

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 me 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-Kofi, 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 intension, 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.