Allow me to apologise on behalf of UNHCR for all the worries that this has caused you and this in a time when you are already burdened with so many other concerns.

I am therefore all the more grateful for your availability and support during this painful process.

Yours sincerely,

W. K. K.
Ruud

Ruud Lubbers

Mr. Kofi A. Annan
Secretary-General
United Nations Headquarters
New York

STRICTLY CONFIDENTIAL

Response to the OIOS report of investigation into misconduct and abuse of authority at UNHCR

Introduction

1. In this reply to the OIOS "report of an investigation into misconduct and abuse of authority at UNHCR" dated 2 June 2004, I set out to (a) deny that any acts of sexual harassment or abuse of authority took place; (b) establish that such "evidence" of the alleged misconduct as is said to exist is insufficient and flawed; and (c) conclude that the report itself would appear to be based on an irregular statutory basis and also flawed by errors of law and reasoning.

2. I should also like to draw attention to remarks in the report which, given the circumstances and the lack of any specific corroborating evidence of the complainant's description of the act of harassment, seem inappropriate and suggest either an element of vindictiveness or a determination to suggest guilt despite the lack of evidence. These remarks are found principally in paragraphs 55, 57, 59, and 60. The exaggerated and emotional language there employed does not suggest an investigation built on a scrupulous attention to fairness grounded on a duty of care to all parties.

The facts in relation to the incident alleged to constitute sexual harassment

3. According to ST/AI/379 dated 29 October 1992, to which you refer in your covering letter of 3 June, "*Sexual harassment is defined as any unwelcome sexual advance, request for sexual favours or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment*".

4. The alleged incident in question took place at the end of an official meeting in my office on 18 December 2003. While three persons had left the room just before the complainant, Mr. Sultan-Khan and I were standing and Mr. Blatter was still sitting across the table when Mrs. Brzak rose to leave the room. The meeting had been cordial and professional. At the outset of the meeting Mrs. Brzak, who was sitting on my left, asked to borrow one of my pens. This is an example of the atmosphere of collegiality present at the meeting. Moreover, the complainant and I had exchanged speeches in a cordial way a few weeks earlier at a farewell party for Mr. Naveed Hussain, the former Chair of the Staff Council. I should perhaps add that in the course of earlier meetings at which Mrs. Brzak was present, the first of which was an interview when she had applied for the post of Chef de Cabinet, I gained the impression that she was rather frank in presentations and not shy of confrontation.

5. The meeting of 18 December 2003 concerned the issue of access to, and selection of, General Service Staff in relation to "the roster" for becoming professional staff. The meeting was held in a positive atmosphere and everyone participated in an effort to find the fairest way to ensure that General Service Staff were given proper consideration when their qualifications were

adequate and appropriate. Mrs. Brzak, who has a long history of advocacy on behalf of her General Service Staff colleagues, played a positive role in the discussions.

6. At the end of the meeting, I ushered Mrs. Brzak out. She passed in front of me. I have no specific recollection of touching her; however, as a courteous gesture I would regularly usher a lady next to me out of a room at the end of a function. I believe this is what happened on 18 December; if I touched her in so doing, my right hand would have been on her waist. In this context I would note that:

- (a) Mrs. Brzak was the only lady leaving the meeting;
- (b) she and I were satisfied with the positive role she had played in the meeting and would still have to play as a key representative of the General Service Staff;
- (c) my own practice of good manners, which would normally include a gesture of both friendliness and courtesy in such circumstances;
- (d) in the statement of Mr. Blatter to OIOS, the gesture was characterised in the same way though described as "overly familiar". Mr. Blatter described it to me, however, just as "familiar";
- (e) Mr. Sultan-Khan stated that, beyond the request for my pen, he saw nothing happening.

7. Ushering Mrs. Brzak out in this way – possibly interrupted for a second when she returned the pen, of which I have no recollection given the lapse of time, – might have included physical contact. However, it can in no way be interpreted as of a sexual nature. It was a sign of courtesy and friendliness.

