

## Wrongdoing of International Civil Servants – Referral of Cases to National Authorities for Criminal Prosecution

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“The most important asset of the United Nations Secretariat is the staff”.

This statement using more or less the same or similar words has recurrently been made by several Secretary-Generals of the United Nations, usually on the occasion of the general debate of the agenda item “human resources management” in the Fifth Committee (Administrative and Budgetary) of the United Nations General Assembly. As far as it is

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\* The views expressed in this article are personal and do not represent the views of the German Embassy Nicosia/ Cyprus or any other official German entity.

known no Member State has contradicted such an appraisal and there should be no doubt that the thrust of the statement is correct.

In recruiting staff the Secretary-General as the chief administrative officer of the organization<sup>1</sup> has to adhere to Article 101 para. 3 of the Charter which states:

“The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.”

The constitutions of specialized agencies of the United Nations system often contain provisions similar to Article 101 para. 3 of the United Nations Charter.<sup>2</sup> In organizations where the requirements for recruitment of staff are not spelt out in detail at the level of primary law, such as a constitution, usually staff regulations contain the legal basis for this

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<sup>1</sup> Article 97 of the United Nations Charter.

<sup>2</sup> WHO, article 35: “The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations established by the Health Assembly. The paramount consideration in the employment of the staff shall be to assure that the efficiency, integrity and internationally representative character of the Secretariat shall be maintained at the highest level. Due regard shall be paid also to the importance of recruiting the staff on as wide a geographical basis as possible”. UNESCO, article VI para. 4: “The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations to be approved by the General Conference. Subject to the paramount consideration of securing the highest standards of integrity, efficiency and technical competence, appointment to the staff shall be on as wide a geographical basis as possible”. UNIDO, article 11 para. 5 (fourth and fifth sentence): “The paramount consideration in the employment of the staff and in determining the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting staff on a wide and equitable geographical basis”. Slightly different the accentuation in the Constitution of the International Labour Organization (ILO), article 9 para. 2: “So far as is possible with due regard to the efficiency of the work of the Office, the Director-General shall select persons of different nationalities”. Noticeable also subsequent para. 3: “A certain number of these persons shall be women”.

(e.g. Organization for Economic Co-operation and Development (OECD)).<sup>3</sup>

## I. Importance of the Investigations Function in Secretariats of International Organizations

However, all recruited persons are and will remain human beings, not angels and, thus, the risk of wrongdoing by staff members of the Secretariats of international organizations cannot be completely excluded. In the context of strengthening the oversight function (or even establishing it properly) in the Secretariat of the United Nations, as well as in other organizations of the United Nations family – a debate which started some 20 years ago – Member States also decided to create an investigation function.

The Office of Internal Oversight Services of the United Nations Secretariat has been established in 1994.<sup>4</sup> Paragraph 5C (IV) of that resolution states:

“The Office shall investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken.”<sup>5</sup>

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<sup>3</sup> Staff Regulation 7:

“In recruiting officials the Secretary-General shall give primary consideration to the necessity to obtain staff of the highest standards of competence and integrity.

He shall provide, so far as possible, for an equitable distribution of posts among the nationals of Members of the Organization, in particular as regards senior posts.

Different from similar legal texts of United Nations system organizations the wording of regulation 7 b) has not (yet) been reformulated in terms of gender neutrality.”

<sup>4</sup> Through A/RES/48/218B of 29 July 1994.

<sup>5</sup> For further details see K.T. Paschke, “Innenrevision in den Vereinten Nationen – eine neue Erfahrung”, *Vereinte Nationen* 44 (1996), 41 et seq.

The Secretary-General has fine-tuned the mandate of the investigations function of the Office of Internal Oversight Services in 1994.<sup>6</sup> Since its inception in 1994 funding and human capital for the Office as well as the Investigations Division within the Office have been constantly increased. In the budget of the current biennium 2006-2007 of the United Nations the Investigations Division is equipped with 68 established posts and funds (regular and extra budgetary) in the overall amount of US\$ 13.586.000.<sup>7</sup>

The Joint Inspection Unit (JIU) of the United Nations system, the only external oversight body empowered with a system-wide mandate<sup>8</sup> has been entrusted with an investigation function through the General Assembly already in 1976.<sup>9</sup> According to article 5 para. 1 of its Statute Inspectors “shall have the broadest powers of investigation in all matters having a bearing on the efficiency of the services and the proper use of funds.”<sup>10</sup>

However, unlike other tasks in the areas of inspection and evaluation assigned to it, the Unit has hardly made use of its investigation function since it was understaffed for a proper delivery of investigations and had to focus on the (still broad) remaining range of its mandate for a number of reasons.<sup>11</sup>

Nevertheless, the Unit has not only played the role of a compassionate advocate in strengthening internal oversight functions in general.<sup>12</sup> It has also specifically addressed the subject of investigative ca-

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<sup>6</sup> Doc. ST/SGB/273 (section II.D.).

<sup>7</sup> Doc. A/60/6 (Sect. 29).

<sup>8</sup> Disregarding the Bretton-Woods-Institutions and IFAD.

<sup>9</sup> A/RES/31/192 of 22 December 1976.

<sup>10</sup> See also article 6 para. 1: “Acting singly or in small groups, the Inspectors shall make on-the-spot-inquiries and investigations, some of which may be without prior notification, as and when they themselves may decide, in any of the services of the organizations.”

<sup>11</sup> For further details see W. Münch, “The Joint Inspection Unit of the United Nations and the Specialized Agencies – The Role and Working Methods of a Comprehensive Oversight Institution in the United Nations System”, *Max Planck UNYB* 2 (1998), 287 et seq.

<sup>12</sup> See the series of reports contained in the following documents, Accountability and Oversight in the United Nations Secretariat, Doc. A/48/420; Accountability, Management, Improvement, and Oversight in the United Nations System, Doc. A/50/503 (Part I and II); More Coherence for En-

pabilities of secretariats of international organizations in a report entitled “Strengthening the Investigations Function in United Nations System Organizations”<sup>13</sup>, which recommends, *inter alia*:

- developing and adopting a common set of standards and procedures for conducting investigations;
- ensuring sufficient training for managers involved in investigations;
- conducting a risk profile of organizations;
- and developing proactive investigations.

This report has been accepted quite favourably by the Chief Executives Board for Coordination as reflected in Document A/56/282/Add. 1 and later it triggered a lively discussion in various subordinate bodies of the United Nations General Assembly as well as in a number of meetings of legislative bodies of specialized agencies. Subsequent to the positive comments made by the Committee for Programme and Coordination<sup>14</sup> the recommendations of the report have been endorsed by the United Nations General Assembly in 2002.<sup>15</sup>

The report further encouraged, e.g., the Conference of Investigators of United Nations Organizations and Multilateral Financial Institutions in Recommendation 6 to continue and to intensify inter-agency-cooperation in different areas of investigations. This Conference has been initiated by the Office of Internal Oversight Services in 1999 and holds meetings, with one exception, on an annual basis. Main players of the Conference other than the Office of Internal Oversight Services are the sister service of the World Bank and the European Anti-Fraud-Office (OLAF). The organizers of the Conference also deserve recognition for offering other organizations (outside the United Nations system) the opportunity to participate and, thus, to profit from the broad experience of bigger organizations as far as the rather delicate issue of handling investigations is concerned. One of the recurrent agenda items of the Conference is the issue of, if, when and under what conditions

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hanced Oversight in the United Nations System, Doc. A/53/171; Oversight Lacunae in the United Nations System, Doc. A/60/860. Reports and Notes of the Joint Inspection Unit can be retrieved in English, French and Spanish versions from the Unit’s website available at: <<http://www.unjiu.org>>.

<sup>13</sup> Issued as United Nations Doc. A/56/282.