8. According to paragraph 16 of the OIOS report, Mrs. Brzak's "*allegation against Mr. Lubbers is that at the end of the 18 December meeting, Mr. Lubbers placed his hands on Mrs. Brzak's waist, pulled her back towards him, pushed his groin into her buttocks and held her briefly in that position before releasing her*". This was not the case. There were two witnesses: Mr. Blatter, Head of Human Resources who, according to his statement, saw me ushering her out and qualified it – at least according to the OIOS report – as overly familiar (to me he simply said "familiar"), and Mr. Sultan-Khan who is always conscious of protocol aspects and who was standing near me and is known to see and hear everything I do and say. He saw nothing. It is clear that Mr. Blatter, sitting at the table, saw the friendly ushering out from a different angle than Mr. Sultan-Khan. However Mr. Blatter stated to OIOS that "if he had seen Mr. Lubbers do anything improper, he would have intervened to protect Mrs. Brzak" (report, paragraph 23). This is an important point: the report suggests that the two witnesses had inconsistent accounts, whereas they both clearly saw no evidence of anything improper or sexual. And in this connection I wish to comment on paragraph 46 of the OIOS report. It is not correct to suggest that there were instructions from me to Mr. Blatter and Mr. Sultan-Khan, prior to their interviews with OIOS. Mr. Sultan-Khan learned about the accusations against me for the first time only during his interview with OIOS. Finally, I object to the suggestions in the report, without any explanation, that the two witnesses were not "independent" (paragraphs 54 and 57).

9. I can only conclude that the perception or later interpretation of the event by Mrs. Brzak might have been influenced by what is reported to have happened shortly after with Mr. Blatter and later in encounters with him. In my note to all staff dated 28 May 2004, I wrote: "*I have also been made to understand that the misunderstanding may have been either created or exacerbated by a joking reference made by one of her colleagues outside of the meeting. This appears to have given the friendly gesture a connotation of an entirely different nature, than the one intended*". This is a summary conclusion of paragraphs 5, and 31 to 36 in the report. While I was in no way

part of or present in all of that, I only conclude that a friendly gesture including possibly physical contact in the room was given in these subsequent events "an entirely different nature, than the one intended".

10. The definition of sexual harassment under ST/AI/379 requires a sexual element. In this case that element is clearly missing. I myself was not even conscious of having touched the complainant in any real way; I made what I considered and still consider to be a friendly gesture to her. I was simply ushering her out of my room at the end of a function. There is no evidence from those present of any sexual element. Had I performed the act described by OIOS (report, paragraph 16), would there not have been an automatic reaction on the part of Mrs. Brzak? Would she not have manifested shock or dismay visible either by an expression or physical reaction to the two persons watching her leave the room? Would she not have appeared upset or bewildered to my secretary whose desk she passed in leaving the suite of rooms? Would she not have sought to display a grievance either privately to me or through an appropriate procedure before more than four months had passed, particularly given her qualities of frankness, directness, resourcefulness, mentioned above? There are no explanations or answers to these legitimate questions in the report. It is curious that paragraph 61 of the report attributes to me an intention to do something which has clearly not been proven in any way, while paragraph 62 puts the similar allegations against Mr. Blatter into the context of joking and playfulness without more; another indication of what I would call the vindictive nature of aspects of the report, referred to above.

11. Paragraphs 29 and 30 of the report try to reflect elements of my interview by Mr. Nair and Mr. Postica speculating on "why Mrs. Brzak would have filed such a complaint". I prefer not to go into the accuracy of these speculations. I consider it was up to OIOS to consider these dimensions and their relevance. I can, however, only conclude that OIOS did not do so in any serious and thorough way, including, for example, by not giving due attention to a statement by Mr. Naveed Hussain, former Chair of the Staff Council, brought to Mr. Nair on Monday, 24 May. It is worth recalling that the investigation is supposed to "establish all the facts of the matter by retrieving information and evidence-both inculpatory and exculpatory".

12. In the same way, OIOS did not ask the complainant:

- why she did not react immediately in the room, if she felt offended in any way;
- why she did not "keep a written record of events as soon as possible after ..." as she was encouraged to do according to paragraph 4 of Administrative Instruction ST/AI/379 on procedures for dealing with sexual harassment;
- why she did not come to me to discuss her problem when her working relationship with me (as an important member of the Staff Council and because of her earlier application for the post of Chef de Cabinet) made that indeed very possible;
- why she did not take up offers for help in resolving informally the problem from Mrs. Dubravka Suzic-Koffi, UNHCR's Staff Welfare Officer, nor Ms. Karola Paul, the Mediator - whom she effectively informed only in the spring of 2004; but preferred not to ask for mediation.

13. Moreover, why did OIOS not choose to look into the veracity and implications of Mrs. Brzak's statement (paragraph 38): "*there were occasions when she had been sexually harassed by other senior managers who, she said, have since left the Organization*". If this was the case, OIOS might have looked into the question as to the reasons for her course of action now, marked by her not aiming at an informal resolution but going for a formal procedure/complaint which has to be compared with her earlier silence in other alleged cases? Or whether there might be some

undue sensitivity on her part to conventional behaviour which she interprets, for whatever reason, with an altogether different connotation?