<sup>14</sup> See Doc. A/57/16, paras 356 – 358.

<sup>15</sup> A/RES/57/282 of 20 December 2002, Section IV.

referrals of criminal cases should be made to the national authorities of host countries.

The General Assembly Resolution mentioned above requested the Secretary-General to review the practices involving programme managers in investigative processes, with specific attention to independence, training and proper guidelines. The Secretary-General has presented his findings in Document A/58/708, a report which has been serving as a policy document for conducting investigations. In particular, the report identifies categories of high risks such as serious or complex fraud or other serious criminal acts or activities and categories of lower risks such as simple thefts or single entitlement frauds.<sup>16</sup>

The Office of Internal Oversight Services is keeping Member States informed on investigations either through individual reports (e.g. Document A/55/352, a proactive investigation of the education grant entitlements and discovered cases of fraud) and through its annual report.

The latter usually identifies major cases of investigations and provides information on the volume of recovered funds and assets as well as on managerial issues with regard to the investigation division of the Office and other pieces of information relevant to Member States. Consideration has been given to the idea of issuing on a regular basis a free-standing report on investigations only, but this idea has not (yet) materialized. Another source of information for Member States are the reports of the Board of Auditors on the audited financial statements of the United Nations and its funds and programmes and on United Nations peace-keeping operations which contain a separate sub-section on "Fraud and Presumptive Fraud".<sup>17</sup>

The practice of specialized agencies and organizations outside the United Nations system is not uniform, but it can be stated that all of them are unified on the common denominator to do the utmost to protect their good image in world public opinion which has achieved a

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<sup>16</sup> The General Assembly welcomed the report in its resolution A/RES/59/287 of 13 April 2005 and gave the Secretary-General further guidance on specific elements such as basic investigation training or mandatory reporting by programme managers of allegations of misconduct.

<sup>17</sup> Most recent reports contained in Doc. A/59/5 (Vol. I and II); for further details on the Board of Auditors see E. Kaltenbach, "Die externe Finanzkontrolle der Vereinten Nationen. Zur Arbeit des Rates der Rechnungsprüfer", *Vereinte Nationen* 45 (1997), 168 et seq.

much higher level of awareness than it used to be the case in the past. Headlines of United Nations Press Releases such as “Mark Malloch Brown<sup>18</sup> says management has zero-tolerance policy for fraudulent behaviour, 8 staff suspended while investigation continues”,<sup>19</sup> reflect the sensitivity prevailing among Member States against wrongdoing as perceived by the Secretary-General of the United Nations.

Some Heads of organizations invite Member States to special briefings if cases of suspicion of criminal acts occur (in particular, when the local media started to attach interest to the issue) or they address the Heads of Permanent Missions in a personal letter. The Annual Report of the Office of Institutional Integrity of the Inter-American Development Bank (IDB) is a very illustrative example of detailed information provided to Member States including some facts on the number of referrals of specific cases to the authorities of Member States.<sup>20</sup>

## II. Main Areas of Wrongdoing

What are the main areas of criminal activities that can be observed among a minority of international civil servants? In essence, these are fraud and embezzlement, theft and bribery.

As far as fraud to the detriment of an organization is concerned, some cases are spectacular and trigger much interest such as the one of a senior staff member of the United Nations Interim Administration Mission in Kosovo (UNMIK) who misappropriated a seven-digit amount of US\$.<sup>21</sup> More frequent are cases of so-called entitlement frauds; when staff members apply for reimbursement of claims in amounts which are higher than justified in legal terms or even totally unfounded (for example: abuse of education grant by blowing up the tuition fees for staff members' children). These cases can occur in collusion with third parties and in combination with other criminal acts such as falsification or manipulation of documents or alteration of cheques.

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<sup>18</sup> At the time Chief of Cabinet of the Secretary-General, now Deputy Secretary-General of the United Nations.

<sup>19</sup> Doc. SC/8645.

<sup>20</sup> The Report can be accessed on the Bank's Internet site available at: <[http://www.iadb.org/integrity/oii\\_ar05](http://www.iadb.org/integrity/oii_ar05)>.

<sup>21</sup> For further details see 9th annual report of the Office of Internal Oversight Services contained in Doc. A/58/364, preface and para. 66.

Similar cases of fraud have been observed in the context of clearances of missions or relocation of staff members from one duty station to another. What is also worth mentioning in this context is also the almost “classical” fraudulent abuse of telephone facilities.<sup>22</sup> According to the statements of the Board of Auditors the summary of cases of fraud or presumptive fraud during the biennium 2002-2003 involves 14 cases amounting to US\$ 707.304.<sup>23</sup>

The second cluster of criminal acts are cases of theft. Investigators report that duty stations in the field, in particular in certain peace-keeping operations are prone to that type of delinquency. There is a rather simple explanation for that phenomenon: it is the shortage of important goods which are relevant for the staff members’ own elementary needs (for example: building material for fixing an apartment) or which can be easily sold on the black market and, thus, be converted into profits (gasoline, sometimes also food stuff). Nevertheless, cases of theft can also occur at Headquarters. The report of the Board of Auditors for the biennium ended 31 December 2003, contains some information on stolen laser-jet printer toner cartridges at the United Nations Office at Nairobi.<sup>24</sup>

The third cluster of wrongdoing are cases of bribery, very often in the context of infringements of procurement regulations and rules. The reasons for the increase in that type of delinquency can be found, in essence, in the following: first of all, the oversight function is taken much more seriously by Heads of organizations than in old times. Second, as a result of largely increased engagement of the United Nations in peace-keeping, the purchase of equipment is breaking all records of United Nations history. According to the report of the Board of Auditors on budgetary and administrative aspects of the financing of United Nations peace-keeping operations the overall amount of peace-keeping budgets for the period from 1 July 2004 to 30 June 2005<sup>25</sup> stands at US\$

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<sup>22</sup> In the report on implementation of decisions of the 2005 World Summit outcome the Secretary-General mentions an increase of fraud cases in recent years in the Office of the United Nations High Commissioner for Refugees, Doc A/60/568, para. 25(a).

<sup>23</sup> Doc. A/59/5 (Vol. I), para. 335.

<sup>24</sup> Doc. A/59/5 (Vol. I), para. 343.

<sup>25</sup> According to Regulation 2.13 of the Financial Regulations of the United Nations (published in Doc. ST/SGB/2003/7) the Secretary-General shall submit twice a year to the General Assembly for informational purposes a



3.807.160.900.<sup>26</sup> The relevant document is dated 22 April 2005 and neither contains any costs with regard to the new peace-keeping operation in Sudan (United Nations Mission in Sudan - UNMIS) nor smaller items such as the peace-keeping support account. If those additional cost elements were to be considered the overall amount would rise beyond the 5 billion threshold. In a recent report the Secretary-General informs Member States that procurement at Headquarters and in peace-keeping missions has significantly increased from US\$ 1.010 million to US\$ 1.774 million over the last two years as a direct result of the unprecedented surge in peace-keeping.<sup>27</sup>

It is worth noting that the Secretary-General, following the advice of the Office of Internal Oversight Services, launched the idea at the time of the negotiations on the Convention against Corruption, that international civil servants also be included in the texts imposing sanctions on bribery and embezzlement and that international organizations as well as State Parties be allowed to have stolen assets returned.<sup>28</sup> The Convention initiated by the United Nations General Assembly was opened for signature in Merida/Mexico on 9 December 2003 and entered into force on 14 December 2005.<sup>29</sup>

14th December has henceforth been designated as International Anti-Corruption Day. The Convention is, indeed, applicable, if an international civil servant becomes the target of an act of bribery.<sup>30</sup> However, in the reverse case, when the international civil servant assumes the

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table summarizing the budgetary requirements of each peace-keeping operation for the financial period from 1 July to 30 June, including a breakdown of expenditure by major line item and the aggregate total resource requirement.