14. In the General Assembly report dated 11 October 2000, on rules and procedures to be followed by OIOS, it is made clear in point 2 that the General Assembly considers it important to underline that "findings [be] based on evidence".

And it goes on:

"With equal vigour, the Investigations Section will work to clear the name of the staff members who are wrongly or incorrectly accused. In such cases, the evidence either demonstrates that the accused person has not engaged in the alleged activity or that there is insufficient evidence to support the allegation. In the latter case, the accused person must be given the benefit of the doubt. In both cases, the accused person is cleared." On the basis of the lack of evidence as to the commission of a sexual act in the circumstances of the event of 18 December 2003, the last sentence of the text above must apply. OIOS does not appear to have applied this rule.

15. Finally, I will not go into Mrs. Brzak's character and personality as described by OIOS in paragraph 41. I distance myself, however, from the tendentious comment: "(except Mr. Lubbers)". In my note of 28 May to all staff, I said of her that "*I know she cares very much for the Organisation which she has served for so many years. I know she wants us all to move forward with ethical intention, civic-mindedness and respect*". Moreover, paragraph 40 seems an attempt to bolster the credibility of the complainant by stating that she consulted various people before lodging her complaint and that her version of events remained constant. However, the fact that she repeated her version of events is not evidence that the version tallies with reality. And I am afraid that the reference to "others" is symptomatic of the tendency of the report as a whole to favour broad, general and anonymous allegations and accounts over firm evidence and verified testimony.

16. While paragraph 3 of the report refers to sexual harassment both "in conduct and in words" suggesting that this reference applies to both Mr. Blatter and myself, I have found no reference to allegations in relation to sexual harassment by words in my case.

Secondary evidence: pattern of conduct

17. The report of OIOS, having disregarded the evidence of the two witnesses to the alleged act, has then found it appropriate to look for a "pattern of conduct" on my part. Before coming to the four cases cited, let me state the following. A single complaint was made against me and against a colleague. While I have not been permitted to see the complaint, the harassment part seems to relate, in my case, to the alleged incident in December 2003. The complaint was forwarded to OIOS by the only complainant, Mrs. Brzak. There are apparently no claims as to other alleged incidents. It is the complaint as lodged which in law must stand alone and be judged on its merits; if there is no direct evidence to support it, the complaint must fail. The confidential remarks by anonymous persons on subjects outside the complaint, as interpreted by OIOS, should not be relevant in any sense. This section of the report even seems to me to suggest that OIOS has exceeded its powers in the particular case, given the direct evidence which has been tabled. Nevertheless, as you have requested me to reply to the report as a whole, I make the following comments.

18. OIOS posits four cases in this category:

Case "a" - the description here is incorrect. "a" informed me that she wanted to discuss matters outside the mandate of UNHCR, related to the issue of Palestinian refugees, which she wanted to talk over with me outside the office. It was not to "discuss her area of work with others". I offered her two possibilities: to meet each other in a café/restaurant or to come to my apartment. She preferred the second option. The statement is also incorrect where it reads: "*However, when she arrived, she discovered that no one else was present*". She knew this would be the case since she had requested a one-to-one conversation on the Palestinian issues at my apartment. In my note to staff of 28 May 2004, I wrote truthfully (and protecting the staff-member in question): "*And indeed I do remember from my UNHCR experience one such case. It was in no way sexual harassment but I became aware at that time that she felt very uncomfortable. Therefore, I made an apology even in writing*".

19. Cases "b" and "c" are for me speculation; they lack substance and supporting evidence. I have no recollection of such cases and no such person has ever drawn my attention to such a situation of discomfort as described.

20. Case "d" is not described in my note to all staff of 28 May for the simple reason that it was not about a UNHCR staff member. And beyond that, it was in no way comparable to Mrs. Brzak's allegation. Here I have no other comment other than that this was simply an invitation to sit down for a drink, which was not welcomed and declined. It had nothing to do with UNHCR and was a purely personal social encounter. Just to be accurate, I did not say "feeling alone", I said, "I am now alone" (after the long meeting and the dinner we had with a large group), referring to the fact that the first invitation for a drink was when I was still part of the group of participants of the retreat.