<sup>26</sup> Doc. A/59/736, Annex II.

<sup>27</sup> Doc. A/60/846, para. 2.

<sup>28</sup> Doc. A/58/364, para. 139.

<sup>29</sup> On the 90th day after deposit of the 30th ratification instrument according to article 68.

<sup>30</sup> Article 16 para. 1 states: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business."

role of a briber the Convention only requests the State Party to consider how to handle such a case in its domestic legislation.<sup>31</sup> Thus, the good intention of the Secretary-General has not been fully met.

Other cases of criminal activities such as sexual exploitation, abuse or harassment trigger a particularly high degree of attention in the media (all the more, if a senior official or even a top official is involved), but are not that frequent among staff members. Unfortunately, it has to be admitted that they do exist and cause a considerable degree of work to the Investigations Division of the Office of Internal Oversight Services. The Secretary-General has taken special measures of protection from such acts of criminality.<sup>32</sup>

Finally, it is also worth mentioning in this context that the Secretary-General has established an Ethics Office implementing a decision of the General Assembly which was taken at the World Summit 2005.<sup>33</sup> Whereas the terms of reference of the Ethics Office go far beyond the pure prevention of criminal acts committed by staff members, the *raison-d'être* of the Office ought to be seen as part of the overall endeavour of securing integrity within the Secretariat of the United Nations and creating an atmosphere in which any thought directed at wrongdoing cannot fall on fruitful soil.<sup>34</sup>

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<sup>31</sup> Article 16 para. 2 states: "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties." The full text of the Convention can be accessed electronically on the website of the United Nations Office on Drugs and Crime (UNODC) available at: <<http://www.unodc.org>>.

<sup>32</sup> See Doc. ST/SGB/2003/13.

<sup>33</sup> A/RES/60/1 of 16 September 2005, para. 161 (d).

<sup>34</sup> For further details about the Office see Doc. A/60/568 and Doc. ST/SGB/2005/22.

### III. Action to Be Taken After Discovery of Wrongdoing

Once a case of wrongdoing has been discovered in a Secretariat, the initial questions which arise usually are: what has to be done to safeguard the financial interests of the organization? What steps are required in the interest of damage containment? What disciplinary measures can be applied against the staff member concerned?

Staff Rule 110.3 of the United Nations<sup>35</sup> provides the following list of disciplinary measures (which corresponds by and large also to the legal situation and practice in other international organizations):

- (a) Written censure by the Secretary-General;
- (b) Loss of one or more steps in grade;
- (c) Deferment, for a special period of eligibility for within-grade increment;
- (d) Suspension without pay;
- (e) Fine;
- (f) Demotion;
- (g) Separation from service, with or without notice or compensation in lieu thereof;
- (h) Summary dismissal.

The list does not include written or oral reprimands by supervisors which are similar to letters of caution but are regarded not as disciplinary, but as managerial measures.<sup>36</sup>

Next to the issue of application of disciplinary measures the question arises what has to be done to recover assets of the organization and to compensate financial losses resulting from staff members' wrongdoing. Closely related to the latter is the question of referral of cases to the national judiciary of the country where the criminal act has been committed.

Staff members with a long record of years of service and retirees of the United Nations Secretariat occasionally report the anecdote that in old times the worst case scenario which could have happened if some-

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<sup>35</sup> Published in Doc. ST/SGB/2002/1.

<sup>36</sup> A compilation of disciplinary measures taken by the Secretary-General and cases of criminal behaviour covering the period 1 January 2004 – 30 June 2005 is published in Doc. A/60/315.

one was identified as a criminal actor was summary dismissal. The anecdote, although falling under the category of tavern gossiping and being somewhere in between poetry and reality, sheds some light on the ethical and managerial conditions in a Secretariat how they should not be, if an organization wants to convince its stakeholders that assessed and voluntary contributions are well invested in the interest of the individual Member State and the entire membership.

#### IV. Arguments in Support of Referrals

National authorities can only act upon wrongdoing by international civil servants, if the Head of the organization initiates such course of action. Are referrals to national authorities of the host country appropriate? In principle: yes. The affirmative response to the aforementioned question can be based on the following (not exhaustive) reflections:

1. It is a pure matter of justice to submit an international civil servant, again in principle, to the same legal treatment as any other individual after having committed a criminal act. If the suspect enjoys diplomatic immunity (in organizations of the United Nations system usually at the level of P-5 and above<sup>37</sup>), the Head of the organization has to waive it. It is recalled that diplomatic privileges and immunities solely exist in the interest of the organization, not to the personal benefit of the individual staff member. World public opinion no longer tolerates a lax attitude which leaves cases of wrongdoing to be settled within the framework of administrative and disciplinary rules. There must be no safe haven for offenders.
2. National authorities and law courts have possibilities to contain damage which may not be (or definitively are not) at the disposal of secretariats of international organizations. Heads of international organizations can put subordinate staff members on special leave and prevent them from entering the premises of the organization, but they cannot arrest them. Thus, a delinquent might still be in a position to destroy pieces of evidence or to exercise pressure on witnesses. Furthermore, access to the proceeds of a criminal act such

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<sup>37</sup> Main exception, the United States, here the diplomatic status is only granted at the level of an Assistant Secretary-General and above.

as fraud can be a complicated issue, only national authorities can freeze assets, seize proceeds and stop any transfer of money abroad.

3. Furthermore, a staff member can easily escape any disciplinary measure taken by the organization by resignation from service (Staff Regulation 9.2). National prosecution remains, in that situation, the only means of sanctioning his or her wrongdoing.

4. Another important argument in support of the current appraisal is the organizations perspective to recover stolen or embezzled funds. Once a staff member has been convicted, the organization is using colloquial language, in a more comfortable legal position for a successful recovery. When judgements of criminal courts gain legal force, it requires a lot of advocatory imagination to challenge the claims of an organization against his staff member who has turned out not to be blessed with a high standard of integrity. It should be noted that the organizations of the United Nations system have no access to the entitlements of staff members accrued in the United Nations Pension Fund.<sup>38</sup>

## V. Arguments Cautioning against Referrals

However, as mentioned before, the response to the question raised is “yes, in principle”.

It cannot be an unlimited, but it must be a “qualified yes”. Different from OLAF international organizations with a broad membership (not necessarily a universal one, but all the more, if it is universal) must be given a certain degree of discretion in handling criminal acts committed by its own staff.

In accordance with article 10 (2) of Regulation (EC) No. 1073/1999 of the European Parliament and of the Council of 25 May 1999:

“ ... the Director of the Office shall forward to the judicial authorities of the Member State concerned the information obtained by the Office during internal investigations into matters liable to result in criminal proceedings. Subject to the requirements of the investigation, he shall simultaneously inform the Member State concerned.”

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<sup>38</sup> The Secretary-General of the United Nations referred 32 cases to national authorities within the period from 1 January 2004 to 30 June 2005, cf. Doc. A/60/315, para. 39.

Such an automatism appears to be acceptable notwithstanding some doubts in cases of a trivial nature within the supranational entity European Community in which all members have reached a high degree of economic, social and also legal cohesion and homogeneity as it is manifested in legal instruments such as the European arrest warrant or in the EU-Convention on Simplified Extradition.<sup>39</sup>

Heads of international organizations can have good, even compelling reasons of non-referral. These reasons can either be based in the sphere of their own internal affairs and interests or be related to the host country to which a case would have to be referred. As to the former it might not be opportune to bring a case in all details to the attention of authorities of the host country because the organization would be obliged to deliver pieces of information of strict confidentiality. In doing so the overall damage to the organization could be much higher than the fact that a non-honourable staff member is lucky enough to escape his or her criminal judge. Furthermore, an organization could run the risk of suffering immaterial damage as the result of bad publicity that a referral could engender.