21. I must, however, repeat my serious reservations as to the legitimacy of this section of the report for the reasons given earlier. It is particularly troubling that in cases (b) and (c) the report can contain OIOS's interpretation of anecdotal and unsubstantiated allegations provided on the basis of anonymity (cf. paragraph 8, Rules and procedures applying to OIOS), without even statements being attached.

22. And there is another dimension to this pattern of conduct issue which OIOS chose apparently not to explore. This is the very different "pattern of conduct" that a number of UNHCR female staff urged OIOS to give attention to and which should have been examined if OIOS were really objectively interested in my pattern of conduct over the years. A series of messages started with one from Mrs. Christina Linnér, former Senior Coordinator on Refugee Children, presented to OIOS on 21 May and attached to a letter to Mr. Nair on 24 May 2004. And this was followed by other spontaneous initiatives:

- (a) Fax to Mr. Nair from Ms. Cindy Burns dated 25 May 2004;
- (b) Letter to Mr. Nair from Ms. Anita Bay-Bundegaard, Ms. Shoko Shimozawa and Ms. Carina van Eck dated 27 May 2004 (copied to the Secretary-General via Ms. Elisabeth Lindenmayer); and
- (c) Letter to the Secretary-General from Ms. Anne Dawson-Shepherd dated 1 June.

I should also like to mention that, in addition to the above colleagues, I maintain regular and professional contacts - often on a one-to-one basis - with the following other female colleagues: Wendy Chamberlin, Erika Feller, Hope Hanlan, Marjon Kamara and Pirkko Kourula. None of

them has ever indicated to me or others any cause for complaint in relation to a "pattern of conduct".

Alleged abuse of authority

23. This section of the report is stark in its allegations of "abuse" but accompanied by no real evidence of fact or justification in law. Paragraphs 46 and 47 refer to the fact that I discussed the case with my senior officials, some of whom were witnesses to the event in question. But from there the report jumps to the idea that these discussions involved putting pressure on people to influence their testimony or speak in my defence. In fact, discussions with management were designed to find the appropriate ways to protect the organisation from being enveloped in discussion of the allegations to the detriment of its mission. The investigation may not formally be required to follow all the constraints imposed by the notion of due process but surely there has to be substance behind claims as serious as these. Apart, perhaps, from libelling one staff-member with the remark that "he decided to play it safe", - a gratuitous insult based on nothing -, we read simply in paragraph 47 that "other" staff were afraid to discuss the case for fear of retaliation. This is pure supposition and seems also to suggest that OIOS did not really want to hear their views, since the investigators were so ready in a previous part of the report to offer anonymity to witnesses in return for their accounts. There are also unsupported and incorrect allegations that I sought to find out who was "cooperating with OIOS". The allegations in paragraphs 47 and 48 are again speculative or unduly general in their references to "other" staff, "other women", "many staff" and "senior manager".

24. Clearly, the leaks to the press on the allegations have damaged the interests of the parties and, of course, UNHCR. The rules to be applied to investigations by OIOS contain strict directives as to confidentiality and prohibit unauthorised disclosures. The leaks started on 18 May 2004 with an article in the New York Times referring to the complaint and reporting comments by Mrs. Brzak, albeit without mentioning her name. This was followed by a second article in the New York Times on 19 May and then two days later the media reported "four more official complaints of sexual harassment". It is confirmed by record that the media leak on Friday, 21 May about "four more" cases was reported by Mr. Bob Kroon, a Dutch Geneva-based free lance journalist. The same Mr. Kroon became very active again, in particular on 28 May, reporting on Dutch television about a telephone conversation between Mr. Nair and himself after circulation of my note to all staff.

25. Again, very early on Thursday, 3 June (European time), Mr. Kroon was the first to report that OIOS had completed its investigation. Early on Friday, 4 June, he revealed to Mr. Ron Redmond, Head of Public Information at UNHCR, that he had entertained regular contact with Mr. Nair up to 3 June. He even revealed the "human interest detail" that they practised their knowledge of Bahasa Indonesia and had mutual friends in Singapore. Mr. Nair apparently told Mr. Kroon that he had given the "final" report to the Secretary-General and described it as "rather negative" for the High Commissioner.

26. I will not speculate about those involved in the first leak to the New York Times. I consider it to be the responsibility of OIOS to look into these leaks to the media, the breach in confidentiality and the consequent damage caused to UNHCR, myself, my wife, my family and the Netherlands. I should add, however, that my attempts, as from 20 May, and following a written request by a group of field staff on 23 May to have the leaks investigated, including through the UNHCR Inspector-General, were vetoed by Mr. Nair on the grounds that to do so would affect the integrity of the OIOS activity or could be construed as an attempt to undermine their ongoing inquiries. I wrote to Mr. Nair asking for an explanation on his position and

suggesting that a refusal by OIOS to address the leaks might be construed as an attempt not to allow any efforts to end the leaks. The remarks in paragraph 48 of the report have to be read in the light of the above.