Press releases stating “XY newspaper claims fraud in organization Z” ought to be avoided from the viewpoint of the Head of an organization, in particular, if a small issue is at stake. A similar reflection applies to the uncertainty of the outcome of a criminal procedure. What would be the public reaction, if an accused international civil servant is acquitted by a national law court? What would be the consequences for the organization in such a case as far as its perspectives are concerned to recover stolen or embezzled funds? Although the United Nations Administrative Tribunal (UNAT) has ruled that acquittal in a national court is not a sufficient basis for a successful appeal by a staff member against summary dismissal,<sup>40</sup> an acquittal would not improve the “legal ammunition” at the disposal of the organization. It must remain at the discretion of the Head of an organization to decide whether it is acceptable or not to incur risks of the aforementioned nature.

The reason for non referrals can also be related to the political situation in the host country. Plenty of United Nations activities, in particular those under “Chapter VI and a half” of the Charter, i.e. peace-

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<sup>39</sup> Published in OJEC No 78, 30 March 1995.

<sup>40</sup> UNAT judgement No. 436 (Case No. 457, Wiedl against: The Secretary-General of the United Nations, 9 November 1988).

keeping operations, take place on territories where public order is seriously disturbed or where it has collapsed completely. In cases of a failed state the question of referral simply does not arise. There are also cases of countries where a good measure of political and administrative stability exists, but the justice system does not function as it should, procedures take too long, law courts are extremely understaffed, judges may be tainted with the image of being corrupt and court orders could be bought. Frustrated investigators have experienced the referral of a number of criminal acts, mainly fraud, to the authorities of the host country of the duty station concerned, but all cases were abandoned due to lack of progress.

Such an experience is not only discouraging, but should also be seen from a financial and managerial stance. Preparing files for presentation to national authorities of the host country, preparing testimony before its law courts requires a lot of work occupying staff members' workforce. If there is a high risk that the administrative workload of an organization will be in vain or out of proportion in comparison to the gravity of a criminal act, the Head of an organization must be given the liberty to judge in consultation with the Office of Legal Affairs what would be the best course of action. Regardless from the "quality" of the functioning of criminal justice in host countries, the Head of an organization has to accept that certain countries refuse to take cases of "petty crime".

The most important and also non insurmountable obstacle to referrals leaving no power of discretion to the Head of an organization is the lack of respect of human rights on part of the host country. Strengthening human rights and bringing them to validity worldwide is one of the major aims of the United Nations Charter as enshrined in the second preambular paragraph and Arts 1, 13, 55, 56, and 62 para. 2.<sup>41</sup> Since its inception the United Nations as well as regional international organizations and also non governmental organizations have invested enormous effort aiming at the realization of that goal. The recent creation of a Human Rights Council whose establishment was agreed on by the 2005 World Summit<sup>42</sup> and which held its first session in Geneva in June 2006,

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<sup>41</sup> For further details F. Sudre, *Droit européen et international des droits de l'homme*, 7ième édition refondue, 2005, paras 23 and 24.

<sup>42</sup> A/RES/60/1 of 16 September 2005, paras 157 – 160. Finally established by A/RES/60/251 of 15 March 2006; E. Strauss, "Menschenrechtsschutz im UN System. Zu den Auswirkungen der Reform der Vereinten Nationen

as well as the renewal of the commitment of all Member States to the value and significance of human rights<sup>43</sup> are cornerstones of this struggle. The practical consequence for the original question therefore has to be: wherever and whenever there are clear grounds for the assumption that the respect of human rights is doubtful, referrals to national authorities are out of question.

Host countries whose human rights record is open to question as established in the Universal Declaration of Human Rights and the Covenants as well as reflected in related resolutions of the United Nations General Assembly (even if they are not legally binding *strictu sensu*) must be excluded from exercising jurisdiction over international civil servants. In particular, if there is no guarantee of an independent and impartial judiciary, no perspective of a due process, if the execution of criminal judgements exposes the convicted to horrible conditions of detention, the risk of becoming the victim of torture or any type of humiliation no referral must take place. Although the issue is not part of generally accepted international law referrals should also be out of question if the convicted is exposed to the risk of capital punishment.