27. The note to staff of 28 May 2004 (referred to in report, paragraph 49) also has to be seen as a consequence of the leaks, which clearly put me in an impossible position vis-à-vis the staff as a whole and indeed the organisation as a whole. The confidentiality of the process had been breached and the complaint was now in the public domain. And it had furthermore become clear that the OIOS report, which we had understood was to be finalised on 24 May, would now not be completed before early June. It was my judgement that there was a real need to report to the staff on the position I was then placed in. I understood the dilemma before me and that I would have to refer to matters which were supposed to be confidential; however I considered that I had no alternative but to send the note given the state of confusion that had arisen, the speculation rife in the corridors of UNHCR and, not least, because of the wrong impression caused by the leaks and the lack of due process. The issue was affecting the capacity of the organisation to get down to work, not to speak of the reaction from the wider public vis-à-vis UNHCR. The note was an attempt to end speculation by providing the staff with an account of where the process was at that time and to address possible shortcomings in the organisation's approach to dealing with sexual harassment cases and in our awareness of the problem, including through promoting greater awareness and education of the staff. The note was in no way directed at silencing people or obstructing or influencing the investigation, and I do not believe a reading of it suggests any such intention.

28. Similarly, as encouraged by the relevant Administration Instruction, my letter to Mrs. Brzak of 26 May (referred to in a post script to the report) was a genuine and final attempt to achieve "reconciliation" through the path of informal resolution, initiated by Mr. Naveed Hussain, the former Chair of the Staff Council, as from Saturday, 22 May and reported to Mr. Nair on Monday, 24 May. It was not at all intended as an attempt to intimidate her or to "subvert" an investigation which was in progress.

29. In short, the evidence is lacking to suggest that I was attempting to subvert the investigation, influence its findings or intimidate those involved in it. Here I refer again to the burden of proof in such a case, referred to earlier.

30. Finally, in this connection, I again ask the question as to how a section of a report dealing with a complaint submitted to OIOS on a single case of alleged sexual harassment can relate to allegations of misconduct through abuse of authority. Assuming any merit in these allegations, which I deny, should there not have been a separate investigation on the basis of a separate complaint from a different source forming the subject of a separate preliminary enquiry? It seems to me that this aspect of the report is unrelated to Mrs. Brzak's complaint and that by joining the two a certain lack of clarity and confusion of roles have arisen. Indeed, paragraphs 48 and 49, and 58 show little evidence of having been written on the basis of any serious investigation.

Procedural errors and irregularities

31. Apart from the reservations expressed above as to the legitimacy in the OIOS report of the sections on Pattern of conduct and Abuse of authority, I would raise the fundamental question as to the propriety of the role of OIOS in this case. A procedure for dealing with allegations of sexual harassment is set out in ST/A/379, referred to earlier. The Instruction encourages staff to resolve the problem by informal means and offers advice as to how this might be done. There is

also a formal investigative procedure which is described as being available where informal resolution is not appropriate or has been unsuccessful.

32. I myself continue to believe that this case should have been dealt with through the informal channel and that it is an appropriate case for such a procedure. Amicable reconciliation should always be pursued even during a formal procedure which then might be suspended. However OIOS does not seem interested in the reconciliation option, in spite of its being the preferred procedure according to the Administrative Instruction. Indeed, OIOS even seems to discredit, in its post script to the report, the reconciliation effort undertaken by Mr. Naveed Hussain, former Chair of the Staff Council and a close colleague of Mrs. Brzak, and referred to in my letter to the complainant. In short, Mr. Naveed Hussain, with the support of Mr. Yacoub El Hillo, my former Chef de Cabinet and also close to Mrs. Brzak, had proposed a meeting of "reconciliation", as they called it. Mr. Hussain explained that if there would be apologies from Mr. Blatter and myself, even when what happened was unintentional and the subject of misunderstanding, then, he believed Mrs. Brzak might accept such apologies and go for reconciliation. This possibility was brought to the knowledge of OIOS and subsequently Mr. Naveed Hussain was contacted by them. But it would not appear that OIOS encouraged such a reconciliation initiative. I was, and remain, of the view that it had to be considered as positive and in the interests of UNHCR, Mrs. Brzak and myself.