If the Head of an organization decides not to refer the case to the authorities of the host country, there is still room for reflecting whether the suspected (expatriate) staff member can be relocated to the previous or another duty station and be handed to national authorities there. This would make sense, if the criminal act which had been committed elsewhere falls under criminal law of the state to which the staff member would be relocated. However, it would require careful consideration whether all administrative efforts and costs of relocation were justified in view of the gravity by the criminal act.

## VI. Final Remarks

The aforementioned reflections also apply to persons who work for an international organization without having the status of staff members (e.g. consultants, United Nations volunteers). If those people are involved in acts of wrongdoing, the financial and immaterial interests of

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auf das Amt des Hohen Kommissars für Menschenrechte”, *Vereinte Nationen* 54 (2006), 19 et seq.

<sup>43</sup> A/RES/60/1, see above, paras 121 et seq.



an organization are affected in the same way or at least nearly in the same way as if the criminal act had been committed by a staff member.

However, in cases of wrongdoing committed by blue helmets, the Secretary-General has no legal instruments at his disposal, but only moral ones. Blue helmets are integrated into the military forces of the troop contributor. If they become suspected of criminal acts unfortunately this has happened occasionally (e.g. cases of sexual molestation of civilians,<sup>44</sup> paedophilia, driving under influence of alcohol, theft<sup>45</sup>), it is up to the military justice of the troop contributor to investigate those issues in cooperation with the Office of Internal Oversight Services, eventually indict and bring the case to sentence. Any other solution is not imaginable since no troop contributor is likely to be prepared to accept that other authorities than its own exercise criminal jurisdiction over its military forces.

Nevertheless, Member States of the United Nations are aware of the problem as can be seen in the most recent resolution of the Security Council extending the mandate of the United Nations Peace-Keeping Force in Cyprus (UNFICYP) by Resolution 1687 in June 2006 which states is para. 6:

*“The Security Council*

welcomes the efforts being undertaken by UNFICYP to implement the Secretary-General’s zero tolerance policy on sexual exploitation

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<sup>44</sup> On cases in the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), see the results of the investigations of the Office of Internal Oversight Services contained in Doc. A/59/661. As to the international press, see *Neue Züricher Zeitung* of 15 February and 13 September 2005. Also noteworthy the Bulletin of the Secretary-General in this respect cf. Doc. ST/SGB/2003/13.

<sup>45</sup> The report of the Board of Auditors on United Nations Peace-keeping Operations for the period 1 July 2003 to 30 June 2004 is mentioning the case of siphoning and reselling of gasoline at the United Nations Mission in Sierra Leone (UNAMSIL), Doc. A/59/5 Vol. II, para. 345. In addition a number of cases of fraud obviously happened at UNAMSIL as is evidenced in A/RES/60/279 of 30 June 2006, para. 6, on financing UNAMSIL: “The General Assembly .... Notes with concern the cases of fraud and presumptive fraud identified by the Mission, and requests the Secretary-General to report to the General Assembly at its sixty-first session on the matters, including investigations undertaken in this regard and actions taken regarding proven cases, in accordance with established procedures, as well as efforts to recover any lost funds.”

and abuse and to ensure full compliance of its personnel with the United Nations code of conduct, requests the Secretary-General to continue to take all necessary action in this regard and to keep the Security Council informed, and urges troop-contributing countries to take appropriate preventive action including the contact of pre-deployment awareness training, and to take disciplinary action and other action to ensure full accountability in cases of such conduct involving their personnel.”<sup>46</sup>

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<sup>46</sup> S/RES/1687 (2006) of 15 June 2006. Also in this respect see S/RES/1675 (2006) of 28 April 2006, concerning MINURSO and S/RES/1655 (2006) of 31 January 2006 concerning UNIFIL.