33. In order to keep this option open, I judged it important in my message to staff of 28 May to repeat Mrs. Brzak's own sentiment, as conveyed to me by Mr. Naveed Hussain. *"I ask most genuinely that we all move forward with ethical intention, civic-mindedness and respect"*. Regrettably, as stated above, OIOS seems to have distorted the intent of the personal and confidential letter I had delivered to Mrs. Brzak through Mr. Naveed Hussain in order to discredit me. Very telling in this regard is their omission to mention, in the post script to the report, that the reconciliation effort was in the first instance an initiative by Mr. Naveed Hussain, a reality which was fully known to them.

34. In any case, no informal procedure was carried out nor was it shown not to be appropriate, as required by the Administrative Instruction. This evaluation should presumably have been made by the ASG for Human Resources Management as it is to this person that a written request for an investigation is to be made (Para 8 ST/AI/379). Thus, by sending the complaint directly to OIOS, and through OIOS acting without the authority of the ASG for Human Resources Management, the preliminary stage of the process established under ST/AI/379 has seemingly been omitted; a significant flaw. In this respect, it is revealing that the preliminary enquiry by OIOS turned into a full investigation after only an interview with the complainant and "obtaining additional information" (unspecified), i.e. without any of the preliminary controls set out in the Administrative Instruction. (Report, paragraph 9). Moreover, paragraph 10 of the same Administrative Instruction requires (the mandatory "shall") that a copy of the complaint be given to the alleged offender. This has never been done in this case despite my request, documented in the report. This again has worked to my detriment since I feel I am defending myself in the dark. In fact, I was not formally informed of the investigation and its terms of reference. One wonders also whether OIOS should not have made two investigations in relation to the sexual harassment charges; one in relation to the allegations against me and another in relation to Mr. Blatter. Such a procedure would have respected to a greater degree the requirements of confidentiality in each case and may well have ensured that Mr. Blatter was not a witness and an alleged offender in the same case. Then there are the breaches in confidentiality, referred to earlier. The majority of the above-mentioned lapses are serious errors of procedure which have caused me prejudice.

35. It is also a particularly egregious error when, in disregard of OIOS's own rules (cited earlier), the procedure followed has in effect reversed the burden of proof to my serious prejudice.

36. I also take strong exception, as already stated, to the tendency of the report to hastily reach conclusions not based on evidence and to frame them through tendentious remarks and OIOS's own accounts of the views of anonymous persons. The report manifests a lack of professionalism, fairness and impartiality in its compilation.

Conclusion

37. Allow me to end by referring to the Recommendations in the OIOS report. I believe that Recommendation No. 1 reflects the general trend of laxity manifested throughout the report, both in terms of reasoning and legal procedure, when it refers to "unwanted touching", rather than sexual harassment. For the rest, even ignoring the procedural flaws, there is such a lack of evidence in relation to the two charges of misconduct that I trust that you will decide that the case be closed under the provisions of paragraph 11 (a) of ST/AI/379.

38. Since it is my view the report is seriously flawed, I could obviously not support Recommendation No. 3. Moreover, the recommendation, as with a lot of the report, pays scant attention to my interests and makes no reference to my reply to the report, equally part of the record. And I doubt that circulating material relating to this case to UNHCR staff would help the organisation move on.

39. With respect to Recommendation No. 5, may I respectfully quote from what I wrote in my message to staff on 28 May.

I am very disturbed by the fact that, in such cases, the concerned staff members may not always be able to receive the kind of advice which would allow them to have their complaints and concerns addressed promptly and in an effective way. It is every colleague's right to consult and to receive counselling and advice. However, the mechanisms we have in place may not be fully effective. To avoid unnecessary time lags in the future, UNHCR needs guidelines which include a clear definition of the elements of sexual harassment, illustrative examples of inappropriate behaviour and guidance on actions to be taken. I believe that if such guidelines had been available and followed in the case under investigation, the misunderstanding could have been clarified and the present situation avoided. I am consulting with some staff on how to use the very hard lessons of this experience positively, in order to ensure that staff members, in the future, are able to receive compassionate and professional assistance in a timely manner. I have therefore asked Joyce Mends-Cole, who has worked on gender equality and gender balance issues for some time, to look into this dimension, with a particular emphasis on learning lessons for the future.

Ruud Lubbers
21 June 2004

Mr. M. van der Stoel
SV 's-Gravenhage,

2517

Lubeckstraat 138

Mr. Ruud Lubbers
High Commissioner for Refugees
UNHCR
Geneva

Dear Ruud,

I received the OIOS report regarding your alleged misconduct and abuse of authority at UNHCR and other relevant information regarding these questions.

Sexual harassment has to be considered as a serious form of misconduct. In an international organisation like the UNHCR, disciplinary steps against persons found guilty of sexual harassment, in very serious cases even dismissal, are therefore appropriate. Moreover, the victims need help. In this connection I note that in the note you sent to the UNHCR staff on 28 May you underlined the need "to ensure that staff members, in the future, are able to receive compassionate and professional assistance in a timely manner".

On the other hand, there is also the need to ensure that the procedural rights of the alleged offender will be fully respected, that the investigation is objective and impartial and that a person will only be considered guilty of sexual harassment when there is solid and convincing evidence to support this conclusion. It is against this background that I have analysed the OIOS report regarding your case. I have come to the following conclusions :

1. On 3 June the Secretary-General sent you the OIOS report on its investigations. In his cover letter he refers to the procedures set out in the Administrative Instruction regarding Procedures for Dealing with Sexual Harassment ST/AI/379 of 29 October 1992 which is clearly applicable in this case. Article 10 of this Administrative Instruction states i.a. that the alleged offender shall receive a copy of the complaint. In refusing to provide you with this document, OIOS clearly violated the Administrative Instruction by informing you that "pursuant to its own mandate, terms of reference and investigative protocols, there is no requirement to provide copies of complaints". Acting in this way, OIOS has acted against the universally accepted principle that a defendant has the right to know in so many words what he is accused of. As the accused person in this case, you were certainly entitled to receive full information regarding the OIOS terms of reference and investigative protocols. But OIOS failed to do this, thereby violating one of the most essential principles of correct procedure in cases like this. In this regard it is noteworthy that it is not clear from the report whether OIOS considers itself bound by the Administrative Instruction. And, if not, what its terms of reference are.

2. Regarding the accusation of sexual harassment itself the statements of the complainant and the accused contradict each other. This makes the statements of the two persons who are still in the room when the incident happened even more relevant. One of them, Mr. Blatter, described the attitude of the accused as "overly familiar". It is evident that to behave in an "overly familiar" way does not constitute an act of sexual harassment.

The other person in the room, Mr. Sultan Khan, stated that he did not see anything. The OIOS report comments (para 58) : "Mr. Sultan Khan, for reasons not difficult to understand, particularly in the light of Mr. Lubbers' actions, decided to play it safe by claiming that he did not see anything." The report, therefore, implies that Mr. Khan was lying, without convincing proof of this and seriously damaging his reputation.

In para 58 it is also stated that "Other UNHCR staff told OIOS that they were afraid to discuss this case for fear of retaliation".

But, quite apart from the question whether such fears did really exist, this statement is totally irrelevant. How can a person, who was not in the room at the time of the incident, provide relevant information about what happened ?

The only relevant facts are that the accused and the complainant have provided completely contradictory versions about the incident and that the only two other persons in the room did not provide evidence confirming the version given by the complainant. In the light of this, it is also incomprehensible why OIOS concludes that the actions of the accused "constitute misconduct with a clear intent to embarrass and humiliate Mrs. Brzak" (para 61).

The report does not give any indication that the complainant did make a gesture reflecting her indignation and displeasure, as one could expect from a woman subjected to sexual harassment. Nor does it explain why complainant waited for more than four months before formally making the accusation, notwithstanding the fact that she stated (para 38) that "she felt so angry and humiliated that she could not remain silent anymore". This is even more remarkable because the OIOS report describes her (para 41) as "a very strong advocate in matters of principle".

3. Para 7 of the OIOS-report states that OIOS was apprised of several other cases of Mr. Lubbers engaging in misconduct involving UNHCR staff or women closely affiliated with UNHCR. OIOS thus widened the investigation and mentioned in which it alleges that misconduct on the part of Mr. Lubbers took place. In this respect it has to be noted that none of them decided to file a complaint. For one of them it would have been impossible, because she did not belong to the UNHCR staff, but the others could have taken this step. Still, it is on the basis of these four cases that OIOS concludes that "the pattern of Mr. Lubbers' misconduct seems clear" (para 55).

The four women mentioned have asked that their names would not be mentioned in the OIOS report. But, as their cases get such a prominence in the report, it would have been appropriate that the report would have mentioned that the Secretary-General would be enabled on a confidential basis to take note of the text of the interviews held with them. If no texts or only summary accounts are available or if the persons concerned have not had the opportunity to give their approval to these accounts, this would raise even more serious questions about the quality of investigation.

4. The report bases its charge of abuse of authority by the High Commissioner mainly on the fact that he sent a message to the UNHCR staff, which it describes as "intimidating" (para 64 sub I). In itself the sending of such a message might be considered as an unusual or even undesirable step. But this step has to be considered against the background of the situation on 28 May, the date on which the message went out. Since 21 May media reports were circulating about four more cases of improper conduct of the High Commissioner. This caused considerable commotion and concern in the staff. Against this background, it becomes fully understandable why the High Commissioner decided to take this step.

The charge in the report that the message to the staff was "intimidating" is not substantiated at all in the OIOS report. It fails to indicate which words or sentences could have had this effect. It could better be described as an effort on the part of the High Commissioner to calm down the situation.

5. In a postscript to the report Mr. Nair comments on the attempt of the accused to come to a reconciliation with the complainant. He writes : "Mr. Lubbers sent a letter to the complainant herself, asking her to "drop" the complaint", and comments : "This action of his was nothing but a blatant attempt to subvert the whole investigation". Mr. Nair does not mention another part of the letter, which sheds a completely different light on the matter : "It became clear to me that my intention to ask (probably a spelling mistake; usher instead of ask) you out in a warm and friendly way was understood differently by you and I feel sorry for that".

The letter seems to be fully in line with Administrative Instruction St/AI/379, para 5, which mentions the possibility of informal resolution. This would have been even more appropriate because, as I have indicated above, the investigation did not provide convincing evidence that the complainant had been subjected to sexual harassment. Instead of giving such a biased view of what happened OIOS could better have given its support to this effort to come to a reconciliation.

The withdrawal of a complaint on a voluntary basis after mediation by a honest broker is possible in every administrative or legal system. The mediation effort, of which the letter is an essential element, is not mentioned in the report, whereas the letter is taken out of context and construed as an effort to intimidate the complainant.

6. Para 7 of Administrative Instruction St/AI/379, regarding procedures for dealing with sexual harassment, states i.a. : "... all reports of sexual harassment will be handled discreetly to protect the privacy of all involved". However, this requirement has not been respected. I will give two examples : On Friday 21 May a Dutch journalist stationed in Geneva, Bob Kroon, reported in a Dutch radio programme that according to high UN sources four more complaints of sexual harassment had been made against Mr. Lubbers. The second example relates directly to Mr. Nair. In a Dutch Radio broadcast on 29 May the journalist Bob Kroon, referring to the message of the High Commissioner to his staff, remarks about the reactions to this in the U.N. : "They feel, in the first place, that it constitutes interference in the ongoing investigation. Secondly they say that the High Commissioner has discredited himself by this letter. This is what Undersecretary-General Dileep Nair told me yesterday on the phone from New York".

Against this background it is also relevant that Mr. Kroon revealed to Mr. Redmond, head of public information at the UNHCR, that he had entertained regular contact with Mr. Nair until the OIOS report was presented on 2 June. They might have had contact since 20-21 May when Mr. Nair was in Geneva. It is evident that Mr. Nair, far from being the guardian of confidentiality as would have been his duty, has committed indiscretions himself.

7. It seems only logical that the High Commissioner called for an investigation into the leaks, which, apart from damaging his reputation, were also very damaging for the UNHCR itself. But Mr. Nair blocked this by telling the UNHCR Inspector-General to refrain from such a step. He motivated this by saying that this "could interfere with, and affect the integrity of, the work OIOS is doing". But the investigation regarding the leak could have taken place without any negative effect on the ongoing OIOS investigations. Equally unacceptable is the conclusion of Mr. Nair in para 48 of his report to the Secretary-General that "His (Mr. Lubbers') attempted inquiries into the press reports is an ill-disguised attempt to prevent other staff of speaking with OIOS". By calling for an investigation to the leaks the High Commissioner was not standing in the way of continued OIOS investigations taking place on the basis of the discretion Administrative Instruction SI/AI/379 calls for.
8. In conclusion, I want to stress in the first place that the OIOS report is deficient in objectivity and impartiality. It is a biased one. Its conclusions are insufficiently motivated or not motivated at all. It fails to prove that there was abuse of authority by the High Commissioner. It also fails to prove that sexual harassment has taken place. There are therefore strong arguments for closing the case.
Considering the number of leaks which occurred in the course of the OIOS investigation, a special investigation into this question is clearly high desirable.

Yours,

Max.